Many Unhappy Returns: Another Hanging Paragraph Creates a Trap for Consumer Bankruptcy Lawyers

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The Bankruptcy Code's Return Policy: Another Hanging Paragraph Hangs Consumers Out to Dry

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I. Introduction

In this article, we will discuss the implications of the "hanging paragraph" of section 523(a) on the dischargeability of late-filed tax returns and will examine recent cases on this topic including: *In re Fahey*, 779 F.3d 1 (1st Cir. 2015), *In re Mallo*, 774 F.3d 1313 (10th Cir. 2014), *In re McCoy*, 666 F.3d 924 (5th Cir. 2012), *In re Martin*, 542 B.R. 479 (B.A.P. 9th Cir. 2015), and *In re Justice*, No. 15-10273, 2016 WL 1237766 (11th Cir. Mar. 30, 2016).

II. Late-Filed Tax Returns and the Hanging Paragraph

Section 523 of the Bankruptcy Code provides certain exceptions to discharge. With respect to tax debt, § 523(a) states:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
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> (1) for a tax or a customs duty—
>
> . . .
>
> (B) with respect to which a return, or equivalent report or notice, if required—
>
> (i) was not filed or given; or
>
> (ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition;

11 U.S.C. § 523(a).

Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), courts looked to the test articulated in *Beard v. Comm'r*, 82 T.C. 766, 777–78 (1984), to determine what qualified as a return. *In re Nilsen*, 542 B.R. 640, 644 (Bankr. D. Mass. 2015).[3] Under the *Beard* test in order to qualify as a "return": "(1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to

[3] At the time of this writing, *In re Nilsen* is on appeal to the United States District Court for the District of Massachusetts. In *Nilsen*, the Bankruptcy Court for the District of Massachusetts, rejected an argument that a late-filed return could be "equivalent report or notice" under § 523(a)(1)(B). 542 B.R. at 647 ("The Debtor filed Form 1040s and Form 1s is late. He did not file something akin to or equivalent to those documents. He filed actual returns, not something different. It appears to this Court that the Debtor is attempting to rename the tax forms as equivalent reports to evade the holding in *In re Fahey*.")

allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law." 542 B.R. at 644. As part of BAPCPA, a definition of "return" was added as a "hanging paragraph" to § 523:

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

11 U.S.C.A. § 523(a)(*).[4] Courts are divided on whether the hanging paragraph makes tax debt associated with all late-filed tax returns non-dischargeable. The Court of Appeals for the First Circuit, the Court of Appeals for the Fifth Circuit, and the Court of Appeals for the Tenth Circuit have found that late-filed returns are not "returns" within the meaning of the hanging paragraph.[5] *See In re Fahey*, 779 F.3d 1; *In re Mallo*, 774 F.3d 1313; *In re McCoy*, 666 F.3d 924. The Court of Appeals for the Eleventh Circuit and the Bankruptcy Appellate Panel for the Ninth Circuit have rejected that strict approach and continue to use versions of the *Beard* test. *See In re Martin*, 542 B.R. 479; *In re Justice*, No. 15-10273, 2016 WL 1237766.

A. First Circuit

In *Fahey*, the Court of Appeals for the First Circuit found that a return filed after the due date is "a return not filed as required, i.e. a return that does not satisfy the 'applicable filing

[4] The legislative history of BAPCPA provides no guidance on the intent behind the addition of the first sentence of the hanging paragraph. With respect to the second sentence, the House Report states: "Section 714 of the Act amends section 523(a) of the Bankruptcy Code to provide that a return prepared pursuant to section 6020(a) of the Internal Revenue Code, or similar State or local law, constitutes filing a return (and the debt can be discharged), but that a return filed on behalf of a taxpayer pursuant to section 6020(b) of the Internal Revenue Code, or similar State or local law, does not constitute filing a return (and the debt cannot be discharged)." H.R. REP. 109-31(I), 103, 2005 U.S.C.C.A.N. 88, 167.

[5] At the time of this writing, a case on this issue is pending in the Court of Appeals for the Third Circuit on appeal from the United States District Court for the Eastern District of Pennsylvania. *See In re Giacchi*, 2015 WL 5737357 (E.D. Pa. Sept. 30, 2015). In the underlying case, the United States District Court for the Eastern District of Pennsylvania affirmed the bankruptcy court's decision that late-filed post-assessment tax documents do not qualify as "returns" under the hanging paragraph of § 523(a). *Id.* at *5–6.

requirements.'" 779 F. 3d at 5. In that case, the debtors filed their Massachusetts income tax returns late and failed to pay all taxes, interest, and penalties that were due to the Massachusetts Department of Revenue.[6] The Court of Appeals for the First Circuit found that under the hanging paragraph, in order for a document to be "return," it must "satisfy the requirements of applicable nonbankruptcy law (including applicable filing requirements)." *Id.* at 4. Timely filing is a "filing requirement" under Massachusetts law. *Id.* Accordingly, a return filed after the due date does not satisfy the applicable filing requirements and is a return not filed as required. *Id.* at 5.

Addressing the arguments made in the dissenting opinion, the court reasoned that since the hanging paragraph carves out an exception for one type of late return—those prepared under Internal Revenue Code section 6020(a)—the "two-year" provision of § 523(a)(1)(B)(ii) is not superfluous. *Id.* at 6. As such, "a late tax return, if prepared in compliance with section 6020(a) and filed within two years of the bankruptcy petition, is still a return (and the tax due thus dischargeable), notwithstanding its failure to meet the otherwise 'applicable filing requirement' of a mandatory deadline." *Id.* Returns prepared under section 6020(a) of the Internal Revenue Code are those that are prepared and processed by the Internal Revenue Service for non-filing taxpayers.[7] Although this exception "may only apply in a small minority of cases," the court

[6] The opinion in relates to four separate chapter 7 cases that were appealed to the First Circuit Court of Appeals on the same issue. *See Perkins v. Mass. Dep't of Revenue*, 507 B.R. 45 (D. Mass. 2014); *In re Gonzalez*, 506 B.R. 317 (B.A.P. 1st Cir. 2014); *In re Brown*, B.A.P. No. MW 13–027, 2014 WL 1815393 (B.A.P. 1st Cir. Apr. 3, 2014).

[7] Section 6020 of the Internal Revenue Code states:

> **a) Preparation of return by Secretary.**--If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the Secretary may prepare such return, which, being signed by such person, may be received by the Secretary as the return of such person.
>
> **b) Execution of return by Secretary.--**
>
> **(1) Authority of Secretary to execute return.**--If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed

found that the "two-year provision still has a role to play if the hanging paragraph's plain meaning controls." *Id.*

In the dissent, Judge Thompson found several flaws in the majority's logic. *Id.* at 12 (Thompson, J., dissenting). First, as late-filed returns will still be accepted by the Commonwealth under Massachusetts law and incur only a small penalty which can be waived, the dissent did not understand how the court could "conclude that a late-filed return never satisfies the requirements of Massachusetts tax law if the Commonwealth not only accepts the return, but is even willing to waive the already relatively conservative penalty for filing it late." *Id.* at 13. Additionally, the dissent found that majority's reading rendered § 523(a)(1)(B)(ii) superfluous. *Id.* The dissent found the outcome under the majority's reasoning absurd:

> the scofflaw who sits on his hands at tax time, doesn't bother to file a return, and then, after getting caught cooperates with the authorities and lets the government file the substitute return for him, would be the only late filer who would be allowed to discharge his tax debt. The person who files his return one day late—which the state then accepts—would not be permitted to discharge, regardless of the reason for tardiness.

Id. at 15. Rather, the dissent interpreted subsection (ii) and its two year provision as creating a specific exception that deals with late filers. *Id.* at 13.

B. Fifth and Tenth Circuits

The Court of Appeals for the Fifth Circuit and the Court of Appeals for the Tenth Circuit have also adopted the strict interpretation. In *McCoy*, the Fifth Circuit Court of Appeals determined that a debtor's failure to comply with a Mississippi law stating that returns "shall be

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> therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.
> **(2) Status of returns.**--Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.

filed on or before April 15th" meant that the returns did not satisfy applicable filing requirements under the definition in the hanging paragraph. 666 F. 3d at 932.

In that case, the debtor filed a post-discharge adversary proceeding against the Mississippi State Tax Commission seeking a declaration that her pre-petition state income tax debts were discharged. *Id.* at 925. The Mississippi tax code provides that "if the return is filed on the basis of a calendar year, it shall be filed on or before April 15th of each year." *Id.* at 928 (quoting Miss. Code. Ann. § 27–7–41). Taking the plain meaning approach, as the debtor submitted her tax filings after April 15th, the court found that the filings did not satisfy applicable nonbankruptcy law and were not "returns" for the purposes of § 523(a). *Id.*

Addressing the exemption for returns prepared under § 6020 of the Internal Revenue Code, the court reasoned that:

> [the] second sentence in § 523(a)(*) carves out a narrow exception to the definition of "return" for § 6020(a) returns, while explaining that § 6020(b) returns, in contrast, do not qualify as returns for discharge purposes. Such a reading conforms with the plain language of the text and leaves no portion of § 523(a)(*) superfluous.

Id. at 931.

Similarly, the Court of Appeals for the Tenth Circuit found that returns filed late under the Internal Revenue Code are not returns within the meaning of the hanging paragraph. 774 F. 3d at 1321. In *Mallo*, the debtors filed their Form 1040s after the tax had been assessed by the Internal Revenue Service. *Id.* at 1316.

As discussed in *Mallo*, the Internal Revenue Code states that "returns made on the basis of the calendar year shall be filed on or before the 15th day of April following the close of the calendar year . . . ." 26 U.S.C. § 6072(a). The court found that the phrase "shall be filed on or before" was a "classic example of something that must be done with respect to filing a tax return and, therefore, is an 'applicable filing requirement.'" 774 F. 3d at 1321. As such, the court held

that "because applicable filing requirements include filing deadlines, § 523(a)(*) plainly excludes late-filed Form 1040s from the definition of a return." *Id.*

C. Circuits that Reject the Strict Interpretation

The Eleventh Circuit Court of Appeals and the Bankruptcy Appellate Panel for the Ninth Circuit have rejected the strict approach and continue to use versions of the *Beard* Test to determine what constitutes a "return."[8] In *Martin*, chapter 7 debtors brought an adversary proceeding against the Internal Revenue Service seeking a determination that their federal tax debts relating to late-filed tax returns were dischargeable. 542 B.R. 479, 481–82.

In rejecting a strict interpretation, the Bankruptcy Appellate Panel for the Ninth Circuit found "no convincing or persuasive indication that BAPCPA or the hanging paragraph abrogated" the version of the *Beard* test articulated in *In re Hatton (Hatton II)*, 220 F.3d 1057, 1058 (9th Cir. 2000). 542 B.R. at 490 (The *Hatton II* "version of the Beard test provides: '(1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law.'").

The Bankruptcy Appellate Panel for the Ninth Circuit found that that the literal construction would render § 523(a)(1)(B)(ii) "all but meaningless—reducing the potential application of that provision to a minuscule scope." *Id.* at 480. The court took further issue with the literal construction:

> under the literal construction of the hanging paragraph, a debtor taxpayer who is one month or one day or even one hour late in filing his or her return will have his associated tax debt excepted from discharge, whereas a debtor taxpayer who never bothers to file his or her own return can discharge his or

[8] The Bankruptcy Court for the District of New Jersey has also rejected the strict interpretation. *In re Maitland*, 531 B.R. 516 (Bk. D.N.J. 2015). The court found that a late-filed tax return can meet the definition of return under § 523(a)(*). *Id.* at 520. The court reasoned that a strict reading would render the other parts of § 523 superfluous, in particular the two year provision. *Id.*

> her associated tax debt if the IRS fortuitously prepares a return on that person's behalf.

Id. at 487. Rather than adopt the strict interpretation, the Bankruptcy Appellate Panel for the Ninth Circuit concluded that for the purposes of determining the dischargeability of federal income tax debt, the "return" definition in the hanging paragraph "effectively codified the *Beard* test, except that Congress in the second sentence carved out some specific rules for tax returns prepared by taxing authorities." *Id.* at 489–90.

In *Justice*, the Court of Appeals for the Eleventh Circuit declined to adopt the strict interpretation's "one-day-late rule." 2016 WL 1237766, at *3 ("We can assume *arguendo*, although we expressly do not decide, that that one-day-late rule is incorrect"). Rather than establishing a strict rule, the Court of Appeals for the Eleventh Circuit found that the *Beard* test is incorporated into "applicable nonbankruptcy law." *Id.* In particular, the fourth prong—that there must be an honest and reasonable attempt to satisfy the requirements of the tax law—is relevant where the filing is delinquent. *Id.* at *4–5. In applying the *Beard* test, the court nevertheless found that the debtors' late-filed Form 1040s did not qualify as tax returns, and as such, the tax debts were not dischargeable. *Id.* at *6.

III. Practical Implications

For debtors in the First, Fifth and Tenth Circuits, the rule is clear—tax debt associated with late-filed returns is excepted from discharge (unless the return was prepared pursuant to 6020(a) of the Internal Revenue Code, or similar state or local law). Even though the Internal Revenue Service generally takes the position that a late-filed return does not bar discharge of the underlying debt, most taxing authorities will view the debt as non-dischargeable in those jurisdictions, which places significant leverage in the hands of the taxing authorities when

attempting to deal with tax debt. It is of critical importance that counsel knows what returns have been filed and when.

In re Brian S. FAHEY, Debtor

Brian S. Fahey, Appellant,

v.

Massachusetts Department of Revenue, Appellee.

In re Timothy P. Perkins, Debtor

Timothy P. Perkins, Appellant,

v.

Massachusetts Department of Revenue, Appellee.

In re Anthony M. Gonzalez, Debtor

Anthony M. Gonzalez, Appellee,

v.

Massachusetts Department of Revenue, Appellant.

In re: John T. Brown, Debtor

John T. Brown, Appellee,

v.

Massachusetts Department of Revenue, Appellant.

Nos. 14–1328, 14–1350, 14–9002, 14–9003.

United States Court of Appeals, First Circuit.

Feb. 18, 2015.

Background: State taxing authority brought adversary proceedings to except tax debts from discharge in debtors' separate Chapter 7 cases, as tax debts for which returns "w[ere] not filed or given." Taxing authority moved for summary judgment. The United States Bankruptcy Court for the District of Massachusetts, Melvin S. Hoffman, J., 489 B.R. 1, denied taxing authority's motion and subsequently entered judgment in favor of debtor, and taxing authority appealed. The United States Bankruptcy Appellate Panel for the First Circuit, Cabán, J., 506 B.R. 317, affirmed, and appeal was taken. In separate proceeding, the United States District Court for the District of Massachusetts, 2014 WL 1815393, affirmed a similar decision by its Bankruptcy Court, Melvin S. Hoffman, J., 489 B.R. 1, and taxing authority appealed. Finally, in two other Chapter 7 cases, debtors commenced adversary proceedings seeking determinations that their income liabilities to Massachusetts Department of Revenue were subject to discharge. The Bankruptcy Court in first case entered judgment in debtor's favor, and the Department appealed. The Bankruptcy Court in second case entered judgment in the Department's favor, and debtor appealed. Consolidating appeals, the United States District Court for the District of Massachusetts, Young, J., 507 B.R. 45, affirmed in part and reversed in part. Appeal was taken.

Holding: Consolidating appeals, The Court of Appeals, Kayatta, Circuit Judge, held that late-filed tax returns are, by definition, ones that fail to satisfy requirements of applicable nonbankruptcy law, and which do not qualify as "returns," for dischargeability purposes.

Affirmed in part and reversed in part.

Thompson, Circuit Judge, dissented and filed opinion.

1. Bankruptcy ⚿3782

On bankruptcy appeal that turned entirely on proper interpretation of provision of the Bankruptcy Code, the Court of Appeals' review was plenary.

2. Bankruptcy ⚿3343.5

Phrase "applicable filing requirements," as used in definitional provision recently added as "hanging paragraph" to nondischargeability provision, pursuant to which a tax "return" is specified to be a

document "that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)," was broad enough to include filing deadlines imposed by such applicable nonbankruptcy law; accordingly, late-filed tax returns are, by definition, ones that fail to satisfy requirements of applicable nonbankruptcy law, and which do not qualify as "returns," for purposes of deciding whether tax debt should be excepted from discharge as one for which a required return was not "filed or given." 11 U.S.C.A. § 523(a)(1)(B)(ii).

See publication Words and Phrases for other judicial constructions and definitions.

3. Statutes ⚿1092

When language of statute is plain, it must be interpreted in accordance with the usual and natural meaning of its words.

Celine E. Jackson, Counsel to the Commissioner, Massachusetts Department of Revenue, with whom Jeffrey S. Ogilvie, Counsel to the Commissioner, Amy A. Pittner, Commissioner, Massachusetts Department of Revenue, Martha A. Coakley, Massachusetts Attorney General, Daniel J. Hammond, Assistant Attorney General, Kevin W. Brown, Special Assistant Attorney General, were on brief, for Massachusetts Department of Revenue.

Andrew L. Barrett for appellant Brian S. Fahey.

Carl D. Aframe, with whom Aframe & Barnhill, PA, was on brief, for appellant Timothy P. Perkins.

Marques C. Lipton, with whom Law Office of Nicholas F. Ortiz, P.C., was on brief, for appellees Anthony M. Gonzalez and John T. Brown.

Tara Twomey, National Consumer Bankruptcy Rights Center, Joanne Mulder Nagjee, Joel Peter–Fransen, Shane Mulrooney, and Kirkland & Ellis LLP, on brief for National Association of Consumer Bankruptcy Attorneys, amicus curiae in support of appellants Brian S. Fahey and Timothy P. Perkins.

Before TORRUELLA, THOMPSON, and KAYATTA, Circuit Judges.

KAYATTA, Circuit Judge.

The four bankruptcy appeals before us pose a single question of statutory interpretation: whether a Massachusetts state income tax return filed after the date by which Massachusetts requires such returns to be filed constitutes a "return" under 11 U.S.C. § 523(a) such that unpaid taxes due under the return can be discharged in bankruptcy. For the reasons set forth below, we conclude that it does not.

I. Background

The facts in each of the four cases now on appeal are undisputed. John Brown, Brian Fahey, Anthony Gonzalez, and Timothy Perkins (the "debtors") all failed to timely file their Massachusetts income tax returns for multiple years in a row. This failure would not be a problem for them in these bankruptcy proceedings, but for the fact that they also failed to pay (either timely or otherwise) their taxes to the Massachusetts Department of Revenue. Eventually, each debtor filed his late tax returns, but still failed to pay all taxes, interest, and penalties that were due. More than two years later, they filed for Chapter 7 bankruptcy. The debtors seek a ruling that their obligation to pay the taxes they failed to pay is dischargeable.[1]

1. Although the debtors did not each make identical arguments in their briefs or at oral

The Department argues for the opposite result; it contends unpaid taxes for which no return was timely filed by the Commonwealth's statutory deadline fit within an exception to discharge under 11 U.S.C. § 523(a)(1)(B)(i).

The procedural postures of these four cases are described in detail in the Bankruptcy Appellate Panel ("BAP") and district court opinions that gave rise to these appeals. *Perkins v. Mass. Dep't of Revenue,* 507 B.R. 45, 46–47 (D.Mass.2014); *In re Gonzalez,* 506 B.R. 317, 318–23 (B.A.P. 1st Cir.2014); *In re Brown,* B.A.P. No. MW 13–027, 2014 WL 1815393, at *1–5 (B.A.P. 1st Cir. Apr. 3, 2014). In brief, the bankruptcy courts below split three to one in favor of the debtors, the BAP sided with the debtors in the two cases appealed to the BAP, and the district court granted summary judgment to the Department in the two cases appealed to the district court.

II. Discussion

A. Standard of Review

[1] Since no material facts are disputed and the issue before us turns entirely upon an interpretation of law, our review is plenary. *Pasquina v. Cunningham (In re Cunningham),* 513 F.3d 318, 323 (1st Cir.2008); *Brandt v. Repco Printers & Lithographics, Inc. (In re Healthco Int'l, Inc.),* 132 F.3d 104, 107 (1st Cir.1997).

B. Legal Background

Section 727 of the Bankruptcy Code instructs the court to grant a debtor a discharge from his debts in a Chapter 7 bankruptcy proceeding. *See* 11 U.S.C. § 727. This rule is subject to several exceptions. In particular, 11 U.S.C. § 523(a)(1) controls whether unpaid taxes are dischargeable in bankruptcy. It provides, in relevant part:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
>
> (1) for a tax or a customs duty—
>
> . . .
>
> (B) with respect to which a return, or equivalent report or notice, if required—
>
> (i) was not filed or given; or
>
> (ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition[.]

11 U.S.C. § 523(a)(1)(B)(i)-(ii). In other words, a tax is not dischargeable if the debtor failed to file a return, or if—perhaps anticipating bankruptcy—he filed the return late and within two years of his bankruptcy petition.

Looking solely at the foregoing language, and using a common notion of what a "return" is, one could easily conclude that any return filed after the due date but more than two years before a bankruptcy filing would place the tax due under that return outside the section 523(a)(1) exception, and thus within the broad category of dischargeable debts. Prior to 2005, courts nevertheless attempted to fashion a definition of "return" that prevented debtors from relying on "bad faith" returns, or returns filed only after the taxing authority actually issued an assessment for taxes due in the absence of a tax return. *See generally Moroney v. United States (In re Moroney),* 352 F.3d 902, 905–06 (4th Cir. 2003) (providing examples of courts that determined late tax returns "filed after an involuntary assessment do not serve the

argument, we attribute their contentions to "the debtors" collectively.

purposes of the tax system, and thus rarely, if ever, qualify as honest and reasonable attempts to comply with the tax laws").

In 2005, Congress decided to define "return" on its own when it passed the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), making numerous revisions to section 523. Pub.L. No. 109–8, 119 Stat. 23 (2005). Among the BAPCPA's changes was the insertion of a "hanging paragraph," denoted as section 523(a)(*), at the end of section 523(a). It provides:

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

11 U.S.C. § 523(a)(*).[2]

So the question now presented is a question of statutory interpretation: Is a Massachusetts tax return filed after the due date for such returns a "return" as defined in section 523(a)(*) so that the tax due under that return remains dischargeable? [3]

C. Analysis

[2] Read together, the hanging paragraph's definitional language and the "applicable" Massachusetts law control our decision. Under the hanging paragraph, for a document, whatever it may be called, to be a "return," it must "satisf[y] the requirements of applicable nonbankruptcy law (including applicable filing requirements)." So the question is whether timely filing is a "filing requirement" under Massachusetts law. The answer is plainly yes.

[3] As the Massachusetts Supreme Judicial Court has held for state tax law purposes, "[t]he general rule of construction is that where the language of the statute is plain, it must be interpreted in accordance with the usual and natural meaning of the words." *Comm'r of Revenue v. AMIWoodbroke, Inc.,* 418 Mass. 92, 634 N.E.2d 114, 115 (1994) (citing *O'Sullivan v. Sec'y of Human Servs.,* 402 Mass. 190, 521 N.E.2d 997, 1000 (1988)). Mass. Gen. Laws ch. 62C, § 6(c) ("section 6(c)") states that "[e]xcept as otherwise provided, [income tax returns] shall be made on or before the fifteenth day of the fourth month following the close of each taxable year." None of the exceptions that "otherwise provide[ ]" are applicable here.[4] This

2. Section 6020(a) returns are allowed only at the I.R.S.'s request and require the taxpayer's cooperation, while returns filed under section 6020(b) do not involve assistance by the taxpayer and may involve willful fraud. *Compare* 26 U.S.C. § 6020(a) *with* 26 U.S.C. § 6020(b).

3. At oral argument, the attorney for Gonzalez and Brown raised the point that even if a late filed return is not a return, it may qualify as an ''equivalent report or notice'' under section 523(a)(1)(B). Since this argument was not preserved in the record by any of the four debtors or briefed on appeal to this Court, we do not consider it here. *See United States v. Zannino,* 895 F.2d 1, 17 (1st Cir.1990).

4. The Department points us to two statutory provisions that give meaning to the phrase ''[e]xcept as otherwise provided.'' Mass. Gen. Laws ch. 30, § 24 (as amended 2013) authorizes acts that must be performed on a Saturday, Sunday, or legal holiday to be performed on the next business day. And Mass. Gen. Laws ch. 62C, § 19 (as amended 1985) allows the tax commissioner to ''grant a reasonable extension of time for filing any return, provid-

command that returns "shall" be made by the due date certainly seems like a "filing requirement." *See Black's Law Dictionary* (10th ed.2014) (defining "shall" as "a duty; more broadly, is required to[;] the mandatory sense that drafters typically intend and that courts typically uphold"). And another section of the Massachusetts tax code makes plain that it is so viewed. *See* Mass. Gen. Laws 62C, § 32(a) ("section 32(a)") ("Taxes shall be due and payable at the time when the tax return is required to be filed."). Accordingly, under this straightforward reading of Massachusetts law, a return filed after the due date is a return not filed as required, i.e., a return that does not satisfy "applicable filing requirements."

The two other circuits to have decided this issue, albeit construing other jurisdictions' "applicable" filing deadlines, reached the same conclusion. The Tenth Circuit recently found returns filed late under the Internal Revenue Code ("I.R.C.") not to be returns within the meaning of the hanging paragraph. *Mallo v. Internal Revenue Service (In re Mallo),* 774 F.3d 1313, 1321 (10th Cir.2014) (explaining, in reference to the I.R.C.'s deadline for income tax returns, that "the phrase 'shall be filed on or before' a particular date is a classic example of something that must be done with respect to filing a tax return and therefore, is an 'applicable filing requirement' "). Similarly, the Fifth Circuit determined that a debtor's failure to comply with a Mississippi law stating that returns "shall be filed on or before April 15th" meant that the returns did not satisfy applicable filing requirements under the hanging paragraph's definition. *McCoy v. Miss. State Tax Comm'n (In re McCoy),* 666 F.3d 924, 928, 932 (5th Cir.2012). And at least one other circuit court judge, in dictum, predicted such a result. *In re Payne,* 431 F.3d 1055, 1060 (7th Cir.2005) (Easterbrook, J., dissenting) ("After the 2005 legislation, an untimely return can not lead to a discharge—recall that the new language refers to 'applicable nonbankruptcy law (including applicable filing requirements).' ").

The debtors nevertheless argue that the hanging paragraph's language is not quite so clear as to dictate our holding. Perhaps the term "applicable filing requirement" may acquire vagueness at the outer boundaries of its possible application. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 31–32 (2012) (explaining that vagueness is present when a phrase's "unquestionable meaning has uncertain application to various factual situations"). For example, is an instruction on an official form that the filer not staple the return together, or staple the check to the return, an "applicable filing requirement"? However one might answer that question, we do not see how there is any room for reasonable argument that, as a matter of plain language, a Massachusetts law setting the date when a tax return "is required to be filed" is somehow not a "filing requirement."

In nevertheless describing the statute as materially ambiguous and our reading of it contrived, the dissent relies on the premise that when a statute states that the universe of X "includes" Y, one normally presumes that Y is merely an example of what is in X, and that X includes more than Y. Op. at 14. The dissent errs, though, in claiming that our interpretation fails to satisfy this premise. The dissent makes this error by presuming that the universe defined by the statute is "late-filed returns

ed that the taxpayer . . . files a tentative return . . . and pays therewith the amount of tax reasonably estimated to be due.'' The debtors do not argue that these provisions, or any other law or regulation, ''otherwise provided'' a due date for their filings.

that count as returns," Op. at 14, and that section 6020(a) returns (and "similar" state or local law returns) are therefore simply examples of a wider array of permitted late filed returns. The statute neither says nor implies any such thing. Rather, the statute provides that a "return" includes a "return prepared pursuant to section 6020(a) ... or similar State or local law." So one presumes only that a "return" includes more than these few types of returns. And it plainly does: it includes all sorts of returns (such as Form 1040s) that satisfy their respectively applicable filing requirements.

Similarly, the dissent errs in claiming that our reading of the statute "means that conversely, a section 6020(b) return would be the *only* type of return that is *not* a return." Op. at 14. This is plainly not so—any type of return not filed in accord with applicable filing requirements is not a "return" under our reading of the statute. The returns at issue in this case are a notable demonstration that section 6020(b) returns are not the only ones that are not returns under the statute.

Widening the scope slightly, debtors point to the language of section 523(a)(1)(B)(ii) ("the two-year provision"), which clearly implies that there can be a "return" that is filed within two years "after the date on which such return ... was last due." [5] So the hanging paragraph cannot be read as entirely excluding the possibility that a late return can also be a "return." Grasping onto this point, the debtors contend (and the BAP agreed) that our interpretation would "vitiat[e] in its entirety" the two-year provision, rendering it "superfluous." *See TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (citation and internal quotation marks omitted)); *Nat'l Org. for Marriage v. McKee,* 649 F.3d 34, 66 (1st Cir.2011) (quoting *TRW Inc.* for the same proposition).

The defect in this argument is that the hanging paragraph itself carves out an exception from its general rule, deeming one type of late return to be a return. It specifies that "a return prepared pursuant to section 6020(a) ... or similar State or local law" qualifies as a "return," while those prepared pursuant to section 6020(b) do not. 11 U.S.C. § 523(a)(*). Section 6020(a) and (b) can both be invoked when a taxpayer "fails to make" a proper return, including situations where the taxpayer is late in filing a return to the I.R.S. *See McCoy,* 666 F.3d at 928–29. Therefore, a late tax return, if prepared in compliance with section 6020(a) and filed within two years of the bankruptcy petition, is still a return (and the tax due thus dischargeable), notwithstanding its failure to meet the otherwise "applicable filing requirement" of a mandatory deadline. While section 6020(a) may only apply in a small minority of cases, the fact that a late filed section 6020(a) return can still qualify as a "return" for section 523(a) purposes means that the two-year provision still has a role to play if the hanging paragraph's plain meaning controls.

The I.R.S.'s Chief Counsel has referred to the number of section 6020(a) returns as "minute" and in 2010 took the position that the safe harbor created by it was "illusory" because taxpayers have no right to de-

5. The purpose of the two-year provision is apparently to prevent debtors from utilizing bankruptcy filings as a way of avoiding their overdue tax obligations. *In re Payne,* 431 F.3d at 1059.

mand a return under the provision. I.R.S. Chief Couns. Notice CC–2010–016 at 2–3 (Sept. 2, 2010). We accept the claim that such returns are rare, and are allowed only at the I.R.S.'s behest. It hardly follows, though, that the safe harbor expressly created for such returns is illusory. In fact, this "narrow safe harbor," hypothetically described by the district court below in the Perkins case, was utilized by a debtor in a recent bankruptcy case where the bankruptcy court was bound by the reading of section 523(a)(*) that the Department urges here. *See In re Kemendo,* 516 B.R. 434, 438 (Bankr.S.D.Tex.2014). In that case, the I.R.S. had prepared a tax return with information provided by the taxpayer, in accordance with section 6020(a). *Id.* at 438. More than two years later, the taxpayer filed for bankruptcy. *Id.* at 438–39. The bankruptcy court found that the taxpayer's delinquent tax debt had been properly discharged. *Id.* In short, reading the hanging paragraph as generally excluding returns filed after the date when applicable law requires them to be filed does not conflict with the implication of section 523(a)(1)(B)(ii) that there can be a late return, either notionally or in practice.

The dissent takes a different tack, deeming it "absurd" to think that Congress would allow a discharge of taxes due under a section 6020(a) return prepared years after the due date, but not under a Massachusetts return that is one day late. We see no absurdity. Section 6020(a) is a tool for the I.R.S., invoked solely at its discretion, when it decides obtaining help from the late filing taxpayer is to the I.R.S.'s advantage. That Congress left the I.R.S. a carrot to offer a taxpayer in such infrequent cases does not mean that it was absurd for Congress not to extend this carrot categorically to large numbers of other late filers.

But, say the debtors, our reading of the hanging paragraph still renders unnecessary its last clause, stating that the term "return" does not include "a return made pursuant to [section 6020(b)] or a similar State or local law." The debtors are correct on this point. Nevertheless, we do not see this as the type of redundancy that invokes any effective application of the doctrine that we try to read statutes so that no section is superfluous. Here, in context, it simply appears that in creating an exception for section 6020(a), the drafters made clear (desiring a belt and suspenders) that they were not including its companion section 6020(b).[6] Whatever one thinks of this redundancy, it offers too little to parry the force of the observation that a requirement to file on time is a filing requirement. *See In re McCoy,* 666 F.3d at 931.

Moreover, were we to adopt the debtors' position that a law requiring compliance with a filing deadline is not a filing requirement, we would be left without any textual basis for distinguishing those filing requirements that count from those that do not. Instead—and debtors and the dissent are frank about this—we would be back to tinkering with subjective and conflicting judge—made rules. In that respect, we would render the principal thrust of the hanging paragraph to be largely of no effect. Of course, the debtors say that this is what Congress wanted, simply seeking to "confirm" pre-existing case law. But, as we discuss in greater detail later in this opinion, there was no such uniform rule in the case law to which the language in the hanging paragraph could be read as

6. The distinction makes sense when we consider the basic difference between sections 6020(a) and (b) because the latter is prepared without the taxpayer's assistance and sometimes as a result of the taxpayer's willful fraud.

referring. *Cf. In re Mallo,* 774 F.3d at 1325 ("If Congress intended to define a return through application of the *Beard* test or some other substantial compliance doctrine, rather than by a taxpayer's compliance with the applicable filing requirements contained in the Tax Code, Congress [would not have added] the phrase 'including applicable filing requirements.' ").

The debtors also seek support in the Massachusetts laws and regulations bearing on the meaning of "return." They point out that in Massachusetts, a preassessment delinquent return is treated the same as any other return.[7] This is not exactly so, however, as Massachusetts imposes a penalty on any taxpayer who does not file his return by the date required. *See* Mass. Gen. Laws ch. 62C, § 33 ("Late returns; penalty; abatement").[8]

Relatedly, the debtors contend that the Commonwealth's own definition of "return" lacks a timeliness element. This, too, is not exactly so. The Massachusetts Code of Regulations defines a return as "a taxpayer's signed declaration of the tax due, if any, properly completed by the taxpayer or the taxpayer's representative on a form prescribed by the Commissioner and *duly* filed with the Commissioner." 830 C.M.R. 62C.26.1(2) (emphasis supplied). Webster's Third New International Dictionary gives as its first definition "in a due manner, time, or degree." *Webster's Third New International Dictionary* 700 (3d ed.2002). Courts consistently include a timeliness element when interpreting "duly" in other contexts. *See, e.g., McAdams v. United States,* No. 07164T, 2008 WL 654271, at *3 (Fed.Cl. Feb. 1, 2008) (in order for a claim to be duly filed under 26 U.S.C. § 7422, it must comply with the statutorily prescribed timeliness requirement in 26 U.S.C. § 6511(a)); *O'Connell v. United States,* No. 02–10399–RBC, 2004 WL 1006485, at *3 (D.Mass. Mar. 22, 2004) (same); *Mobil Corp. v. United States,* 52 Fed.Cl. 327, 331, 337 (Fed.Cl.2002) (I.R.C. regulation prohibiting suit to recover wrongfully assessed taxes "until a claim for refund ... has been duly filed" includes timeliness requirement). In sum, the debtors' invocation of Massachusetts laws and regulations does not change the result.[9]

Sensibly anticipating weak support in the statutory and regulatory language, the debtors rely with much emphasis on three other rules of statutory construction.

First, they (and the amicus curiae) implore us to find instructive the notion that exceptions to discharge should be narrowly construed in the debtor's favor, *Gleason v. Thaw,* 236 U.S. 558, 562, 35 S.Ct. 287, 59 L.Ed. 717 (1915); *Rutanen v. Baylis (In re Baylis),* 313 F.3d 9, 17 (1st Cir.2002), and that the Bankruptcy Code should be read in light of its purpose to provide a fresh start to the "honest but unfortunate debtor." *Local Loan Co. v. Hunt,* 292 U.S. 234, 244, 54 S.Ct. 695, 78 L.Ed. 1230 (1934) ("One of the primary purposes of the Bankruptcy Act is to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfor-

7. The Department did not issue assessments against any of the debtors.

8. Nor need we address in this case whether a return is required to be filed by the due date if Massachusetts should deem the failure to be excused, and thus of no effect under Mass. Gen. Laws ch. 62C, § 33(f) (waiving any penalty on a showing of good cause).

9. We express no opinion on whether other jurisdictions' laws and regulations bearing on a tax return's timeliness qualify as ''applicable filing requirements'' under section 523(a)(*).

tunes." (internal quotation marks omitted)).

Second, the debtors attempt to frame our interpretation—particularly with respect to the limitations it imposes on the two-year provision's applicability—as representing a significant change to the pre–2005 Bankruptcy Code. The debtors and the bankruptcy court below for the Brown and Gonzalez cases quote the Supreme Court in urging us to be "reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." *Dewsnup v. Timm,* 502 U.S. 410, 419, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992).

Third, the debtors and amicus curiae call the result we reach here—that all late filed returns in Massachusetts are not subject to discharge in bankruptcy—"unfathomable" and its consequences "draconian" and "absurd."

Our response to the debtors' reliance on these rules of statutory construction is fourfold.

First, and most importantly, where the question is whether a Massachusetts law setting a date by which a tax return "is required to be filed" is a "filing requirement" under Massachusetts law, we find little need—or justification—for turning to secondary principles of statutory construction. *Cf. United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) ("The language before us expresses Congress' intent ... with sufficient precision so that reference to legislative history and to pre-Code practice is hardly necessary.").

Second, while the result we reach may be unfavorable towards delinquent taxpayers who are also bankrupt, there is hardly anything "unfathomable," "draconian," or "absurd" in the notion that Congress might disfavor debtors who both fail to pay their taxes and also fail to timely file the returns that would alert the taxing authority to the failure to pay. *Cf. id.* at 242, 109 S.Ct. 1026 ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.' " (quoting *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 571, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982))).

Third, application of secondary principles of statutory construction hardly cuts just one way, or as forcefully as the debtors claim. We note in particular that the hanging paragraph, adding to the statute the key language at issue, was part of an enactment whose motivating factors were: the "recent escalation of consumer bankruptcy filings"; the "significant losses asserted to be associated with bankruptcy filings"; to close the loopholes that "allow and—sometimes—even encourage opportunistic personal filings and abuse"; and "the fact that some bankruptcy debtors are able to repay a significant portion of their debts." H. Comm. on the Judiciary, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, H.R.Rep. No. 109–31(I), at 3–5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 90–92.[10] None of these enumerated purposes align with the debtors' fall-back stance of helping the "honest but unfortunate debtor" achieve a

10. There were no published committee reports explaining the hanging paragraph's purpose, and it remains true that even when a statute effectuates a change to prior law, "where the language is unambiguous, silence in the legislative history cannot be controlling." *Dewsnup,* 502 U.S. at 419–20, 112 S.Ct. 773.

"fresh start."[11] And as the Supreme Court has already stated, "[t]he statutory provisions regarding nondischargeability reflect a congressional decision to exclude from the general policy of discharge certain categories of debts—such as . . . taxes[.] Congress evidently concluded that the creditors' interest in recovering full payment of debts . . . outweighed the debtors' interest in a complete fresh start." *Grogan v. Garner,* 498 U.S. 279, 287, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

Finally, we acknowledge that straightforward application of Congress's language changes presumed practice in some bankruptcy courts (including those that ruled for three of the debtors below). That being said, the judge-made law surrounding the meaning of a "return" in section 523(a) was far from settled. Prior to the BAPCPA, and in the absence of any limiting definition of the term "return," courts used a four-part test first articulated by the United States Tax Court in *Beard v. Comm'r,* 82 T.C. 766, 777–78 (1984), *aff'd,* 793 F.2d 139 (6th Cir.1986), in order to determine whether a document purporting to be a return was a return for purposes of section 523(a). Courts considered a return's timeliness under the *Beard* test's fourth prong: whether the submitted document "represent[ed] an honest and reasonable *attempt* to satisfy the requirements of tax law." *United States v. Hindenlang (In re Hindenlang),* 164 F.3d 1029, 1033–34 (6th Cir.1999) (emphasis supplied); *see also Colsen v. United States (In re Colsen),* 446 F.3d 836, 839 (8th Cir.2006); *In re Payne,* 431 F.3d at 1057; *In re Moroney,* 352 F.3d at 905; *United States v. Hatton (In re Hatton),* 220 F.3d 1057, 1060–61 (9th Cir.2000). These cases dealt only with federal tax returns, and even within that limited context, failed to reach a consensus on the issue. The Fourth, Sixth, Seventh, and Ninth Circuits all determined that debtors who submitted their tax returns late for multiple consecutive years and then filed for bankruptcy had not satisfied the test's fourth prong, but the bases for that conclusion varied. *See In re Payne,* 431 F.3d at 1057–59 (expressing concern that a chronically delinquent taxpayer was making belated filings to "set the stage" for a discharge in bankruptcy); *In re Moroney,* 352 F.3d at 905–06 (same); *In re Hatton,* 220 F.3d at 1061 (debtor "made every attempt to avoid paying his taxes until the IRS left him with no other choice"); *In re Hindenlang,* 164 F.3d at 1034 (post-assessment returns lack utility for the I.R.S.). *But see In re Colsen,* 446 F.3d at 839–41 (document's contents, not timeliness, determined what constitutes a "return" for discharge purposes).

Against this background, it is more plausible that Congress intended to settle the dispute over late filed tax returns against the debtor (who both fails to pay taxes and fails to file a return as required by law) than it is that Congress sought to preserve some version of the unsettled four-pronged *Beard* test by using language that has no reference to that case law and that certainly suggests no four-pronged definition. Particularly noteworthy is the fact that Congress's chosen test called for satisfying the filing requirements of applicable law, not merely making an "honest attempt" to do so.[12]

11. The debtor unfriendly thrust of the BAPCPA was also manifest in its rewriting of section 523(a)(1)(B) to make it applicable "not only to the failure to file a required return, but also to the failure to file or give an 'equivalent' required 'report or notice' " corresponding to the debt. *See Maryland v. Ciotti (In re Ciotti),* 638 F.3d 276, 279–80 (4th Cir. 2011).

12. This is not to reject the possibility that pre-amendment case law, such as *Beard,* might

III. Conclusion

For the foregoing reasons, we *affirm* the district court's judgment in favor of the Department in the cases of Fahey and Perkins, and we *reverse* the BAP's grant of judgment for Brown and Gonzalez. Summary judgment shall be entered in favor of the Department for the tax years at issue because the debtors' tax liabilities were not discharged in bankruptcy as a matter of law.

So ordered.

THOMPSON, Circuit Judge, dissenting.

Our nation's bankruptcy system was built on the principle that sometimes, honest people fall on hard times. While the bankruptcy code has naturally gone through revisions and updates since its inception, that foundational philosophy has always laid at its root.

In my view, the majority is unfairly dismissive of the debtors' logical interpretation of the statutory provisions at issue. It simultaneously takes too academic and literal of an approach to its reading of one of the code's definitional provisions, leading to a result that defies common sense, while also conveniently ignoring the plain meaning of other words in the very same paragraph, in order to reach a certain outcome. It ignores the mandates of statutory construction we are obligated to follow, years of lines of caselaw upon which debtors had been relying, and the clearly stated policy reasons for Congress's imposing these statutory provisions in the first place.

Needless to say, I dissent.

remain viable in deciding whether a document not purporting to be a return is an ''equivalent report or notice'' under section 523(a)(1)(B). *See In re Ciotti,* 638 F.3d at 280–81.

The Canons of Construction

In our de novo review, the rules we follow to interpret a statute—including bankruptcy statutes—are well established. First, we "look [ ] to the specific language at issue." *In re Rudler,* 576 F.3d 37, 44 (1st Cir.2009). "If the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." *Id.* at 44–45 (citations and quotations omitted). In so doing, however, we only apply plain meaning if the statutory language is not ambiguous and would not "lead to absurd results." *Id.* (citations and quotations omitted). Thus, in this case we must initially decide whether we can enforce 11 U.S.C. § 523(a)(1)(B)(ii) [13]—the specific statutory provision at issue —"according to its terms," based on an assessment that the "disposition required by the text is not absurd," *id.* at 44 (citations and quotations omitted), and that the statute cannot be "read in more than one way," *In re Thinking Machines Corp.,* 67 F.3d 1021, 1025 (1st Cir.1995) (quoting *United States v. Gibbens,* 25 F.3d 28, 34 (1st Cir.1994)) ("A statute is ambiguous if it can be read in more than one way.").

The majority concludes that the hanging paragraph, which Congress added to the bankruptcy statute in order to define what a "tax return" is for purposes of Subsection (ii),[14] unambiguously dictates that "a return filed after the due date is a return not filed as required," and thus, that debtors who file their Massachusetts taxes late can *never* benefit from Subsection (ii). As I will explain, I disagree that the hanging paragraph—when read in concert with

13. From now on, I'll refer to 11 U.S.C. § 523(a)(1)(B)(ii) as ''Subsection (ii).''

14. The hanging paragraph's definition of ''return'' applies to the entire 11 U.S.C. § 523(a). *See* 11 U.S.C. § 523(a)(*).

Subsection (ii)—unequivocally demands that conclusion. To the contrary, the majority's interpretation of the hanging paragraph leads to an absurd result that cannot be reconciled simply with a strictly literal reading of the statute.

Plain Meaning

The statute at issue provides that a debtor may not discharge a tax debt if "a return . . . if required—(i) was not filed or given; or (ii) was filed or given after the date on which such return . . . was last due, under applicable law or under any extension, and after two years before the date of the filing of the [bankruptcy] petition[.]" [15] 11 U.S.C. § 523(a)(1)(B)(i)-(ii).

In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act, making numerous and significant changes to the bankruptcy code. As part of those 2005 amendments, Congress added the "hanging paragraph" to the end of 11 U.S.C. § 523(a), clarifying that for purposes of that subsection, a " 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)." Significant to this appeal, Congress did not change Subsection (ii) during the 2005 amendments.

The majority hones in on the hanging paragraph's added clarification that returns must comply with a state's "applicable filing requirements" to be dischargeable. The majority concludes that the text of the hanging paragraph unambiguously states that if a return does not comply with *all* the state law tax return filing requirements (including the filing deadline),[16] then the taxes cannot be discharged.

The majority's logic suffers from several flaws, which I address in turn.

First, it is not obvious to me that under Massachusetts tax law, filing a return late *necessarily* means that a debtor did not comply with "applicable filing requirements," such that his return would not "satisf[y] the requirements of applicable nonbankruptcy law." As the majority concedes, a tardy return will still be accepted by the state, and the debtor's tax liability will still be assessed. *See* Mass. Gen. L. c. 62C, § 26(a) ("Taxes shall be deemed to be assessed at the amount shown as the tax due upon any return filed under the provisions of this chapter and on any amendment, correction or supplement thereof, or at the amount properly due, whichever is less, and at the time when the return is filed or required to be filed, whichever occurs later."). While late-filed returns are subject to a one-percent penalty, Mass. Gen. L. c. 62C, § 33(a),[17] even the fine is waivable on a showing of good faith:

15. The majority makes much ado about the fact that the debtors in this case never paid their back taxes. It seems obvious to me that when Congress drafted the bankruptcy statute, it anticipated that someone seeking to discharge a *debt* in bankruptcy never actually paid the money. Otherwise, he wouldn't have any debt to discharge.

16. Confusingly, the majority admits that even under its interpretation of the statute, ''the term 'applicable filing requirement' may acquire vagueness at the outer boundaries of its possible application.'' As an example, the majority suggests that it is unclear whether a failure to properly staple documents, even though technically an ''applicable filing requirement,'' would render the taxes deriving therefrom non-dischargeable. The majority goes on, however, to answer its own hypothetical by later concluding that ''any type of return not filed in accord with applicable filing requirements in not a 'return' under our reading of the statute.''

17. Mass. Gen. L. c. 62C, § 33(a) provides:

> If any return is not filed with the commissioner on or before its due date or within any extension of time granted by him, there shall be added to and become a part of the

> If it is shown that any failure to file a return or to pay a tax in a timely manner is due to reasonable cause and not due to willful neglect, any penalty or addition to tax under this section may be waived by the commissioner, or if such penalty or addition to tax has been assessed, it may be abated by the commissioner, in whole or in part.

Mass. Gen. L. c. 62C, § 33(f). I do not see how we can conclude that a late-filed return never satisfies the requirements of Massachusetts tax law if the Commonwealth not only accepts the return, but is even willing to waive the already relatively conservative penalty for filing it late.

More importantly though, even if we assume, as the majority does, that timely filing is generally a necessary component of a "return" under Massachusetts tax law, we still cannot draw the majority's ultimate conclusion that late filers can never discharge their Massachusetts tax debts under 11 U.S.C. § 523(a). Subsection (ii)—which Congress chose not to alter during its 2005 amendments—continues to provide a discharge exception for people who filed their taxes late, so long as those debtors did not file within the two years just prior to filing for bankruptcy. *See In re Weinstein*, 272 F.3d 39, 43 (1st Cir. 2001) (noting that when two statutory provisions are "meant to work in concert," to discern the plain meaning of the provision at issue, we must analyze both, as one statutory provision cannot be read in isolation). As the debtors appropriately urge, there would be no point in leaving in Subsection (ii)-the specific exception that deals with late filers-if Congress meant for the hanging paragraph to penalize everyone who misses filing deadlines. As the majority concedes, we should not, when we can avoid it, construe statutes in a way that allows a "clause, sentence, or word" to be "superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001); *see also Kawaauhau v. Geiger*, 523 U.S. 57, 62, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.") (citation and quotations omitted).

So how do we reconcile this discrepancy (i.e., ambiguity) that arises within the statute? The correct answer is to assess what the legislature likely meant when it wrote the statute—a step the majority incorrectly assumes it can skip, based on its half-reading of the statutory provisions it was required to consider. *See In re Weinstein*, 272 F.3d at 44 (noting that a "conflict between two provisions of [a] statute—a conflict with which neither provision deals expressly ... provides a reason to move beyond the text and to examine a statute's legislative history and apparent purpose"). Instead of taking on its required task, the majority, in an attempt to resolve this matter solely on the plain text, glosses over the ambiguity by concluding that Subsection (ii) is not a superfluous clause because one type of person would still benefit from it—the people who filed a return pursuant to 26 U.S.C. § 6020(a) (or a comparable state or local law).[18]

> tax, as an additional tax, a penalty of one per cent of the amount required to be shown as the tax on such return for each month or fraction thereof during which such failure continues, not exceeding, in the aggregate, twenty-five per cent of said amount.

18. Section 6020(a) allows the IRS to prepare a federal return for someone who fails to do so on his own, but still consents to providing the IRS with the information it needs to prepare the return itself. It provides:

> If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to dis-

As the majority notes, the hanging paragraph provides:

> ["Return"] includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, ... but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law. 11 U.S.C. § 523(a)(*). So, the majority concludes, Subsection (ii) retains some usefulness because § 6020(a) returns (even if they are filed late), can still be discharged under Subsection (ii).

The majority's logic on this point is off for a number of reasons, two of which relate to plain language interpretation.

For one, the text of the hanging paragraph does not, as the majority concludes, dictate that § 6020(a) returns are the *only* type of late-filed returns that count as "returns." The hanging paragraph provides that a return "*includes* a return prepared pursuant to section 6020(a)." (Emphasis added). The majority asks us to assume that Congress, in its use of the word "includes," intended for the exception to apply only to § 6020(a)-type returns.

I am perplexed as to how the majority reaches this contrived extrapolation. Congress's use of the word "includes" connotes that § 6020(a) returns and their state or local law equivalents are mere *examples* of returns that would still comply with "applicable filing requirements," despite the fact that the taxpayer did not meet the filing deadline.[19] If Congress intended the outcome espoused by the majority, it would have used different language (e.g., "is limited to")—not the word "includes." [20]

In a similar vein, the hanging paragraph also denotes that a "return" "does not include a return made pursuant to section 6020(b) of the Internal Revenue Code ... or a similar State or local law." [21] Applying the majority's (incorrect) definition of the word "includes," then, means that conversely, a § 6020(b) return, (or its state or local law equivalent) would be the *only* type of return that is *not* a return. But as the bankruptcy court below put it, "[i]f all late-filed returns except § 6020(a) returns are not returns[,] there is no need to state

> close all information necessary for the preparation thereof, then, and in that case, the Secretary may prepare such return, which, being signed by such person, may be received by the Secretary as the return of such person.
>
> 26 U.S.C. § 6020(a).

19. While § 6020(a) does not specifically discuss filing deadlines, I think it fair to presume that if a person failed to file a return on his own, he missed the filing deadline.

20. In its attempt to refute my interpretation of the word ''includes,'' the majority concludes that in addition to § 6020(a) returns, ''all sorts of returns (such as Form 1040s) that satisfy their respectively applicable filing requirements'' count as ''returns.'' This logic is circular. Of course a return that satisfies ''applicable filing requirements'' satisfies ''applicable filing requirements.'' The majority's response still fails to address why we should read into the statutory language that late-filed returns, generally, are not considered ''returns,'' even though Congress wrote into the statute an example of a specific type of late-filed return that qualifies.

21. Section 6020(b) permits the IRS to execute a return for someone who either failed to file, or filed a ''false or fraudulent return,'' even if that person did not cooperate and/or did not sign the return the IRS prepared. It provides:

> If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.
>
> 26 U.S.C. § 6020(b)(1).

that § 6020(b) returns are not returns." The majority cursorily writes off this curiosity as a mere "redundancy" in the statute, failing to substantively address why the absurd conclusion we must draw from its reading of the statute does not require consideration of what Congress actually meant when it added the § 6020 language to the statute.

Second, allowing § 6020(a) returns, but not other late-filed returns, to be dischargeable leads to another preposterous result. Section 6020(a) returns result from a taxpayer's failure to file a federal tax return. Under the majority's formulation, then, the scofflaw who sits on his hands at tax time, doesn't bother to file a return, and then, after getting caught, cooperates with the authorities and lets the government file the substitute return for him, would be the *only* late filer who would be allowed to discharge his tax debt. The person who files his return one day late—which the state then accepts—would not be permitted to discharge, regardless of the reason for the tardiness.

The majority responds that § 6020(a) "is a tool for the IRS, invoked solely at its discretion, when it decides obtaining help from the late filing taxpayer is to the IRS's advantage." And so, the majority contends, "[t]hat Congress left the IRS a carrot to offer a taxpayer in such infrequent cases does not mean that it was absurd for Congress not to extend this carrot categorically to large numbers of late filers." But the Massachusetts taxing authority, like the IRS, also has the discretion to accept late-filed materials from a taxpayer (without imposing a penalty), presumably because it, too, would prefer not to start from scratch. Further, the majority offers no authority to support its assumption that Congress was concerned about a rash of people running to the courthouse to discharge their tax debts. A theme I harp on throughout this dissent, we cannot put words in Congress's mouth. Finally, if Congress did provide some indication that it was seeking to prevent "large numbers" of late filers from attempting to discharge, the relevant statistic to look at would be how many late filers—of the § 6020(a) variety or otherwise—would actually seek relief from Subsection (ii), were it available to them, as opposed to how many people, theoretically, file their taxes late.

Given the absurdity of the majority's outcome, and the other textual ambiguities I described above, I disagree with my colleagues that we can avoid delving into legislative intent. I tackle that analysis next.

Legislative Intent

In dicta, the majority rejects the debtors' arguments regarding the legislative intent behind Subsection (ii) and the hanging paragraph. I disagree with this portion of the majority's analysis, as well as its ultimate disposition.

The Caselaw

In trying to discern legislative intent, we look to the historical context of the statute (i.e., prior caselaw), the legislative history of the statutory provision, and the policy underlying the statute. *In re Weinstein,* 272 F.3d at 44–46. So first, we must "consider . . . the context of the statute in bankruptcy caselaw." *Id.* This task requires a brief recap of the history of Subsection (ii) and the addition of the hanging paragraph.

Prior to 2005, the bankruptcy code did not define "return" for purposes of Subsection (ii). Many courts, left to their own devices to figure out what constituted a "return," ended up adopting what's been coined as the "*Beard* test," a four-part standard formulated by the Tax Court for

determining whether a document filed with the IRS qualified as a federal tax return. Under the *Beard* inquiry, a document qualified as a tax return if: (1) it purported to be a return; (2) was signed under penalty of perjury; (3) contained information sufficient to determine tax liability; and (4) was an honest and reasonable attempt to satisfy the tax law requirements. *Beard v. Commissioner,* 82 T.C. 766 (1984), *aff'd per curiam,* 793 F.2d 139 (6th Cir.1986). *See also In re Colsen,* 446 F.3d 836, 839 (8th Cir.2006); *In re Payne,* 431 F.3d 1055, 1057 (7th Cir.2005); *In re Moroney,* 352 F.3d 902, 905 (4th Cir.2003); *In re Hatton,* 220 F.3d 1057, 1060–61 (9th Cir.2000); *In re Hindenlang,* 164 F.3d 1029, 1033–34 (6th Cir.1999) (all adopting *Beard* test).[22]

Many courts ended up grappling with the fourth prong. Some tried to figure out whether filing a return late counted as an "honest and reasonable attempt" to satisfy tax requirements. *See, e.g., In re Payne,* 431 F.3d at 1059; *In re Hindenlang,* 164 F.3d at 1034. Those decisions often turned on whether a return made after the government had already assessed tax liability defeated the main purpose of the filing deadline, which one court described as "spar[ing] the tax authorities the burden of trying to reconstruct a taxpayer's income and income-tax liability without any help from him." *In re Payne,* 431 F.3d at 1057. *See also In re Moroney,* 352 F.3d at 906 (holding that the belated acceptance of responsibility for tax liability does not constitute an honest and reasonable attempt to comply with tax laws, and that whether the eventual effort had an effect on tax liability was irrelevant); *In re Hatton,* 220 F.3d at 1061 (finding that belated cooperation with IRS to settle tax liabilities was not an honest and reasonable attempt to comply with tax law, and tax liability was therefore not excepted from discharge under § 523); *In re Hindenlang,* 164 F.3d at 1034 (applying the fourth prong of *Beard,* holding that a "Form 1040 is not a return if it no longer serves any tax purpose or has any effect under the Internal Revenue Code"). Other courts instead struggled with whether the "honest and reasonable" inquiry was limited to an examination of whether, as a factual matter, the tax forms themselves—regardless of when they were eventually filed—were filled out in good faith and with accurate information. *See, e.g., In re Colsen,* 446 F.3d at 840–41.

Presumably aware of this confusion that was ensuing in the courts, in 2005, Congress added the hanging paragraph, clarifying specifically that substitute returns—even though they were not prepared at the hand of the taxpayer and were filed late—could qualify as dischargeable under 11 U.S.C. § 523(a), so long as the taxpayer cooperated with the government in preparing the return, and did not file a false or fraudulent one. While Congress also injected the language requiring returns to meet "applicable filing requirements," despite the discord among the courts, it did not specifically address whether late-filed returns in particular should be considered "returns" under the revised statutory scheme.

Since 2005, disagreement has continued to persist among the courts about how to apply the law, at least as it pertains to late-filed returns. Only two of our sister courts have answered the specific question

22. We do not appear to have ever formally adopted *Beard,* but prior to 2005, courts in our province applied or considered it to try to figure out what constituted a "return" for purposes of 11 U.S.C. § 523(a). *See, e.g., In re Mulcahy,* 260 B.R. 612, 615–16 (Bankr. D.Mass.2001); *In re Pendergast,* 510 B.R. 1, 9 (B.A.P. 1st Cir.2014) (reiterating its previous holding that " § 523(a)(*) replaces the *Beard* test").

before us, and both have reached the same conclusion as the majority here. *See McCoy v. Miss. State Tax Comm'n (In re McCoy),* 666 F.3d 924, 932 (5th Cir.2012); *In re Mallo,* 774 F.3d 1313, 1327–28 (10th Cir.2014). But as we have said before, "[t]he numbers favoring a rule do not necessarily mean that the rule is the best one." *In re Atlas IT Exp. Corp.,* 761 F.3d 177, 182 (1st Cir.2014). Numerous lower courts—including two of the courts involved in the instant appeal—have applied either a different reasoning or have reached a different outcome from the one espoused by the majority. *See, e.g., In re Gonzalez,* 506 B.R. 317, 318 (B.A.P. 1st Cir.2014) (affirming bankruptcy court's holding that Massachusetts taxes were dischargeable, even though "corresponding tax returns were filed late"); *In re Martin,* 508 B.R. 717, 736 (Bankr.E.D.Cal. 2014) (holding that "requirements of applicable nonbankruptcy law (including applicable filing requirements) do not include a temporal restriction") (quotations omitted). Some courts, including the lower court in *Mallo,* have continued to apply various versions of the *Beard* test. *See, e.g., In re Mallo,* 498 B.R. 268, 281 (D.Colo.2013); *In re Rhodes,* 498 B.R. 357, 360 (Bankr. N.D.Ga.2013).

As the Supreme Court has articulated, "[w]hen Congress amends the bankruptcy laws, it does not write on a clean slate." *Dewsnup v. Timm,* 502 U.S. 410, 419, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992) (quotations omitted). Therefore, we should be "reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." *Id.* Given the widespread disagreement among the courts prior to and after 2005, as well as ubiquitous application of various versions of the *Beard* test's "honest and reasonable attempt" requirement, I do not see how—absent a clear congressional mandate—we can (or should) spring upon debtors the majority's draconian rule-of-law. This very appeal, which involves four different debtors and the decisions of four different lower courts reaching two opposing outcomes, illustrates that the caselaw is far from settled, and that the courts were not generally applying a per se restriction like the one the majority has created today.

Policy

Given the lack of legislative history on the hanging paragraph, it is also appropriate to look to the public policy behind the bankruptcy code to try to determine Congress's intent. *See In re Weinstein,* 272 F.3d at 46 (noting that while we "must not, of course, impose [our] own views of proper bankruptcy policy in place of those of the legislature[,] ... an understanding of the congressional policies underlying a statute, including the Bankruptcy Code, can help to reconcile otherwise indeterminate parts of the statutory text").

The primary purpose of the bankruptcy code has always been to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." *Local Loan Co. v. Hunt,* 292 U.S. 234, 244, 54 S.Ct. 695, 78 L.Ed. 1230 (1934) (citation and quotations omitted); *Marrama v. Citizens Bank of Mass.,* 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007) ("The principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor.") (citations and quotation omitted). As the Supreme Court reiterated fairly recently (and several years after the 2005 amendments were passed), a "fresh start" is a "fundamental bankruptcy concept."

Schwab v. Reilly, 560 U.S. 770, 791, 130 S.Ct. 2652, 177 L.Ed.2d 234 (2010) (citations and quotations omitted). Despite the majority's contentions, Congress made no indication that the 2005 amendments were intended to change those goals. Rather, as President George W. Bush reiterated upon signing the bill, the purpose of our bankruptcy system is to "give those who cannot pay their debts a fresh start." Presidential Statement on Signing the Bankruptcy Abuse Prevention and Consumer Protection Act, 2005 U.S.C.C.A.N. S7, 2005 WL 3693183 (Apr. 20, 2005) ("2005 Presidential Statement"). As I mentioned above, the Massachusetts taxing authority acknowledges that someone may miss the filing deadline for a "reasonable cause." Yet under the majority's formulation, even people who have a good-faith reason for filing late—and are then excused by the state taxing authority for doing so—are mere "delinquent taxpayers," shunned from receiving a bankruptcy discharge. While the 2005 reforms certainly sought to avert abuses that had been occurring in the bankruptcy system, I find it presumptuous to conclude that well intentioned people who file their taxes one day late—with no way to anticipate that bankruptcy would be coming down the pipeline a whole two years later—are the people trying to "commit fraud" or "game the system." *See* 2005 Presidential Statement. I am further convinced that Congress's focus was likely on bad faith, as opposed to mere timing, because the hanging paragraph expressly allows discharge for § 6020(a) returns, but not § 6020(b) returns, despite the fact that both are, by their nature, filed late—as the majority concedes, "the basic difference between sections 6020(a) and (b) [is that] the latter is prepared without the taxpayer's assistance and sometimes as a result of the taxpayer's willful fraud." It seems to me that in light of the public policy behind the bankruptcy code and Congress's decision not to specifically create a per se rule barring late-filed returns from being dischargeable, we cannot just write one in.

Given the state of the caselaw in 2005, the most sensible explanation for Congress's addition of the provision was to elucidate that regardless of who prepared a return—or when—if the document a debtor filed would no longer be considered a "return" because the state won't accept it as one, the debtor can't just turn around and file a tax form solely for the purpose of discharging those taxes during bankruptcy. This interpretation of the law is further supported by Congress's choice, in 2005, to maintain the very safeguard that was already built into the statute to help prevent that kind of problem from arising: "the requirement of a two-year waiting period after filing a late return but before seeking discharge prevents a debtor who has ignored the filing requirements of the Internal Revenue Code from waiting until the eve of bankruptcy, filing a delayed but standard tax return form, and seeking discharge the next day." *In re Hindenlang,* 164 F.3d at 1032. Considering the purpose of the bankruptcy code, it is beyond me how—or why—the majority would assume, without textual or other justification, that "it is more plausible that Congress intended to settle the dispute over late filed tax returns against the debtor. . . ."

In my view, the most sensible interpretation of Subsection (ii) and the hanging paragraph, when considered in concert, is that a return that does not comply with state filing requirements (and thus will not be accepted by the state as a return when it is filed) does not count as a "return," and so those taxes cannot be discharged. In order to prevent people from filing late returns solely for the purpose of discharging their taxes in bankruptcy, the debtor may only discharge if he filed for bank-

ruptcy two years after he filed his late return. This reading aligns with the plain text (including Congress's choice to retain Subsection (ii) in its entirety), the historical context of the statute, and the public policy reasons for enacting the bankruptcy code. The majority, ignoring blatant textual ambiguities and judicial precedent, instead opts to create a per se restriction that is contrary to the goal of our bankruptcy system to provide, as the former President put it in 2005, "fairness and compassion" to "those who need it most."

Ultimately, this continued confusion may be Congress's problem to fix. In the meantime, debtors who legitimately resort to bankruptcy when they reach wit's end should not be punished for the lack of clarity that persists in the very laws enacted to help them—or for the majority's implicitly articulated viewpoint that a financially strapped person who misses a deadline is trying to work a runaround.

I respectfully dissent.

Addiel SOTO–FELICIANO, Plaintiff, Appellant,

v.

VILLA COFRESÍ HOTELS, INC. and Sandra Y. Caro, Defendants, Appellees.

No. 13–2296.

United States Court of Appeals, First Circuit.

Feb. 20, 2015.

Background: Former employee, the head chef at hotel, brought action against hotel and its general manager in charge of human resources alleging age discrimination and retaliation under Age Discrimination in Employment Act (ADEA), and supplemental state law claims for age discrimination under Puerto Rico's anti-discrimination and wrongful termination statutes. Defendants moved for summary judgment. The United States District Court for the District of Puerto Rico, Juan M. Pérez–Giménez, J., 967 F.Supp.2d 529, granted motion and dismissed federal claims with prejudice and claims under Puerto Rico law without prejudice. Employee appealed.

Holdings: The Court of Appeals, David J. Barron, Circuit Judge, held that:

(1) employee established prima facie case of age discrimination;

(2) fact issue existed as to whether defendants' articulated legitimate, nondiscriminatory reason for employee's suspension and firing, his alleged misconduct on the job, were pretext for age discrimination;

(3) employee established that he engaged in protected conduct, as required to establish prima facie case of ADEA retaliation; and

(4) fact issue existed as to whether defendants' articulated legitimate, nonretaliatory reason for employee's suspension and termination were pretext to retaliate for his efforts to redress alleged age discrimination.

Reversed and remanded.

1. Federal Courts ⚿3604(4), 3675

Court of Appeals reviews district court's summary judgment ruling de novo, considering the record and all reasonable inferences therefrom in the light most favorable to the non-moving party.

Department of the Treasury | Internal Revenue Service | Office of Chief Counsel

Notice

CC-2010-016

September 2, 2010

Subject: Litigating Position Regarding the Dischargeability in Bankruptcy of Tax Liabilities Reported on Late-Filed Returns and Returns Filed After Assessment

Cancel Date: Effective until further notice

Purpose

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

Background

Pursuant to section 523(a)(1)(B)(i), an individual's bankruptcy discharge does not discharge a tax debt for which a required return was not filed. The Government successfully argued in a number of circuits that a Form 1040 filed after assessment does not qualify as a return for discharge purposes under section 523(a)(1)(B)(i). For example, In re Hindenlang, 164 F.3d 1029 (6th Cir.), cert. denied, 528 U.S. 810 (1999), the Sixth Circuit held that a document must qualify as a federal tax return under tax law to be a return for bankruptcy purposes. The court applied the test in Beard v. Commissioner, 82 T.C. 766 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986), which held that if a document "contains sufficient information to permit a tax to be calculated" and "purports to be a return" and "is sworn to as such, and "evinces an honest and reasonable attempt to satisfy the law," it is a return. The Hindenlang court concluded that a Form 1040 filed after assessment serves no tax purpose and therefore was not an honest and reasonable attempt to satisfy the tax laws. Other circuits largely followed Hindenlang. See In re Payne, 431 F.3d 1055 (7th Cir. 2005); In re Moroney, 352 F.3d 902 (4th Cir. 2003); In re Hatton, 220 F.3d 1057 (9th Cir. 2000). The Eighth Circuit disagreed in In re Colsen, 446 F.3d 836 (8th Cir. 2006), holding that a document that on its face evinces an honest and reasonable attempt to satisfy the tax laws qualifies as a return, whether or not it was filed after assessment.

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

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Filename: CC-2010-016 File copy in: CC:FM:PF

> For the purpose of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State of local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

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

Discussion

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

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

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

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

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

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

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

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

Conclusion

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

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

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

/s/
Deborah A. Butler
Associate Chief Counsel
(Procedure & Administration)

The Bankruptcy Code's Return Policy: Another Hanging Paragraph Hangs Consumers Out to Dry

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I. Introduction

In this article, we will discuss the implications of the "hanging paragraph" of section 523(a) on the dischargeability of late-filed tax returns and will examine recent cases on this topic including: *In re Fahey*, 779 F.3d 1 (1st Cir. 2015), *In re Mallo*, 774 F.3d 1313 (10th Cir. 2014), *In re McCoy*, 666 F.3d 924 (5th Cir. 2012), *In re Martin*, 542 B.R. 479 (B.A.P. 9th Cir. 2015), and *In re Justice*, No. 15-10273, 2016 WL 1237766 (11th Cir. Mar. 30, 2016).

II. Late-Filed Tax Returns and the Hanging Paragraph

Section 523 of the Bankruptcy Code provides certain exceptions to discharge. With respect to tax debt, § 523(a) states:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> (1) for a tax or a customs duty—
>
> . . .
>
> (B) with respect to which a return, or equivalent report or notice, if required—
>
> (i) was not filed or given; or
>
> (ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition;

11 U.S.C. § 523(a).

Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), courts looked to the test articulated in *Beard v. Comm'r*, 82 T.C. 766, 777–78 (1984), to determine what qualified as a return. *In re Nilsen*, 542 B.R. 640, 644 (Bankr. D. Mass. 2015).[3] Under the *Beard* test in order to qualify as a "return": "(1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to

[3] At the time of this writing, *In re Nilsen* is on appeal to the United States District Court for the District of Massachusetts. In *Nilsen*, the Bankruptcy Court for the District of Massachusetts, rejected an argument that a late-filed return could be "equivalent report or notice" under § 523(a)(1)(B). 542 B.R. at 647 ("The Debtor filed Form 1040s and Form 1s is late. He did not file something akin to or equivalent to those documents. He filed actual returns, not something different. It appears to this Court that the Debtor is attempting to rename the tax forms as equivalent reports to evade the holding in *In re Fahey*.")

allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law." 542 B.R. at 644. As part of BAPCPA, a definition of "return" was added as a "hanging paragraph" to § 523:

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

11 U.S.C.A. § 523(a)(*).[4] Courts are divided on whether the hanging paragraph makes tax debt associated with all late-filed tax returns non-dischargeable. The Court of Appeals for the First Circuit, the Court of Appeals for the Fifth Circuit, and the Court of Appeals for the Tenth Circuit have found that late-filed returns are not "returns" within the meaning of the hanging paragraph.[5] *See In re Fahey*, 779 F.3d 1; *In re Mallo*, 774 F.3d 1313; *In re McCoy*, 666 F.3d 924. The Court of Appeals for the Eleventh Circuit and the Bankruptcy Appellate Panel for the Ninth Circuit have rejected that strict approach and continue to use versions of the *Beard* test. *See In re Martin*, 542 B.R. 479; *In re Justice*, No. 15-10273, 2016 WL 1237766.

A. First Circuit

In *Fahey*, the Court of Appeals for the First Circuit found that a return filed after the due date is "a return not filed as required, i.e. a return that does not satisfy the 'applicable filing

[4] The legislative history of BAPCPA provides no guidance on the intent behind the addition of the first sentence of the hanging paragraph. With respect to the second sentence, the House Report states: "Section 714 of the Act amends section 523(a) of the Bankruptcy Code to provide that a return prepared pursuant to section 6020(a) of the Internal Revenue Code, or similar State or local law, constitutes filing a return (and the debt can be discharged), but that a return filed on behalf of a taxpayer pursuant to section 6020(b) of the Internal Revenue Code, or similar State or local law, does not constitute filing a return (and the debt cannot be discharged)." H.R. REP. 109-31(I), 103, 2005 U.S.C.C.A.N. 88, 167.

[5] At the time of this writing, a case on this issue is pending in the Court of Appeals for the Third Circuit on appeal from the United States District Court for the Eastern District of Pennsylvania. *See In re Giacchi*, 2015 WL 5737357 (E.D. Pa. Sept. 30, 2015). In the underlying case, the United States District Court for the Eastern District of Pennsylvania affirmed the bankruptcy court's decision that late-filed post-assessment tax documents do not qualify as "returns" under the hanging paragraph of § 523(a). *Id.* at *5–6.

requirements.'" 779 F. 3d at 5. In that case, the debtors filed their Massachusetts income tax returns late and failed to pay all taxes, interest, and penalties that were due to the Massachusetts Department of Revenue.[6] The Court of Appeals for the First Circuit found that under the hanging paragraph, in order for a document to be "return," it must "satisfy the requirements of applicable nonbankruptcy law (including applicable filing requirements)." *Id.* at 4. Timely filing is a "filing requirement" under Massachusetts law. *Id.* Accordingly, a return filed after the due date does not satisfy the applicable filing requirements and is a return not filed as required. *Id.* at 5.

Addressing the arguments made in the dissenting opinion, the court reasoned that since the hanging paragraph carves out an exception for one type of late return—those prepared under Internal Revenue Code section 6020(a)—the "two-year" provision of § 523(a)(1)(B)(ii) is not superfluous. *Id.* at 6. As such, "a late tax return, if prepared in compliance with section 6020(a) and filed within two years of the bankruptcy petition, is still a return (and the tax due thus dischargeable), notwithstanding its failure to meet the otherwise 'applicable filing requirement' of a mandatory deadline." *Id.* Returns prepared under section 6020(a) of the Internal Revenue Code are those that are prepared and processed by the Internal Revenue Service for non-filing taxpayers.[7] Although this exception "may only apply in a small minority of cases," the court

[6] The opinion in relates to four separate chapter 7 cases that were appealed to the First Circuit Court of Appeals on the same issue. *See Perkins v. Mass. Dep't of Revenue*, 507 B.R. 45 (D. Mass. 2014); *In re Gonzalez*, 506 B.R. 317 (B.A.P. 1st Cir. 2014); *In re Brown*, B.A.P. No. MW 13–027, 2014 WL 1815393 (B.A.P. 1st Cir. Apr. 3, 2014).

[7] Section 6020 of the Internal Revenue Code states:

> **a) Preparation of return by Secretary.**--If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the Secretary may prepare such return, which, being signed by such person, may be received by the Secretary as the return of such person.
>
> **b) Execution of return by Secretary.--**
>
> **(1) Authority of Secretary to execute return.**--If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed

found that the "two-year provision still has a role to play if the hanging paragraph's plain meaning controls." *Id.*

In the dissent, Judge Thompson found several flaws in the majority's logic. *Id.* at 12 (Thompson, J., dissenting). First, as late-filed returns will still be accepted by the Commonwealth under Massachusetts law and incur only a small penalty which can be waived, the dissent did not understand how the court could "conclude that a late-filed return never satisfies the requirements of Massachusetts tax law if the Commonwealth not only accepts the return, but is even willing to waive the already relatively conservative penalty for filing it late." *Id.* at 13. Additionally, the dissent found that majority's reading rendered § 523(a)(1)(B)(ii) superfluous. *Id.* The dissent found the outcome under the majority's reasoning absurd:

> the scofflaw who sits on his hands at tax time, doesn't bother to file a return, and then, after getting caught cooperates with the authorities and lets the government file the substitute return for him, would be the only late filer who would be allowed to discharge his tax debt. The person who files his return one day late—which the state then accepts—would not be permitted to discharge, regardless of the reason for tardiness.

Id. at 15. Rather, the dissent interpreted subsection (ii) and its two year provision as creating a specific exception that deals with late filers. *Id.* at 13.

B. Fifth and Tenth Circuits

The Court of Appeals for the Fifth Circuit and the Court of Appeals for the Tenth Circuit have also adopted the strict interpretation. In *McCoy*, the Fifth Circuit Court of Appeals determined that a debtor's failure to comply with a Mississippi law stating that returns "shall be

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> therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.
> **(2) Status of returns.**--Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.

filed on or before April 15th" meant that the returns did not satisfy applicable filing requirements under the definition in the hanging paragraph. 666 F. 3d at 932.

In that case, the debtor filed a post-discharge adversary proceeding against the Mississippi State Tax Commission seeking a declaration that her pre-petition state income tax debts were discharged. *Id.* at 925. The Mississippi tax code provides that "if the return is filed on the basis of a calendar year, it shall be filed on or before April 15th of each year." *Id.* at 928 (quoting Miss. Code. Ann. § 27–7–41). Taking the plain meaning approach, as the debtor submitted her tax filings after April 15th, the court found that the filings did not satisfy applicable nonbankruptcy law and were not "returns" for the purposes of § 523(a). *Id.*

Addressing the exemption for returns prepared under § 6020 of the Internal Revenue Code, the court reasoned that:

> [the] second sentence in § 523(a)(*) carves out a narrow exception to the definition of "return" for § 6020(a) returns, while explaining that § 6020(b) returns, in contrast, do not qualify as returns for discharge purposes. Such a reading conforms with the plain language of the text and leaves no portion of § 523(a)(*) superfluous.

Id. at 931.

Similarly, the Court of Appeals for the Tenth Circuit found that returns filed late under the Internal Revenue Code are not returns within the meaning of the hanging paragraph. 774 F. 3d at 1321. In *Mallo*, the debtors filed their Form 1040s after the tax had been assessed by the Internal Revenue Service. *Id.* at 1316.

As discussed in *Mallo*, the Internal Revenue Code states that "returns made on the basis of the calendar year shall be filed on or before the 15th day of April following the close of the calendar year . . . ." 26 U.S.C. § 6072(a). The court found that the phrase "shall be filed on or before" was a "classic example of something that must be done with respect to filing a tax return and, therefore, is an 'applicable filing requirement.'" 774 F. 3d at 1321. As such, the court held

that "because applicable filing requirements include filing deadlines, § 523(a)(*) plainly excludes late-filed Form 1040s from the definition of a return." *Id.*

C. Circuits that Reject the Strict Interpretation

The Eleventh Circuit Court of Appeals and the Bankruptcy Appellate Panel for the Ninth Circuit have rejected the strict approach and continue to use versions of the *Beard* Test to determine what constitutes a "return."[8] In *Martin*, chapter 7 debtors brought an adversary proceeding against the Internal Revenue Service seeking a determination that their federal tax debts relating to late-filed tax returns were dischargeable. 542 B.R. 479, 481–82.

In rejecting a strict interpretation, the Bankruptcy Appellate Panel for the Ninth Circuit found "no convincing or persuasive indication that BAPCPA or the hanging paragraph abrogated" the version of the *Beard* test articulated in *In re Hatton (Hatton II)*, 220 F.3d 1057, 1058 (9th Cir. 2000). 542 B.R. at 490 (The *Hatton II* "version of the Beard test provides: '(1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law.'").

The Bankruptcy Appellate Panel for the Ninth Circuit found that that the literal construction would render § 523(a)(1)(B)(ii) "all but meaningless—reducing the potential application of that provision to a minuscule scope." *Id.* at 480. The court took further issue with the literal construction:

> under the literal construction of the hanging paragraph, a debtor taxpayer who is one month or one day or even one hour late in filing his or her return will have his associated tax debt excepted from discharge, whereas a debtor taxpayer who never bothers to file his or her own return can discharge his or

[8] The Bankruptcy Court for the District of New Jersey has also rejected the strict interpretation. *In re Maitland*, 531 B.R. 516 (Bk. D.N.J. 2015). The court found that a late-filed tax return can meet the definition of return under § 523(a)(*). *Id.* at 520. The court reasoned that a strict reading would render the other parts of § 523 superfluous, in particular the two year provision. *Id.*

> her associated tax debt if the IRS fortuitously prepares a return on that person's behalf.

Id. at 487. Rather than adopt the strict interpretation, the Bankruptcy Appellate Panel for the Ninth Circuit concluded that for the purposes of determining the dischargeability of federal income tax debt, the "return" definition in the hanging paragraph "effectively codified the *Beard* test, except that Congress in the second sentence carved out some specific rules for tax returns prepared by taxing authorities." *Id.* at 489–90.

In *Justice*, the Court of Appeals for the Eleventh Circuit declined to adopt the strict interpretation's "one-day-late rule." 2016 WL 1237766, at *3 ("We can assume *arguendo*, although we expressly do not decide, that that one-day-late rule is incorrect"). Rather than establishing a strict rule, the Court of Appeals for the Eleventh Circuit found that the *Beard* test is incorporated into "applicable nonbankruptcy law." *Id.* In particular, the fourth prong—that there must be an honest and reasonable attempt to satisfy the requirements of the tax law—is relevant where the filing is delinquent. *Id.* at *4–5. In applying the *Beard* test, the court nevertheless found that the debtors' late-filed Form 1040s did not qualify as tax returns, and as such, the tax debts were not dischargeable. *Id.* at *6.

III. Practical Implications

For debtors in the First, Fifth and Tenth Circuits, the rule is clear—tax debt associated with late-filed returns is excepted from discharge (unless the return was prepared pursuant to 6020(a) of the Internal Revenue Code, or similar state or local law). Even though the Internal Revenue Service generally takes the position that a late-filed return does not bar discharge of the underlying debt, most taxing authorities will view the debt as non-dischargeable in those jurisdictions, which places significant leverage in the hands of the taxing authorities when

attempting to deal with tax debt. It is of critical importance that counsel knows what returns have been filed and when.

In re Brian S. FAHEY, Debtor

Brian S. Fahey, Appellant,

v.

Massachusetts Department of Revenue, Appellee.

In re Timothy P. Perkins, Debtor

Timothy P. Perkins, Appellant,

v.

Massachusetts Department of Revenue, Appellee.

In re Anthony M. Gonzalez, Debtor

Anthony M. Gonzalez, Appellee,

v.

Massachusetts Department of Revenue, Appellant.

In re: John T. Brown, Debtor

John T. Brown, Appellee,

v.

Massachusetts Department of Revenue, Appellant.

Nos. 14–1328, 14–1350, 14–9002, 14–9003.

United States Court of Appeals, First Circuit.

Feb. 18, 2015.

Background: State taxing authority brought adversary proceedings to except tax debts from discharge in debtors' separate Chapter 7 cases, as tax debts for which returns "w[ere] not filed or given." Taxing authority moved for summary judgment. The United States Bankruptcy Court for the District of Massachusetts, Melvin S. Hoffman, J., 489 B.R. 1, denied taxing authority's motion and subsequently entered judgment in favor of debtor, and taxing authority appealed. The United States Bankruptcy Appellate Panel for the First Circuit, Cabán, J., 506 B.R. 317, affirmed, and appeal was taken. In separate proceeding, the United States District Court for the District of Massachusetts, 2014 WL 1815393, affirmed a similar decision by its Bankruptcy Court, Melvin S. Hoffman, J., 489 B.R. 1, and taxing authority appealed. Finally, in two other Chapter 7 cases, debtors commenced adversary proceedings seeking determinations that their income liabilities to Massachusetts Department of Revenue were subject to discharge. The Bankruptcy Court in first case entered judgment in debtor's favor, and the Department appealed. The Bankruptcy Court in second case entered judgment in the Department's favor, and debtor appealed. Consolidating appeals, the United States District Court for the District of Massachusetts, Young, J., 507 B.R. 45, affirmed in part and reversed in part. Appeal was taken.

Holding: Consolidating appeals, The Court of Appeals, Kayatta, Circuit Judge, held that late-filed tax returns are, by definition, ones that fail to satisfy requirements of applicable nonbankruptcy law, and which do not qualify as "returns," for dischargeability purposes.

Affirmed in part and reversed in part.

Thompson, Circuit Judge, dissented and filed opinion.

1. Bankruptcy ⚿3782

On bankruptcy appeal that turned entirely on proper interpretation of provision of the Bankruptcy Code, the Court of Appeals' review was plenary.

2. Bankruptcy ⚿3343.5

Phrase "applicable filing requirements," as used in definitional provision recently added as "hanging paragraph" to nondischargeability provision, pursuant to which a tax "return" is specified to be a

document "that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)," was broad enough to include filing deadlines imposed by such applicable nonbankruptcy law; accordingly, late-filed tax returns are, by definition, ones that fail to satisfy requirements of applicable nonbankruptcy law, and which do not qualify as "returns," for purposes of deciding whether tax debt should be excepted from discharge as one for which a required return was not "filed or given." 11 U.S.C.A. § 523(a)(1)(B)(ii).

See publication Words and Phrases for other judicial constructions and definitions.

3. Statutes ⇨1092

When language of statute is plain, it must be interpreted in accordance with the usual and natural meaning of its words.

Celine E. Jackson, Counsel to the Commissioner, Massachusetts Department of Revenue, with whom Jeffrey S. Ogilvie, Counsel to the Commissioner, Amy A. Pittner, Commissioner, Massachusetts Department of Revenue, Martha A. Coakley, Massachusetts Attorney General, Daniel J. Hammond, Assistant Attorney General, Kevin W. Brown, Special Assistant Attorney General, were on brief, for Massachusetts Department of Revenue.

Andrew L. Barrett for appellant Brian S. Fahey.

Carl D. Aframe, with whom Aframe & Barnhill, PA, was on brief, for appellant Timothy P. Perkins.

Marques C. Lipton, with whom Law Office of Nicholas F. Ortiz, P.C., was on brief, for appellees Anthony M. Gonzalez and John T. Brown.

Tara Twomey, National Consumer Bankruptcy Rights Center, Joanne Mulder Nagjee, Joel Peter–Fransen, Shane Mulrooney, and Kirkland & Ellis LLP, on brief for National Association of Consumer Bankruptcy Attorneys, amicus curiae in support of appellants Brian S. Fahey and Timothy P. Perkins.

Before TORRUELLA, THOMPSON, and KAYATTA, Circuit Judges.

KAYATTA, Circuit Judge.

The four bankruptcy appeals before us pose a single question of statutory interpretation: whether a Massachusetts state income tax return filed after the date by which Massachusetts requires such returns to be filed constitutes a "return" under 11 U.S.C. § 523(a) such that unpaid taxes due under the return can be discharged in bankruptcy. For the reasons set forth below, we conclude that it does not.

I. Background

The facts in each of the four cases now on appeal are undisputed. John Brown, Brian Fahey, Anthony Gonzalez, and Timothy Perkins (the "debtors") all failed to timely file their Massachusetts income tax returns for multiple years in a row. This failure would not be a problem for them in these bankruptcy proceedings, but for the fact that they also failed to pay (either timely or otherwise) their taxes to the Massachusetts Department of Revenue. Eventually, each debtor filed his late tax returns, but still failed to pay all taxes, interest, and penalties that were due. More than two years later, they filed for Chapter 7 bankruptcy. The debtors seek a ruling that their obligation to pay the taxes they failed to pay is dischargeable.[1]

1. Although the debtors did not each make identical arguments in their briefs or at oral

The Department argues for the opposite result; it contends unpaid taxes for which no return was timely filed by the Commonwealth's statutory deadline fit within an exception to discharge under 11 U.S.C. § 523(a)(1)(B)(i).

The procedural postures of these four cases are described in detail in the Bankruptcy Appellate Panel ("BAP") and district court opinions that gave rise to these appeals. *Perkins v. Mass. Dep't of Revenue,* 507 B.R. 45, 46–47 (D.Mass.2014); *In re Gonzalez,* 506 B.R. 317, 318–23 (B.A.P. 1st Cir.2014); *In re Brown,* B.A.P. No. MW 13–027, 2014 WL 1815393, at *1–5 (B.A.P. 1st Cir. Apr. 3, 2014). In brief, the bankruptcy courts below split three to one in favor of the debtors, the BAP sided with the debtors in the two cases appealed to the BAP, and the district court granted summary judgment to the Department in the two cases appealed to the district court.

II. Discussion

A. Standard of Review

[1] Since no material facts are disputed and the issue before us turns entirely upon an interpretation of law, our review is plenary. *Pasquina v. Cunningham (In re Cunningham),* 513 F.3d 318, 323 (1st Cir.2008); *Brandt v. Repco Printers & Lithographics, Inc. (In re Healthco Int'l, Inc.),* 132 F.3d 104, 107 (1st Cir.1997).

B. Legal Background

Section 727 of the Bankruptcy Code instructs the court to grant a debtor a discharge from his debts in a Chapter 7 bankruptcy proceeding. *See* 11 U.S.C. § 727. This rule is subject to several exceptions. In particular, 11 U.S.C. § 523(a)(1) controls whether unpaid taxes are dischargeable in bankruptcy. It provides, in relevant part:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
>
> (1) for a tax or a customs duty—
>
> . . .
>
> (B) with respect to which a return, or equivalent report or notice, if required—
>
> (i) was not filed or given; or
>
> (ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition[.]

11 U.S.C. § 523(a)(1)(B)(i)-(ii). In other words, a tax is not dischargeable if the debtor failed to file a return, or if—perhaps anticipating bankruptcy—he filed the return late and within two years of his bankruptcy petition.

Looking solely at the foregoing language, and using a common notion of what a "return" is, one could easily conclude that any return filed after the due date but more than two years before a bankruptcy filing would place the tax due under that return outside the section 523(a)(1) exception, and thus within the broad category of dischargeable debts. Prior to 2005, courts nevertheless attempted to fashion a definition of "return" that prevented debtors from relying on "bad faith" returns, or returns filed only after the taxing authority actually issued an assessment for taxes due in the absence of a tax return. *See generally Moroney v. United States (In re Moroney),* 352 F.3d 902, 905–06 (4th Cir. 2003) (providing examples of courts that determined late tax returns "filed after an involuntary assessment do not serve the

argument, we attribute their contentions to "the debtors" collectively.

purposes of the tax system, and thus rarely, if ever, qualify as honest and reasonable attempts to comply with the tax laws").

In 2005, Congress decided to define "return" on its own when it passed the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), making numerous revisions to section 523. Pub.L. No. 109–8, 119 Stat. 23 (2005). Among the BAPCPA's changes was the insertion of a "hanging paragraph," denoted as section 523(a)(*), at the end of section 523(a). It provides:

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

11 U.S.C. § 523(a)(*).[2]

So the question now presented is a question of statutory interpretation: Is a Massachusetts tax return filed after the due date for such returns a "return" as defined in section 523(a)(*) so that the tax due under that return remains dischargeable? [3]

C. Analysis

[2] Read together, the hanging paragraph's definitional language and the "applicable" Massachusetts law control our decision. Under the hanging paragraph, for a document, whatever it may be called, to be a "return," it must "satisf[y] the requirements of applicable nonbankruptcy law (including applicable filing requirements)." So the question is whether timely filing is a "filing requirement" under Massachusetts law. The answer is plainly yes.

[3] As the Massachusetts Supreme Judicial Court has held for state tax law purposes, "[t]he general rule of construction is that where the language of the statute is plain, it must be interpreted in accordance with the usual and natural meaning of the words." *Comm'r of Revenue v. AMIWoodbroke, Inc.*, 418 Mass. 92, 634 N.E.2d 114, 115 (1994) (citing *O'Sullivan v. Sec'y of Human Servs.*, 402 Mass. 190, 521 N.E.2d 997, 1000 (1988)). Mass. Gen. Laws ch. 62C, § 6(c) ("section 6(c)") states that "[e]xcept as otherwise provided, [income tax returns] shall be made on or before the fifteenth day of the fourth month following the close of each taxable year." None of the exceptions that "otherwise provide[ ]" are applicable here.[4] This

2. Section 6020(a) returns are allowed only at the I.R.S.'s request and require the taxpayer's cooperation, while returns filed under section 6020(b) do not involve assistance by the taxpayer and may involve willful fraud. *Compare* 26 U.S.C. § 6020(a) *with* 26 U.S.C. § 6020(b).

3. At oral argument, the attorney for Gonzalez and Brown raised the point that even if a late filed return is not a return, it may qualify as an ''equivalent report or notice'' under section 523(a)(1)(B). Since this argument was not preserved in the record by any of the four debtors or briefed on appeal to this Court, we do not consider it here. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.1990).

4. The Department points us to two statutory provisions that give meaning to the phrase ''[e]xcept as otherwise provided.'' Mass. Gen. Laws ch. 30, § 24 (as amended 2013) authorizes acts that must be performed on a Saturday, Sunday, or legal holiday to be performed on the next business day. And Mass. Gen. Laws ch. 62C, § 19 (as amended 1985) allows the tax commissioner to ''grant a reasonable extension of time for filing any return, provid-

command that returns "shall" be made by the due date certainly seems like a "filing requirement." *See Black's Law Dictionary* (10th ed.2014) (defining "shall" as "a duty; more broadly, is required to[;] the mandatory sense that drafters typically intend and that courts typically uphold"). And another section of the Massachusetts tax code makes plain that it is so viewed. *See* Mass. Gen. Laws 62C, § 32(a) ("section 32(a)") ("Taxes shall be due and payable at the time when the tax return is required to be filed."). Accordingly, under this straightforward reading of Massachusetts law, a return filed after the due date is a return not filed as required, i.e., a return that does not satisfy "applicable filing requirements."

The two other circuits to have decided this issue, albeit construing other jurisdictions' "applicable" filing deadlines, reached the same conclusion. The Tenth Circuit recently found returns filed late under the Internal Revenue Code ("I.R.C.") not to be returns within the meaning of the hanging paragraph. *Mallo v. Internal Revenue Service (In re Mallo),* 774 F.3d 1313, 1321 (10th Cir.2014) (explaining, in reference to the I.R.C.'s deadline for income tax returns, that "the phrase 'shall be filed on or before' a particular date is a classic example of something that must be done with respect to filing a tax return and therefore, is an 'applicable filing requirement' "). Similarly, the Fifth Circuit determined that a debtor's failure to comply with a Mississippi law stating that returns "shall be filed on or before April 15th" meant that the returns did not satisfy applicable filing requirements under the hanging paragraph's definition. *McCoy v. Miss. State Tax Comm'n (In re McCoy),* 666 F.3d 924, 928, 932 (5th Cir.2012). And at least one other circuit court judge, in dictum, predicted such a result. *In re Payne,* 431 F.3d 1055, 1060 (7th Cir.2005) (Easterbrook, J., dissenting) ("After the 2005 legislation, an untimely return can not lead to a discharge—recall that the new language refers to 'applicable nonbankruptcy law (including applicable filing requirements).' ").

The debtors nevertheless argue that the hanging paragraph's language is not quite so clear as to dictate our holding. Perhaps the term "applicable filing requirement" may acquire vagueness at the outer boundaries of its possible application. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 31–32 (2012) (explaining that vagueness is present when a phrase's "unquestionable meaning has uncertain application to various factual situations"). For example, is an instruction on an official form that the filer not staple the return together, or staple the check to the return, an "applicable filing requirement"? However one might answer that question, we do not see how there is any room for reasonable argument that, as a matter of plain language, a Massachusetts law setting the date when a tax return "is required to be filed" is somehow not a "filing requirement."

In nevertheless describing the statute as materially ambiguous and our reading of it contrived, the dissent relies on the premise that when a statute states that the universe of X "includes" Y, one normally presumes that Y is merely an example of what is in X, and that X includes more than Y. Op. at 14. The dissent errs, though, in claiming that our interpretation fails to satisfy this premise. The dissent makes this error by presuming that the universe defined by the statute is "late-filed returns

ed that the taxpayer . . . files a tentative return . . . and pays therewith the amount of tax reasonably estimated to be due." The debtors do not argue that these provisions, or any other law or regulation, "otherwise provided" a due date for their filings.

that count as returns," Op. at 14, and that section 6020(a) returns (and "similar" state or local law returns) are therefore simply examples of a wider array of permitted late filed returns. The statute neither says nor implies any such thing. Rather, the statute provides that a "return" includes a "return prepared pursuant to section 6020(a) . . . or similar State or local law." So one presumes only that a "return" includes more than these few types of returns. And it plainly does: it includes all sorts of returns (such as Form 1040s) that satisfy their respectively applicable filing requirements.

Similarly, the dissent errs in claiming that our reading of the statute "means that conversely, a section 6020(b) return would be the *only* type of return that is *not* a return." Op. at 14. This is plainly not so—any type of return not filed in accord with applicable filing requirements is not a "return" under our reading of the statute. The returns at issue in this case are a notable demonstration that section 6020(b) returns are not the only ones that are not returns under the statute.

Widening the scope slightly, debtors point to the language of section 523(a)(1)(B)(ii) ("the two-year provision"), which clearly implies that there can be a "return" that is filed within two years "after the date on which such return . . . was last due." [5] So the hanging paragraph cannot be read as entirely excluding the possibility that a late return can also be a "return." Grasping onto this point, the debtors contend (and the BAP agreed) that our interpretation would "vitiat[e] in its entirety" the two-year provision, rendering it "superfluous." *See TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (citation and internal quotation marks omitted)); *Nat'l Org. for Marriage v. McKee,* 649 F.3d 34, 66 (1st Cir.2011) (quoting *TRW Inc.* for the same proposition).

The defect in this argument is that the hanging paragraph itself carves out an exception from its general rule, deeming one type of late return to be a return. It specifies that "a return prepared pursuant to section 6020(a) . . . or similar State or local law" qualifies as a "return," while those prepared pursuant to section 6020(b) do not. 11 U.S.C. § 523(a)(*). Section 6020(a) and (b) can both be invoked when a taxpayer "fails to make" a proper return, including situations where the taxpayer is late in filing a return to the I.R.S. *See McCoy,* 666 F.3d at 928–29. Therefore, a late tax return, if prepared in compliance with section 6020(a) and filed within two years of the bankruptcy petition, is still a return (and the tax due thus dischargeable), notwithstanding its failure to meet the otherwise "applicable filing requirement" of a mandatory deadline. While section 6020(a) may only apply in a small minority of cases, the fact that a late filed section 6020(a) return can still qualify as a "return" for section 523(a) purposes means that the two-year provision still has a role to play if the hanging paragraph's plain meaning controls.

The I.R.S.'s Chief Counsel has referred to the number of section 6020(a) returns as "minute" and in 2010 took the position that the safe harbor created by it was "illusory" because taxpayers have no right to de-

5. The purpose of the two-year provision is apparently to prevent debtors from utilizing bankruptcy filings as a way of avoiding their overdue tax obligations. *In re Payne,* 431 F.3d at 1059.

mand a return under the provision. I.R.S. Chief Couns. Notice CC–2010–016 at 2–3 (Sept. 2, 2010). We accept the claim that such returns are rare, and are allowed only at the I.R.S.'s behest. It hardly follows, though, that the safe harbor expressly created for such returns is illusory. In fact, this "narrow safe harbor," hypothetically described by the district court below in the Perkins case, was utilized by a debtor in a recent bankruptcy case where the bankruptcy court was bound by the reading of section 523(a)(*) that the Department urges here. *See In re Kemendo,* 516 B.R. 434, 438 (Bankr.S.D.Tex.2014). In that case, the I.R.S. had prepared a tax return with information provided by the taxpayer, in accordance with section 6020(a). *Id.* at 438. More than two years later, the taxpayer filed for bankruptcy. *Id.* at 438–39. The bankruptcy court found that the taxpayer's delinquent tax debt had been properly discharged. *Id.* In short, reading the hanging paragraph as generally excluding returns filed after the date when applicable law requires them to be filed does not conflict with the implication of section 523(a)(1)(B)(ii) that there can be a late return, either notionally or in practice.

The dissent takes a different tack, deeming it "absurd" to think that Congress would allow a discharge of taxes due under a section 6020(a) return prepared years after the due date, but not under a Massachusetts return that is one day late. We see no absurdity. Section 6020(a) is a tool for the I.R.S., invoked solely at its discretion, when it decides obtaining help from the late filing taxpayer is to the I.R.S.'s advantage. That Congress left the I.R.S. a carrot to offer a taxpayer in such infrequent cases does not mean that it was absurd for Congress not to extend this carrot categorically to large numbers of other late filers.

But, say the debtors, our reading of the hanging paragraph still renders unnecessary its last clause, stating that the term "return" does not include "a return made pursuant to [section 6020(b)] or a similar State or local law." The debtors are correct on this point. Nevertheless, we do not see this as the type of redundancy that invokes any effective application of the doctrine that we try to read statutes so that no section is superfluous. Here, in context, it simply appears that in creating an exception for section 6020(a), the drafters made clear (desiring a belt and suspenders) that they were not including its companion section 6020(b).[6] Whatever one thinks of this redundancy, it offers too little to parry the force of the observation that a requirement to file on time is a filing requirement. *See In re McCoy,* 666 F.3d at 931.

Moreover, were we to adopt the debtors' position that a law requiring compliance with a filing deadline is not a filing requirement, we would be left without any textual basis for distinguishing those filing requirements that count from those that do not. Instead—and debtors and the dissent are frank about this—we would be back to tinkering with subjective and conflicting judge—made rules. In that respect, we would render the principal thrust of the hanging paragraph to be largely of no effect. Of course, the debtors say that this is what Congress wanted, simply seeking to "confirm" pre-existing case law. But, as we discuss in greater detail later in this opinion, there was no such uniform rule in the case law to which the language in the hanging paragraph could be read as

6. The distinction makes sense when we consider the basic difference between sections 6020(a) and (b) because the latter is prepared without the taxpayer's assistance and sometimes as a result of the taxpayer's willful fraud.

referring. *Cf. In re Mallo,* 774 F.3d at 1325 ("If Congress intended to define a return through application of the *Beard* test or some other substantial compliance doctrine, rather than by a taxpayer's compliance with the applicable filing requirements contained in the Tax Code, Congress [would not have added] the phrase 'including applicable filing requirements.' ").

The debtors also seek support in the Massachusetts laws and regulations bearing on the meaning of "return." They point out that in Massachusetts, a preassessment delinquent return is treated the same as any other return.[7] This is not exactly so, however, as Massachusetts imposes a penalty on any taxpayer who does not file his return by the date required. *See* Mass. Gen. Laws ch. 62C, § 33 ("Late returns; penalty; abatement").[8]

Relatedly, the debtors contend that the Commonwealth's own definition of "return" lacks a timeliness element. This, too, is not exactly so. The Massachusetts Code of Regulations defines a return as "a taxpayer's signed declaration of the tax due, if any, properly completed by the taxpayer or the taxpayer's representative on a form prescribed by the Commissioner and *duly* filed with the Commissioner." 830 C.M.R. 62C.26.1(2) (emphasis supplied). Webster's Third New International Dictionary gives as its first definition "in a due manner, time, or degree." *Webster's Third New International Dictionary* 700 (3d ed.2002). Courts consistently include a timeliness element when interpreting "duly" in other contexts. *See, e.g., McAdams v. United States,* No. 07164T, 2008 WL 654271, at *3 (Fed.Cl. Feb. 1, 2008) (in order for a claim to be duly filed under 26 U.S.C. § 7422, it must comply with the statutorily prescribed timeliness requirement in 26 U.S.C. § 6511(a)); *O'Connell v. United States,* No. 02–10399–RBC, 2004 WL 1006485, at *3 (D.Mass. Mar. 22, 2004) (same); *Mobil Corp. v. United States,* 52 Fed.Cl. 327, 331, 337 (Fed.Cl.2002) (I.R.C. regulation prohibiting suit to recover wrongfully assessed taxes "until a claim for refund ... has been duly filed" includes timeliness requirement). In sum, the debtors' invocation of Massachusetts laws and regulations does not change the result.[9]

Sensibly anticipating weak support in the statutory and regulatory language, the debtors rely with much emphasis on three other rules of statutory construction.

First, they (and the amicus curiae) implore us to find instructive the notion that exceptions to discharge should be narrowly construed in the debtor's favor, *Gleason v. Thaw,* 236 U.S. 558, 562, 35 S.Ct. 287, 59 L.Ed. 717 (1915); *Rutanen v. Baylis (In re Baylis),* 313 F.3d 9, 17 (1st Cir.2002), and that the Bankruptcy Code should be read in light of its purpose to provide a fresh start to the "honest but unfortunate debtor." *Local Loan Co. v. Hunt,* 292 U.S. 234, 244, 54 S.Ct. 695, 78 L.Ed. 1230 (1934) ("One of the primary purposes of the Bankruptcy Act is to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfor-

7. The Department did not issue assessments against any of the debtors.

8. Nor need we address in this case whether a return is required to be filed by the due date if Massachusetts should deem the failure to be excused, and thus of no effect under Mass. Gen. Laws ch. 62C, § 33(f) (waiving any penalty on a showing of good cause).

9. We express no opinion on whether other jurisdictions' laws and regulations bearing on a tax return's timeliness qualify as ''applicable filing requirements'' under section 523(a)(*).

tunes." (internal quotation marks omitted)).

Second, the debtors attempt to frame our interpretation—particularly with respect to the limitations it imposes on the two-year provision's applicability—as representing a significant change to the pre–2005 Bankruptcy Code. The debtors and the bankruptcy court below for the Brown and Gonzalez cases quote the Supreme Court in urging us to be "reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." *Dewsnup v. Timm*, 502 U.S. 410, 419, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992).

Third, the debtors and amicus curiae call the result we reach here—that all late filed returns in Massachusetts are not subject to discharge in bankruptcy—"unfathomable" and its consequences "draconian" and "absurd."

Our response to the debtors' reliance on these rules of statutory construction is fourfold.

First, and most importantly, where the question is whether a Massachusetts law setting a date by which a tax return "is required to be filed" is a "filing requirement" under Massachusetts law, we find little need—or justification—for turning to secondary principles of statutory construction. *Cf. United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) ("The language before us expresses Congress' intent ... with sufficient precision so that reference to legislative history and to pre-Code practice is hardly necessary.").

Second, while the result we reach may be unfavorable towards delinquent taxpayers who are also bankrupt, there is hardly anything "unfathomable," "draconian," or "absurd" in the notion that Congress might disfavor debtors who both fail to pay their taxes and also fail to timely file the returns that would alert the taxing authority to the failure to pay. *Cf. id.* at 242, 109 S.Ct. 1026 ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.' " (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982))).

Third, application of secondary principles of statutory construction hardly cuts just one way, or as forcefully as the debtors claim. We note in particular that the hanging paragraph, adding to the statute the key language at issue, was part of an enactment whose motivating factors were: the "recent escalation of consumer bankruptcy filings"; the "significant losses asserted to be associated with bankruptcy filings"; to close the loopholes that "allow and—sometimes—even encourage opportunistic personal filings and abuse"; and "the fact that some bankruptcy debtors are able to repay a significant portion of their debts." H. Comm. on the Judiciary, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, H.R.Rep. No. 109–31(I), at 3–5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 90–92.[10] None of these enumerated purposes align with the debtors' fall-back stance of helping the "honest but unfortunate debtor" achieve a

10. There were no published committee reports explaining the hanging paragraph's purpose, and it remains true that even when a statute effectuates a change to prior law, "where the language is unambiguous, silence in the legislative history cannot be controlling." *Dewsnup*, 502 U.S. at 419–20, 112 S.Ct. 773.

"fresh start." [11] And as the Supreme Court has already stated, "[t]he statutory provisions regarding nondischargeability reflect a congressional decision to exclude from the general policy of discharge certain categories of debts—such as ... taxes[.] Congress evidently concluded that the creditors' interest in recovering full payment of debts ... outweighed the debtors' interest in a complete fresh start." *Grogan v. Garner*, 498 U.S. 279, 287, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

Finally, we acknowledge that straightforward application of Congress's language changes presumed practice in some bankruptcy courts (including those that ruled for three of the debtors below). That being said, the judge-made law surrounding the meaning of a "return" in section 523(a) was far from settled. Prior to the BAPCPA, and in the absence of any limiting definition of the term "return," courts used a four-part test first articulated by the United States Tax Court in *Beard v. Comm'r*, 82 T.C. 766, 777–78 (1984), *aff'd*, 793 F.2d 139 (6th Cir.1986), in order to determine whether a document purporting to be a return was a return for purposes of section 523(a). Courts considered a return's timeliness under the *Beard* test's fourth prong: whether the submitted document "represent[ed] an honest and reasonable *attempt* to satisfy the requirements of tax law." *United States v. Hindenlang (In re Hindenlang)*, 164 F.3d 1029, 1033–34 (6th Cir.1999) (emphasis supplied); *see also Colsen v. United States (In re Colsen)*, 446 F.3d 836, 839 (8th Cir.2006); *In re Payne*, 431 F.3d at 1057; *In re Moroney*, 352 F.3d at 905; *United States v. Hatton (In re Hatton)*, 220 F.3d 1057, 1060–61 (9th Cir.2000). These cases dealt only with federal tax returns, and even within that limited context, failed to reach a consensus on the issue. The Fourth, Sixth, Seventh, and Ninth Circuits all determined that debtors who submitted their tax returns late for multiple consecutive years and then filed for bankruptcy had not satisfied the test's fourth prong, but the bases for that conclusion varied. *See In re Payne*, 431 F.3d at 1057–59 (expressing concern that a chronically delinquent taxpayer was making belated filings to "set the stage" for a discharge in bankruptcy); *In re Moroney*, 352 F.3d at 905–06 (same); *In re Hatton*, 220 F.3d at 1061 (debtor "made every attempt to avoid paying his taxes until the IRS left him with no other choice"); *In re Hindenlang*, 164 F.3d at 1034 (post-assessment returns lack utility for the I.R.S.). *But see In re Colsen*, 446 F.3d at 839–41 (document's contents, not timeliness, determined what constitutes a "return" for discharge purposes).

Against this background, it is more plausible that Congress intended to settle the dispute over late filed tax returns against the debtor (who both fails to pay taxes and fails to file a return as required by law) than it is that Congress sought to preserve some version of the unsettled four-pronged *Beard* test by using language that has no reference to that case law and that certainly suggests no four-pronged definition. Particularly noteworthy is the fact that Congress's chosen test called for satisfying the filing requirements of applicable law, not merely making an "honest attempt" to do so.[12]

11. The debtor unfriendly thrust of the BAPCPA was also manifest in its rewriting of section 523(a)(1)(B) to make it applicable "not only to the failure to file a required return, but also to the failure to file or give an 'equivalent' required 'report or notice' " corresponding to the debt. *See Maryland v. Ciotti (In re Ciotti)*, 638 F.3d 276, 279–80 (4th Cir. 2011).

12. This is not to reject the possibility that pre-amendment case law, such as *Beard*, might

III. Conclusion

For the foregoing reasons, we *affirm* the district court's judgment in favor of the Department in the cases of Fahey and Perkins, and we *reverse* the BAP's grant of judgment for Brown and Gonzalez. Summary judgment shall be entered in favor of the Department for the tax years at issue because the debtors' tax liabilities were not discharged in bankruptcy as a matter of law.

So ordered.

THOMPSON, Circuit Judge, dissenting.

Our nation's bankruptcy system was built on the principle that sometimes, honest people fall on hard times. While the bankruptcy code has naturally gone through revisions and updates since its inception, that foundational philosophy has always laid at its root.

In my view, the majority is unfairly dismissive of the debtors' logical interpretation of the statutory provisions at issue. It simultaneously takes too academic and literal of an approach to its reading of one of the code's definitional provisions, leading to a result that defies common sense, while also conveniently ignoring the plain meaning of other words in the very same paragraph, in order to reach a certain outcome. It ignores the mandates of statutory construction we are obligated to follow, years of lines of caselaw upon which debtors had been relying, and the clearly stated policy reasons for Congress's imposing these statutory provisions in the first place.

Needless to say, I dissent.

remain viable in deciding whether a document not purporting to be a return is an "equivalent report or notice" under section 523(a)(1)(B). *See In re Ciotti,* 638 F.3d at 280–81.

The Canons of Construction

In our de novo review, the rules we follow to interpret a statute—including bankruptcy statutes—are well established. First, we "look [ ] to the specific language at issue." *In re Rudler,* 576 F.3d 37, 44 (1st Cir.2009). "If the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." *Id.* at 44–45 (citations and quotations omitted). In so doing, however, we only apply plain meaning if the statutory language is not ambiguous and would not "lead to absurd results." *Id.* (citations and quotations omitted). Thus, in this case we must initially decide whether we can enforce 11 U.S.C. § 523(a)(1)(B)(ii) [13]—the specific statutory provision at issue —"according to its terms," based on an assessment that the "disposition required by the text is not absurd," *id.* at 44 (citations and quotations omitted), and that the statute cannot be "read in more than one way," *In re Thinking Machines Corp.,* 67 F.3d 1021, 1025 (1st Cir.1995) (quoting *United States v. Gibbens,* 25 F.3d 28, 34 (1st Cir.1994)) ("A statute is ambiguous if it can be read in more than one way.").

The majority concludes that the hanging paragraph, which Congress added to the bankruptcy statute in order to define what a "tax return" is for purposes of Subsection (ii),[14] unambiguously dictates that "a return filed after the due date is a return not filed as required," and thus, that debtors who file their Massachusetts taxes late can *never* benefit from Subsection (ii). As I will explain, I disagree that the hanging paragraph—when read in concert with

13. From now on, I'll refer to 11 U.S.C. § 523(a)(1)(B)(ii) as "Subsection (ii)."

14. The hanging paragraph's definition of "return" applies to the entire 11 U.S.C. § 523(a). *See* 11 U.S.C. § 523(a)(*).

Subsection (ii)—unequivocally demands that conclusion. To the contrary, the majority's interpretation of the hanging paragraph leads to an absurd result that cannot be reconciled simply with a strictly literal reading of the statute.

Plain Meaning

The statute at issue provides that a debtor may not discharge a tax debt if "a return . . . if required—(i) was not filed or given; or (ii) was filed or given after the date on which such return . . . was last due, under applicable law or under any extension, and after two years before the date of the filing of the [bankruptcy] petition[.]" [15] 11 U.S.C. § 523(a)(1)(B)(i)-(ii).

In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act, making numerous and significant changes to the bankruptcy code. As part of those 2005 amendments, Congress added the "hanging paragraph" to the end of 11 U.S.C. § 523(a), clarifying that for purposes of that subsection, a " 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)." Significant to this appeal, Congress did not change Subsection (ii) during the 2005 amendments.

The majority hones in on the hanging paragraph's added clarification that returns must comply with a state's "applicable filing requirements" to be dischargeable. The majority concludes that the text of the hanging paragraph unambiguously states that if a return does not comply with *all* the state law tax return filing requirements (including the filing deadline),[16] then the taxes cannot be discharged.

The majority's logic suffers from several flaws, which I address in turn.

First, it is not obvious to me that under Massachusetts tax law, filing a return late *necessarily* means that a debtor did not comply with "applicable filing requirements," such that his return would not "satisf[y] the requirements of applicable nonbankruptcy law." As the majority concedes, a tardy return will still be accepted by the state, and the debtor's tax liability will still be assessed. *See* Mass. Gen. L. c. 62C, § 26(a) ("Taxes shall be deemed to be assessed at the amount shown as the tax due upon any return filed under the provisions of this chapter and on any amendment, correction or supplement thereof, or at the amount properly due, whichever is less, and at the time when the return is filed or required to be filed, whichever occurs later."). While late-filed returns are subject to a one-percent penalty, Mass. Gen. L. c. 62C, § 33(a),[17] even the fine is waivable on a showing of good faith:

15. The majority makes much ado about the fact that the debtors in this case never paid their back taxes. It seems obvious to me that when Congress drafted the bankruptcy statute, it anticipated that someone seeking to discharge a *debt* in bankruptcy never actually paid the money. Otherwise, he wouldn't have any debt to discharge.

16. Confusingly, the majority admits that even under its interpretation of the statute, ''the term 'applicable filing requirement' may acquire vagueness at the outer boundaries of its possible application.'' As an example, the majority suggests that it is unclear whether a failure to properly staple documents, even though technically an ''applicable filing requirement,'' would render the taxes deriving therefrom non-dischargeable. The majority goes on, however, to answer its own hypothetical by later concluding that ''any type of return not filed in accord with applicable filing requirements in not a 'return' under our reading of the statute.''

17. Mass. Gen. L. c. 62C, § 33(a) provides:

> If any return is not filed with the commissioner on or before its due date or within any extension of time granted by him, there shall be added to and become a part of the

> If it is shown that any failure to file a return or to pay a tax in a timely manner is due to reasonable cause and not due to willful neglect, any penalty or addition to tax under this section may be waived by the commissioner, or if such penalty or addition to tax has been assessed, it may be abated by the commissioner, in whole or in part.

Mass. Gen. L. c. 62C, § 33(f). I do not see how we can conclude that a late-filed return never satisfies the requirements of Massachusetts tax law if the Commonwealth not only accepts the return, but is even willing to waive the already relatively conservative penalty for filing it late.

More importantly though, even if we assume, as the majority does, that timely filing is generally a necessary component of a "return" under Massachusetts tax law, we still cannot draw the majority's ultimate conclusion that late filers can never discharge their Massachusetts tax debts under 11 U.S.C. § 523(a). Subsection (ii)—which Congress chose not to alter during its 2005 amendments—continues to provide a discharge exception for people who filed their taxes late, so long as those debtors did not file within the two years just prior to filing for bankruptcy. *See In re Weinstein*, 272 F.3d 39, 43 (1st Cir. 2001) (noting that when two statutory provisions are "meant to work in concert," to discern the plain meaning of the provision at issue, we must analyze both, as one statutory provision cannot be read in isolation). As the debtors appropriately urge, there would be no point in leaving in Subsection (ii)-the specific exception that deals with late filers-if Congress meant for the hanging paragraph to penalize everyone who misses filing deadlines. As the majority concedes, we should not, when we can avoid it, construe statutes in a way that allows a "clause, sentence, or word" to be "superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001); *see also Kawaauhau v. Geiger*, 523 U.S. 57, 62, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.") (citation and quotations omitted).

So how do we reconcile this discrepancy (i.e., ambiguity) that arises within the statute? The correct answer is to assess what the legislature likely meant when it wrote the statute—a step the majority incorrectly assumes it can skip, based on its half-reading of the statutory provisions it was required to consider. *See In re Weinstein*, 272 F.3d at 44 (noting that a "conflict between two provisions of [a] statute—a conflict with which neither provision deals expressly ... provides a reason to move beyond the text and to examine a statute's legislative history and apparent purpose"). Instead of taking on its required task, the majority, in an attempt to resolve this matter solely on the plain text, glosses over the ambiguity by concluding that Subsection (ii) is not a superfluous clause because one type of person would still benefit from it—the people who filed a return pursuant to 26 U.S.C. § 6020(a) (or a comparable state or local law).[18]

> tax, as an additional tax, a penalty of one per cent of the amount required to be shown as the tax on such return for each month or fraction thereof during which such failure continues, not exceeding, in the aggregate, twenty-five per cent of said amount.

18. Section 6020(a) allows the IRS to prepare a federal return for someone who fails to do so on his own, but still consents to providing the IRS with the information it needs to prepare the return itself. It provides:

> If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to dis-

As the majority notes, the hanging paragraph provides:

> ["Return"] includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, ... but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law. 11 U.S.C. § 523(a)(*). So, the majority concludes, Subsection (ii) retains some usefulness because § 6020(a) returns (even if they are filed late), can still be discharged under Subsection (ii).

The majority's logic on this point is off for a number of reasons, two of which relate to plain language interpretation.

For one, the text of the hanging paragraph does not, as the majority concludes, dictate that § 6020(a) returns are the *only* type of late-filed returns that count as "returns." The hanging paragraph provides that a return "*includes* a return prepared pursuant to section 6020(a)." (Emphasis added). The majority asks us to assume that Congress, in its use of the word "includes," intended for the exception to apply only to § 6020(a)-type returns.

I am perplexed as to how the majority reaches this contrived extrapolation. Congress's use of the word "includes" connotes that § 6020(a) returns and their state or local law equivalents are mere *examples* of returns that would still comply with "applicable filing requirements," despite the fact that the taxpayer did not meet the filing deadline.[19] If Congress intended the outcome espoused by the majority, it would have used different language (e.g., "is limited to")—not the word "includes." [20]

In a similar vein, the hanging paragraph also denotes that a "return" "does not include a return made pursuant to section 6020(b) of the Internal Revenue Code ... or a similar State or local law." [21] Applying the majority's (incorrect) definition of the word "includes," then, means that conversely, a § 6020(b) return, (or its state or local law equivalent) would be the *only* type of return that is *not* a return. But as the bankruptcy court below put it, "[i]f all late-filed returns except § 6020(a) returns are not returns[,] there is no need to state

> close all information necessary for the preparation thereof, then, and in that case, the Secretary may prepare such return, which, being signed by such person, may be received by the Secretary as the return of such person.
>
> 26 U.S.C. § 6020(a).

19. While § 6020(a) does not specifically discuss filing deadlines, I think it fair to presume that if a person failed to file a return on his own, he missed the filing deadline.

20. In its attempt to refute my interpretation of the word ''includes,'' the majority concludes that in addition to § 6020(a) returns, ''all sorts of returns (such as Form 1040s) that satisfy their respectively applicable filing requirements'' count as ''returns.'' This logic is circular. Of course a return that satisfies ''applicable filing requirements'' satisfies ''applicable filing requirements.'' The majority's response still fails to address why we should read into the statutory language that late-filed returns, generally, are not considered ''returns,'' even though Congress wrote into the statute an example of a specific type of late-filed return that qualifies.

21. Section 6020(b) permits the IRS to execute a return for someone who either failed to file, or filed a ''false or fraudulent return,'' even if that person did not cooperate and/or did not sign the return the IRS prepared. It provides:

> If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.
>
> 26 U.S.C. § 6020(b)(1).

that § 6020(b) returns are not returns." The majority cursorily writes off this curiosity as a mere "redundancy" in the statute, failing to substantively address why the absurd conclusion we must draw from its reading of the statute does not require consideration of what Congress actually meant when it added the § 6020 language to the statute.

Second, allowing § 6020(a) returns, but not other late-filed returns, to be dischargeable leads to another preposterous result. Section 6020(a) returns result from a taxpayer's failure to file a federal tax return. Under the majority's formulation, then, the scofflaw who sits on his hands at tax time, doesn't bother to file a return, and then, after getting caught, cooperates with the authorities and lets the government file the substitute return for him, would be the *only* late filer who would be allowed to discharge his tax debt. The person who files his return one day late—which the state then accepts—would not be permitted to discharge, regardless of the reason for the tardiness.

The majority responds that § 6020(a) "is a tool for the IRS, invoked solely at its discretion, when it decides obtaining help from the late filing taxpayer is to the IRS's advantage." And so, the majority contends, "[t]hat Congress left the IRS a carrot to offer a taxpayer in such infrequent cases does not mean that it was absurd for Congress not to extend this carrot categorically to large numbers of late filers." But the Massachusetts taxing authority, like the IRS, also has the discretion to accept late-filed materials from a taxpayer (without imposing a penalty), presumably because it, too, would prefer not to start from scratch. Further, the majority offers no authority to support its assumption that Congress was concerned about a rash of people running to the courthouse to discharge their tax debts. A theme I harp on throughout this dissent, we cannot put words in Congress's mouth. Finally, if Congress did provide some indication that it was seeking to prevent "large numbers" of late filers from attempting to discharge, the relevant statistic to look at would be how many late filers—of the § 6020(a) variety or otherwise—would actually seek relief from Subsection (ii), were it available to them, as opposed to how many people, theoretically, file their taxes late.

Given the absurdity of the majority's outcome, and the other textual ambiguities I described above, I disagree with my colleagues that we can avoid delving into legislative intent. I tackle that analysis next.

Legislative Intent

In dicta, the majority rejects the debtors' arguments regarding the legislative intent behind Subsection (ii) and the hanging paragraph. I disagree with this portion of the majority's analysis, as well as its ultimate disposition.

The Caselaw

In trying to discern legislative intent, we look to the historical context of the statute (i.e., prior caselaw), the legislative history of the statutory provision, and the policy underlying the statute. *In re Weinstein*, 272 F.3d at 44–46. So first, we must "consider . . . the context of the statute in bankruptcy caselaw." *Id.* This task requires a brief recap of the history of Subsection (ii) and the addition of the hanging paragraph.

Prior to 2005, the bankruptcy code did not define "return" for purposes of Subsection (ii). Many courts, left to their own devices to figure out what constituted a "return," ended up adopting what's been coined as the "*Beard* test," a four-part standard formulated by the Tax Court for

determining whether a document filed with the IRS qualified as a federal tax return. Under the *Beard* inquiry, a document qualified as a tax return if: (1) it purported to be a return; (2) was signed under penalty of perjury; (3) contained information sufficient to determine tax liability; and (4) was an honest and reasonable attempt to satisfy the tax law requirements. *Beard v. Commissioner*, 82 T.C. 766 (1984), *aff'd per curiam*, 793 F.2d 139 (6th Cir.1986). *See also In re Colsen*, 446 F.3d 836, 839 (8th Cir.2006); *In re Payne*, 431 F.3d 1055, 1057 (7th Cir.2005); *In re Moroney*, 352 F.3d 902, 905 (4th Cir.2003); *In re Hatton*, 220 F.3d 1057, 1060–61 (9th Cir.2000); *In re Hindenlang*, 164 F.3d 1029, 1033–34 (6th Cir.1999) (all adopting *Beard* test).[22]

Many courts ended up grappling with the fourth prong. Some tried to figure out whether filing a return late counted as an "honest and reasonable attempt" to satisfy tax requirements. *See, e.g., In re Payne*, 431 F.3d at 1059; *In re Hindenlang*, 164 F.3d at 1034. Those decisions often turned on whether a return made after the government had already assessed tax liability defeated the main purpose of the filing deadline, which one court described as "spar[ing] the tax authorities the burden of trying to reconstruct a taxpayer's income and income-tax liability without any help from him." *In re Payne*, 431 F.3d at 1057. *See also In re Moroney*, 352 F.3d at 906 (holding that the belated acceptance of responsibility for tax liability does not constitute an honest and reasonable attempt to comply with tax laws, and that whether the eventual effort had an effect on tax liability was irrelevant); *In re Hatton*, 220 F.3d at 1061 (finding that belated cooperation with IRS to settle tax liabilities was not an honest and reasonable attempt to comply with tax law, and tax liability was therefore not excepted from discharge under § 523); *In re Hindenlang*, 164 F.3d at 1034 (applying the fourth prong of *Beard*, holding that a "Form 1040 is not a return if it no longer serves any tax purpose or has any effect under the Internal Revenue Code"). Other courts instead struggled with whether the "honest and reasonable" inquiry was limited to an examination of whether, as a factual matter, the tax forms themselves—regardless of when they were eventually filed—were filled out in good faith and with accurate information. *See, e.g., In re Colsen*, 446 F.3d at 840–41.

Presumably aware of this confusion that was ensuing in the courts, in 2005, Congress added the hanging paragraph, clarifying specifically that substitute returns—even though they were not prepared at the hand of the taxpayer and were filed late—could qualify as dischargeable under 11 U.S.C. § 523(a), so long as the taxpayer cooperated with the government in preparing the return, and did not file a false or fraudulent one. While Congress also injected the language requiring returns to meet "applicable filing requirements," despite the discord among the courts, it did not specifically address whether late-filed returns in particular should be considered "returns" under the revised statutory scheme.

Since 2005, disagreement has continued to persist among the courts about how to apply the law, at least as it pertains to late-filed returns. Only two of our sister courts have answered the specific question

22. We do not appear to have ever formally adopted *Beard*, but prior to 2005, courts in our province applied or considered it to try to figure out what constituted a "return" for purposes of 11 U.S.C. § 523(a). *See, e.g., In re Mulcahy*, 260 B.R. 612, 615–16 (Bankr. D.Mass.2001); *In re Pendergast*, 510 B.R. 1, 9 (B.A.P. 1st Cir.2014) (reiterating its previous holding that " § 523(a)(*) replaces the *Beard* test").

before us, and both have reached the same conclusion as the majority here. *See McCoy v. Miss. State Tax Comm'n (In re McCoy),* 666 F.3d 924, 932 (5th Cir.2012); *In re Mallo,* 774 F.3d 1313, 1327–28 (10th Cir.2014). But as we have said before, "[t]he numbers favoring a rule do not necessarily mean that the rule is the best one." *In re Atlas IT Exp. Corp.,* 761 F.3d 177, 182 (1st Cir.2014). Numerous lower courts—including two of the courts involved in the instant appeal—have applied either a different reasoning or have reached a different outcome from the one espoused by the majority. *See, e.g., In re Gonzalez,* 506 B.R. 317, 318 (B.A.P. 1st Cir.2014) (affirming bankruptcy court's holding that Massachusetts taxes were dischargeable, even though "corresponding tax returns were filed late"); *In re Martin,* 508 B.R. 717, 736 (Bankr.E.D.Cal. 2014) (holding that "requirements of applicable nonbankruptcy law (including applicable filing requirements) do not include a temporal restriction") (quotations omitted). Some courts, including the lower court in *Mallo,* have continued to apply various versions of the *Beard* test. *See, e.g., In re Mallo,* 498 B.R. 268, 281 (D.Colo.2013); *In re Rhodes,* 498 B.R. 357, 360 (Bankr. N.D.Ga.2013).

As the Supreme Court has articulated, "[w]hen Congress amends the bankruptcy laws, it does not write on a clean slate." *Dewsnup v. Timm,* 502 U.S. 410, 419, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992) (quotations omitted). Therefore, we should be "reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." *Id.* Given the widespread disagreement among the courts prior to and after 2005, as well as ubiquitous application of various versions of the *Beard* test's "honest and reasonable attempt" requirement, I do not see how—absent a clear congressional mandate—we can (or should) spring upon debtors the majority's draconian rule-of-law. This very appeal, which involves four different debtors and the decisions of four different lower courts reaching two opposing outcomes, illustrates that the caselaw is far from settled, and that the courts were not generally applying a per se restriction like the one the majority has created today.

Policy

Given the lack of legislative history on the hanging paragraph, it is also appropriate to look to the public policy behind the bankruptcy code to try to determine Congress's intent. *See In re Weinstein,* 272 F.3d at 46 (noting that while we "must not, of course, impose [our] own views of proper bankruptcy policy in place of those of the legislature[,] ... an understanding of the congressional policies underlying a statute, including the Bankruptcy Code, can help to reconcile otherwise indeterminate parts of the statutory text").

The primary purpose of the bankruptcy code has always been to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." *Local Loan Co. v. Hunt,* 292 U.S. 234, 244, 54 S.Ct. 695, 78 L.Ed. 1230 (1934) (citation and quotations omitted); *Marrama v. Citizens Bank of Mass.,* 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007) ("The principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor.") (citations and quotation omitted). As the Supreme Court reiterated fairly recently (and several years after the 2005 amendments were passed), a "fresh start" is a "fundamental bankruptcy concept."

Schwab v. Reilly, 560 U.S. 770, 791, 130 S.Ct. 2652, 177 L.Ed.2d 234 (2010) (citations and quotations omitted). Despite the majority's contentions, Congress made no indication that the 2005 amendments were intended to change those goals. Rather, as President George W. Bush reiterated upon signing the bill, the purpose of our bankruptcy system is to "give those who cannot pay their debts a fresh start." Presidential Statement on Signing the Bankruptcy Abuse Prevention and Consumer Protection Act, 2005 U.S.C.C.A.N. S7, 2005 WL 3693183 (Apr. 20, 2005) ("2005 Presidential Statement"). As I mentioned above, the Massachusetts taxing authority acknowledges that someone may miss the filing deadline for a "reasonable cause." Yet under the majority's formulation, even people who have a good-faith reason for filing late—and are then excused by the state taxing authority for doing so—are mere "delinquent taxpayers," shunned from receiving a bankruptcy discharge. While the 2005 reforms certainly sought to avert abuses that had been occurring in the bankruptcy system, I find it presumptuous to conclude that well intentioned people who file their taxes one day late—with no way to anticipate that bankruptcy would be coming down the pipeline a whole two years later—are the people trying to "commit fraud" or "game the system." *See* 2005 Presidential Statement. I am further convinced that Congress's focus was likely on bad faith, as opposed to mere timing, because the hanging paragraph expressly allows discharge for § 6020(a) returns, but not § 6020(b) returns, despite the fact that both are, by their nature, filed late—as the majority concedes, "the basic difference between sections 6020(a) and (b) [is that] the latter is prepared without the taxpayer's assistance and sometimes as a result of the taxpayer's willful fraud." It seems to me that in light of the public policy behind the bankruptcy code and Congress's decision not to specifically create a per se rule barring late-filed returns from being dischargeable, we cannot just write one in.

Given the state of the caselaw in 2005, the most sensible explanation for Congress's addition of the provision was to elucidate that regardless of who prepared a return—or when—if the document a debtor filed would no longer be considered a "return" because the state won't accept it as one, the debtor can't just turn around and file a tax form solely for the purpose of discharging those taxes during bankruptcy. This interpretation of the law is further supported by Congress's choice, in 2005, to maintain the very safeguard that was already built into the statute to help prevent that kind of problem from arising: "the requirement of a two-year waiting period after filing a late return but before seeking discharge prevents a debtor who has ignored the filing requirements of the Internal Revenue Code from waiting until the eve of bankruptcy, filing a delayed but standard tax return form, and seeking discharge the next day." *In re Hindenlang,* 164 F.3d at 1032. Considering the purpose of the bankruptcy code, it is beyond me how—or why—the majority would assume, without textual or other justification, that "it is more plausible that Congress intended to settle the dispute over late filed tax returns against the debtor. . . ."

In my view, the most sensible interpretation of Subsection (ii) and the hanging paragraph, when considered in concert, is that a return that does not comply with state filing requirements (and thus will not be accepted by the state as a return when it is filed) does not count as a "return," and so those taxes cannot be discharged. In order to prevent people from filing late returns solely for the purpose of discharging their taxes in bankruptcy, the debtor may only discharge if he filed for bank-

ruptcy two years after he filed his late return. This reading aligns with the plain text (including Congress's choice to retain Subsection (ii) in its entirety), the historical context of the statute, and the public policy reasons for enacting the bankruptcy code. The majority, ignoring blatant textual ambiguities and judicial precedent, instead opts to create a per se restriction that is contrary to the goal of our bankruptcy system to provide, as the former President put it in 2005, "fairness and compassion" to "those who need it most."

Ultimately, this continued confusion may be Congress's problem to fix. In the meantime, debtors who legitimately resort to bankruptcy when they reach wit's end should not be punished for the lack of clarity that persists in the very laws enacted to help them—or for the majority's implicitly articulated viewpoint that a financially strapped person who misses a deadline is trying to work a runaround.

I respectfully dissent.

Addiel SOTO–FELICIANO, Plaintiff, Appellant,

v.

VILLA COFRESÍ HOTELS, INC. and Sandra Y. Caro, Defendants, Appellees.

No. 13–2296.

United States Court of Appeals, First Circuit.

Feb. 20, 2015.

Background: Former employee, the head chef at hotel, brought action against hotel and its general manager in charge of human resources alleging age discrimination and retaliation under Age Discrimination in Employment Act (ADEA), and supplemental state law claims for age discrimination under Puerto Rico's anti-discrimination and wrongful termination statutes. Defendants moved for summary judgment. The United States District Court for the District of Puerto Rico, Juan M. Pérez–Giménez, J., 967 F.Supp.2d 529, granted motion and dismissed federal claims with prejudice and claims under Puerto Rico law without prejudice. Employee appealed.

Holdings: The Court of Appeals, David J. Barron, Circuit Judge, held that:

(1) employee established prima facie case of age discrimination;

(2) fact issue existed as to whether defendants' articulated legitimate, nondiscriminatory reason for employee's suspension and firing, his alleged misconduct on the job, were pretext for age discrimination;

(3) employee established that he engaged in protected conduct, as required to establish prima facie case of ADEA retaliation; and

(4) fact issue existed as to whether defendants' articulated legitimate, nonretaliatory reason for employee's suspension and termination were pretext to retaliate for his efforts to redress alleged age discrimination.

Reversed and remanded.

1. Federal Courts ⚷3604(4), 3675

Court of Appeals reviews district court's summary judgment ruling de novo, considering the record and all reasonable inferences therefrom in the light most favorable to the non-moving party.

Department of the Treasury | Internal Revenue Service | Office of Chief Counsel

Notice

CC-2010-016

September 2, 2010

Subject: Litigating Position Regarding the Dischargeability in Bankruptcy of Tax Liabilities Reported on Late-Filed Returns and Returns Filed After Assessment

Cancel Date: Effective until further notice

Purpose

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

Background

Pursuant to section 523(a)(1)(B)(i), an individual's bankruptcy discharge does not discharge a tax debt for which a required return was not filed. The Government successfully argued in a number of circuits that a Form 1040 filed after assessment does not qualify as a return for discharge purposes under section 523(a)(1)(B)(i). For example, In re Hindenlang, 164 F.3d 1029 (6th Cir.), cert. denied, 528 U.S. 810 (1999), the Sixth Circuit held that a document must qualify as a federal tax return under tax law to be a return for bankruptcy purposes. The court applied the test in Beard v. Commissioner, 82 T.C. 766 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986), which held that if a document "contains sufficient information to permit a tax to be calculated" and "purports to be a return" and "is sworn to as such, and "evinces an honest and reasonable attempt to satisfy the law," it is a return. The Hindenlang court concluded that a Form 1040 filed after assessment serves no tax purpose and therefore was not an honest and reasonable attempt to satisfy the tax laws. Other circuits largely followed Hindenlang. See In re Payne, 431 F.3d 1055 (7th Cir. 2005); In re Moroney, 352 F.3d 902 (4th Cir. 2003); In re Hatton, 220 F.3d 1057 (9th Cir. 2000). The Eighth Circuit disagreed in In re Colsen, 446 F.3d 836 (8th Cir. 2006), holding that a document that on its face evinces an honest and reasonable attempt to satisfy the tax laws qualifies as a return, whether or not it was filed after assessment.

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

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> For the purpose of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State of local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

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

Discussion

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

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

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

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

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

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

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

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

Conclusion

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

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

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

/s/
Deborah A. Butler
Associate Chief Counsel
(Procedure & Administration)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
(WESTERN DIVISION)

Steven R. McCarthy & Debra E. McCarthy,	)	Chapter 7 Case No. 13-30959-HJB
Debtors.	)	

MEMORANDUM OF LAW IN SUPPORT OF MASSACHUSETTS DEPARTMENT OF REVENUE'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Mark E. Nunnelly, as he is the Commissioner of the Massachusetts Department of Revenue (hereinafter "MDOR"), a creditor and party in interest in the above-captioned matter, and hereby submits this Memorandum of Law in Support of the Massachusetts Department of Revenue's Motion for Summary Judgment.

I- STATEMENT OF THE CASE

This matter was initiated on June 10, 2015 by Steven R. McCarthy and Debra E. McCarthy, the debtors in the above-captioned case (the "Debtors") with the filing of a Motion for Contempt and for Sanctions seeking award of damages, attorney fees, punitive damages, and such other relief as is just,"[1] against MDOR, for the issuance of a consolidated bill sent to the Debtors in April 2014 for the

[1] Debtor's Motion for Contempt Sanctions (Discharge Violation): Massachusetts Department of Revenue, page 8.

2001, 2002, 2003, 2004, 2005, and 2006 tax years (Periods at Issue). On June 24, 2015, MDOR filed an opposition to the Debtors' Motion and on July 20, 2015 MDOR filed a Supplemental Opposition. The dispute between the parties revolves around the dischargeability of the late-pay penalties. At the latest hearing on this matter, the Court set a deadline of February 5, 2016 for the parties to file cross-motions for summary judgment on that issue.

This issue is one of first impression in the First Circuit, and of first impression within the context of non-dischargeability of late-filed returns.

II- FACTS

The factual background of this case is undisputed. Instead of filing their returns by the date prescribed under Massachusetts General Laws, the Debtors filed their Massachusetts personal income tax return ("Return") for the year 2001 on April 15, 2009, the 2002 Return on July 15, 2008, the 2003 Return on July 18, 2008, the 2004 Return on April 4, 2008, the 2005 Return on July 15, 2008, and the 2006 Return on July 18, 2008. The Debtors made no voluntary payments towards their Massachusetts income tax liability. Pursuant to G.L. c. 62C, § 33(a) and (b), the Commissioner

then assessed the Debtors penalties for failure to file their returns on time and for failure to pay the tax due.

On August 30, 2013, the Debtors filed for Chapter 13 bankruptcy protection. On September 26, 2013, the case was converted to one under Chapter 7 and on March 26, 2014, the Debtors received their order of Discharge.

On April 1, 2014, MDOR issued to the Debtors a Consolidated Bill for the Periods at Issue. In addition to tax and interest, the April 1, 2014 bill included penalties. On June 10, 2015, the Debtors filed the Motion for Contempt Sanction asserting that all penalties were discharged in bankruptcy. On June 12, 2015, MDOR issued a revised notice with amounts of penalties reflected as follows:

Tax Period	Amount of Penalties
2001	$1,129.50
2002	$1,810.25
2003	$1,183.00
2004	$1,046.56
2005	$1,109.25
2006	$1,200.36

The revised amount of penalties only reflects late-pay penalties imposed under G.L. c. 62C, §33(b).

III- ARGUMENT

A- SUMMARY JUDGMENT STANDARD

Pursuant to Fed. R. Bankr. P. 7056, which incorporates Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment must be entered for the moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). See also Borges v. Serrano-Isern, 605 F. 3d 1, 4 (1st Cir. 2010).

As the party seeking summary judgment, MDOR bears the burden of demonstrating that no genuine issue as to any material fact exists, and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), Napier v. F/V Deesie, Inc., 454 F.3d 61 (1st Cir. 2006). As described in this Memorandum and supported by the materials filed with the Court as exhibits to the Motion for Summary Judgment, MDOR meets its burden of proving that no material facts are in dispute and that it is entitled to judgment in its favor.

B- THE LATE-PAY PENALTIES IMPOSED PURSUANT TO G.L. C. 62c, § 33(b) ARE EXCEPTED FROM DISCHARGE BECAUSE THEY RELATE TO A NONDISCHARGEABLE TAX

MDOR contends that the late-pay penalties are not discharged in bankruptcy. 11 U.S.C. § 523(a)(7) excludes from the Bankruptcy Code's discharge provision a penalty if it is payable to and for the benefit of a governmental unit and is not compensation for actual pecuniary loss:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does no discharge an individual debtor from any debt to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty (A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or (B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition.

11 U.S.C. § 523(a)(7).

MDOR asserts that if a tax penalty relates to a nondischargeable tax then the penalty is also nondischargeable irrespective of whether the tax years in questions fall within the three year look back. In short, if subsection (A) of 11 U.S.C. § 523(a)(7) is applicable, then subsection (B) is not required.

This interpretation is in accord with the legislative history of the statute. The Committee Report to Section 523 states:

> The House amendment also adopts the Senate amendment provision limiting the nondischargeability of punitive tax penalties, that is, penalties other than those which represent collection of a principal amount of tax liability through the form of a 'penalty'. Under the House amendment, tax penalties which are basically punitive in nature are to be nondischargeable only if the penalty is computed by reference to a related tax liability which is nondischargeable or, if the amount of the penalty is not computed by reference to a tax liability, the transaction or event giving rise to the penalty occurred during the three-year period ending on the date of the petition.

124 CONG. REC. H 11, 113-14 (Sept. 28, 1978); S. 17,430-1(Oct. 6, 1978).

Further support to MDOR's interpretation can also be found in the Notes of Committee on the Judiciary, Senate Report No. 95-989, U.S. Code Cong. & Admin. News 1978, p. 5865 in which the Committee pointed out that 523(a)(7) "reflects the existing position of the Internal Revenue Code [Title 26] (Rev. Rul. 68-574, 1968-2 C.B. 595)." In said ruling, the Internal Revenue Service deemed that "penalties will also be claimed against after-acquired property of the debtor, if the underlying tax liability is not discharged in Bankruptcy."

A long line of cases, as well as a respected treatise in bankruptcy, has adopted that view: "A penalty relating to a tax cannot be nondischargeable unless the tax itself is nondischargeable." Collier on Bankruptcy § 523.17 (15th ed. 1979). In Longley v. United States (In re Longley), 66 B.R. 237 (1986), the bankruptcy court for the Northern District of Ohio held that civil fraud penalties assessed with respect to a tax specified in Section 523(a)(1) were nondischargeable. This holding echoes the reasoning used in Carlton v. Internal Revenue Service, (In re Carlton), 19 B.R. 73 (D.N.M. 1982) and Gerulis v. Internal Revenue Service (In re Gerulis), 56 Bankr. 283 (Bankr. D. Minn. 1985)(tax penalties on nondischargeable taxes are not dischargeable). See also In re Harris, 59 B.R. 545, 548 (1986)("Section 523(a)(7) of the Bankruptcy Code, which governs the dischargeability of debts for tax penalties, requires that tax penalties be accorded the same treatment as the related underlying tax liability.")

There is no dispute that the penalties at issue here relate to a tax of the type identified in 11 U.S.C. § 523(a)(1). The related late-pay penalties are therefore not dischargeable.

C- THE LATE-PAY PENALTIES ARE NONDISCHARGEABLE BECAUSE THEY RELATE TO A NONDISCHARGEABLE TAX AND TO A TRANSACTION OR EVENT THAT OCCUR WITHIN THE THREE YEAR LOOK BACK

Another set of opinions espouses the belief that subparagraphs A and B of 11 U.S.C. §523(a)(7) set forth two disjunctive exceptions to the general rule that tax penalties are non-dischargeable. As summarized by the Court of Appeals for the Eleventh Circuit:

> While the language of this subsection frames nondischargeable tax penalties as an exception to an exception to an exception. Once the triple negative is taken into account the meaning of the provision gains clarity. A tax penalty is discharged if the tax debt to which it relates is discharged (in the precise terms of the statute, not nondischargeable) or if the transaction or event giving rise to the penalty occurred more than three years prior to the filing of the bankruptcy petition. Since the statute uses the disjunctive, a tax penalty that does not qualify for discharge under one of the two aforementioned circumstances may still qualify under the other.

Burns v. United States (In re Burns), 887 F.2d 1541 (11th Cir. 1989).

Under that line of reasoning, the question presented is whether the late-filed penalties were based on an event or transaction which took place between August 30, 2010 and August 30, 2013 the three-year look back period preceding

the filing of the bankruptcy petition. If so, the penalties are non-dischargeable. The First Circuit has never implicitly defined the term "transaction or event".

The penalties at issue here were imposed pursuant to G.L. c. 62C, § 33(b), which provides that:

> If any amount of tax is not paid to the commissioner on or before the date prescribed for payment of such tax, determined with regard to any extension of time for payment, there shall be added to the amount shown as tax on such return a penalty of one per cent of the amount of such tax for each month or fraction thereof **during which such failure continues**, not exceeding, in the aggregate, twenty-five per cent of said amount.

G.L. c. 62C, § 33(b) (emphasis added). Hence, penalties imposed under G.L. c. 62C, § 33(b) accrue incrementally for each additional month the taxpayer is non-compliant. It is the taxpayer's delinquency that creates the imposition of penalties. Because the penalties are for late payment, an event that continues to take place during the three years before the Petition was filed, the penalties are imposed with respect to a transaction or event occurring within three years of the petition's filing date. "[T]o the extent a tax penalty associated with a nondischargeable income tax obligation pursuant to 11 U.S.C. § 523(a)(1) accrued within the Three Year Look Back

Period,[2] then the penalty is also excepted from discharge." Meyer v. United States (In re Meyer), 2013 Bankr. LEXIS 856, 23-24 (Bankr. E.D.N.Y. 2013). See also Prisco v. IRS, 2013 U.S. Dist. LEXIS (N.D.N.Y. 2013)("Penalties based on nondischargeable tax liabilities are also nondischargeable, if the tax is excepted under § 523(a)(1) and the penalties are imposed with respect to a transaction or event occurring within three years of the petition's filing date.").

The Final Notice sent to the Debtors falls within the exception to discharge outlined in 11 U.S.C. § 523(a)(7) because in addition to the tax and interest, the bill sought to collect a penalty payable to a governmental unit, relating to the type of tax specified in 11 U.S.C. § 523(a)(1) and the penalty arose out of an event that incurred within three years of the petition date.

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[2] "The Three Year Look Back" was defined as the three-year period prior to the Petition Date. Meyer v. United States (In re Meyer), 2013 Bankr. LEXIS 856 (Bankr. E.D.N.Y. 2013).

IV. CONCLUSION

For the foregoing reasons, MDOR contends that the Court should enter an order granting MDOR's Motion for Summary judgment declaring that the late-pay penalties are not discharged. No genuine issue exists as to any material facts and MDOR is entitled to judgment as a matter of law.

Dated: February 5, 2016

Respectfully submitted,

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United States Bankruptcy Court
For the District of Massachusetts
Western Division

Steven R. McCarthy **Debra E. McCarthy** Debtor	)	Case No. **13-30959-HJB** Chapter **7**

DEBTORS' BRIEF SUPPORTING DEBTORS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEBTORS' OPPOSITION TO MDOR'S MOTION FOR SUMMARY JUDGMENT

To the Honorable Henry J. Boroff, U.S. Bankruptcy Judge:

INTRODUCTION

Movant debtors, by and through counsel, have moved for contempt sanctions (discharge violation) against the Massachusetts Department of Revenue (MDOR). MDOR has opposed this request. The parties have exchanged communications discussing the various legal theories. The parties now cross-move for summary judgment, with the debtors seeking only partial summary judgment as to liability..

FACTUAL AND PROCEDURAL BACKGROUND

The movants incorporate the factual and procedural statements of MDOR in whole. There are no disputed facts precluding summary judgment rulings on liability.

MDOR's Notices and bills originally presented to the debtors and exhibited in this contested matter combine the penalty obligations for both late-filed tax returns and late-paid tax obligations without distinction or differentiation. The penalties are stated in the aggregate. The notices and bills do not inform a taxpayer that two separate penalties are involved. Nevertheless, the Department has been completely forthcoming with the debtors in explaining the different penalties and their different statutory sources.

ARGUMENT

MDOR's first argument is that the dischargeability of tax penalties must meet both elements of §523(a)(7) of the Bankruptcy Code, that the penalty relate to a nondischargeable tax (523(a)(1)) and that it be more than three years old (523(a)(2)). This was rejected by the 10th and 11th circuits in *Roberts v. U.S.A. (In re Roberts)*, 906 F.2d 1440 (10th Cir. 1990) and *In re Burns* , 887 F.2d 1541. The better and now uniform interpretation is that 523(a)(7)'s two subsections are disjunctive: a tax penalty is discharged if either element is met. Both are not required. MDOR has governed itself accordingly when it sent corrected bills deleting the late-filed penalty shortly after the motion for sanctions was filed,

MDOR acknowledges that it has the burden of proof for its motion for summary judgment. Memorandum of Law, Doc 87-1 filed 02/05/16 at Page 4. It does not go far enough. MDOR has the burden of proving nondischargeability by a preponderance of the evidence no matter who is the moving party. *Grogan v. Garner*, 498 U.S. 279 (1991).

Section 523(a)(7)(B) of the U.S. Bankruptcy Code establishes that a tax penalty is discharged if "imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition". In other words, a tax penalty imposed with respect to a transaction or event before August 30, 2010 (three years before the debtors' August 30, 2013 petition filing date) is discharged.

All the late-pay penalties at issue here were triggered by a tax return due date earlier than August 30, 2010. The debtors did not file returns by the due date and they did not pay the tax obligation by the due date. That due date, says the debtors, is the transaction or event which determines whether the late-filed and late-pay penalties are discharged.

MDOR agrees with this as applied to late-filed returns and issued corrective bills after the debtors' motion was filed. It disagrees with applying the tax return due date to the late-pay penalties which are assessed later.

MDOR continually assesses new late-pay penalties for the same missed tax obligation payment. It argues that these are new assessments with new dates that are unrelated to the returns' original due date. Therefore, goes its argument, these new late-pay penalties are not based on a "transaction or event" earlier than August 30, 2010 and are not discharged. It argues that the governing "transaction or event" is MDOR's own self-determined assessment date which is later than a return's original due date.

In this way, MDOR can make any late-pay penalty nondischargeable by regularly re-assessing the late-pay penalty and ignore the triggering tax return due date.

(In this way, MDOR also continually establishes a 10 year new statute of limitations date. Its obligees can never get free of the late-pay penalty according to MDOR's practices.)

Courts reject this argument. In particular, see the district court opinion in *U.S.A. v. Hedgecock (In re Hedgecock)*, 160 B.R. 380 (D. Ore. 1993), quoted with approval in *United States v. Wilson*, 2016 U.S. Dist. LEXIS 7285 (N.D. Cal. 2016):

> With respect to the penalties under § 6651(a), there is no question that the transaction or event to which those sanctions relate is the failure to file a return and pay tax on the due date. Although the penalties imposed under the provision increase with each month the taxpayer remains in non-compliance, this monthly accretion merely changes the amount of the taxpayer's liability--it does not alter the date of the transaction giving rise to the penalties. Therefore, **appellant's argument that the monthly increases under the statute should be treated as new penalties, while inventive, is not persuasive.** Accordingly, I affirm the Bankruptcy Court's ruling that the penalties imposed under § 6651(a) are dischargeable.
>
> *Hedgecock*, 160 B.R. at 383. (Emphasis added.)

See also *Fox v. U.S.A. (In re Fox)*, 172 B.R. 247 (Bankr. D. Tenn. 1994). The debtor filed tax returns on October 28, 1991 for tax years ending 1985 and 1986. He then filed his chapter 7 petition on February 3, 1994. The IRS made postpetition assessments for taxes which had not been assessed before the petition was filed. The court ruled that principal and interest was not dischargeable pursuant to §507(a)(7)(A). However, the penalties were discharged despite the IRS' later assessements.

> The applicable "transaction or event" in this case is the date the debtor's 1985 and 1986 tax returns were due, April 15, 1986 and April 14, 1987 respectively. (Citations omitted.) … Thus, the transaction for which the debtor's tax penalties were imposed occurred more than three years before he filed his Chapter 7 petition on February 3, 1994, and the penalty portion of his 1985 and 1986 tax liabilities is dischargeable under §523(a)(7)(B).
>
> 172 B.R. at 250.

Fox expressly rejects new assessment dates by the IRS as changing the "transaction or event" trigger.

Frary v. U.S.A. (In re Frary), 117 B.R. 541 (Bankr. D. Alaska 1990) is another case that rejected an assessment date instead of the due date as the triggering "transaction or event" date. Indeed, *Frary* cites to many cases ruling that the due date is the transaction or event and not an assessment date.

Many cases aggregate late-filed penalties with late-pay penalties as they reach their ruling, and many cases do not have the argument of new and multiple assessments bringing the "transaction or event" date later than three years before a petition's filing date. Nevertheless, every case reviewed by the debtors (including all the *Frary* cases) chooses the due date over an assessment date as the triggerung "transaction or event".

CONCLUSION

Every case reviewed by the debtors choose a return's due date over an assessment date for the triggering "transaction or event" in determining dischargeability. The debtors have not found any case supporting MDOR's argument favoring new assessments over a due date for this purpose.

All penalties, be they late-filed or late-pay, are discharged in this case. MDOR is liable for violating the discharge injunction.

Steven R. McCarthy and Debra E. McCarthy,
by counsel

/s/ Jed Berliner

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Certificate of Service

The undersigned certifies that this document was filed with the Court in a manner appropriate for automated service of true electronic images to all ECF Registrants in this Case or Proceeding, including the Case Trustee and the U.S. Trustee and counsel for the Respondent MDOR.

Date: February 9, 2016

/s/ Jed Berliner
L. Jed Berliner