AMERICAN BANKRUPTCY INSTITUTE

2017 Midwest Regional Bankruptcy Seminar

Consumer Track

Complex Tax Issues

Eric W. Goering, Moderator
Goering & Goering, LLC; Cincinnati

Bethany J. Hamilton
Office of the U.S. Attorney; Columbus, Ohio

Terry Serena
Serena Law LLC; Cincinnati

CONCURRENT SESSION

2017

DISCHARGEABILITY OF FEDERAL TAXES IN 10 MINUTES

THE IMPOSSIBLE DREAM

TERRY SERENA
FOR MIDWEST REGIONAL BANKRUPTCY SEMINAR
AUGUST 23, 2017

Fundamental Rules for Dischargeability of All Debts

1. Debts are dischargeable if *no* exception to dischargeability applies;

2. Debts are non-dischargeable if *any* exception applies.

Statutory Exceptions to Discharge of Taxes

A. 11 USC § 523(a) – General Discharge Provision.
B. Section 507(a)(3)[gap period taxes] and (a)(8) [prepetition priority taxes] incorporated by reference.
C. The discharge provisions of the individual Chapters:
    1. Chapter 7 – § 727(b)
    2. Chapter 9 – § 944(b)
    3. Chapter 11 – § 1141(d)
    4. Chapter 12 – § 1228(a)
    5. Chapter 13 – 1328(a)
D. Exceptions applicable to all debts

Taxes Are Dischargeable Unless They Are One of the Following:

A. Gap period taxes
B. Relate to an unfiled return [“definition” of “return” at § 523(a)(*) and federal common law]
C. Relate to a return that was delinquently filed “after 2 years before” the the bankruptcy filing – 2-Year Rule
D. Relate to a fraudulent return or circumstances by which the debtor ”willfully attempted in any manner to evade or defeat the tax”

Continued

Continuation

E. Are for prepetition income taxes:
   1. For which the return was due within 3 years of the bankruptcy filing – 3-Year Rule
   2. That were assessed within 240 days of the petition date – 240-Day Rule – as extended by OIC and/or prior bankruptcy pending in the 240 day period + 90 days
   3. That were not assessed but are assessable after the petition date (subject to noted exceptions)

Note: The 3-Year and 240-Days Rules are also extended by Collection Due Process proceedings, + 90 days, and by the time a of a prior Bankruptcy, + 90 days [partially duplicative for 240-day rule]

Continuation

F. Were for trust fund taxes
G. Employment taxes on prepetition wages under § 507(a)(4)
H. Were for excise taxes, subject to a variation of the 3-year rule

Continuation

Penalties – § 523(a)(7)

A. Penalties are non-dischargeable if they (1) relate to non-dischargeable taxes; AND (2) relate to a transaction or event that occurred within 3 years of the petition date

B. Penalties are dischargeable if they (1) relate to dischargeable taxes; OR (2) relate to a transaction or event that occurred more than 3 years before the petition date

Incorporation of § 523 Into Individual Chapters

A. Chapter 7 –
   1. Individuals – Section 523 applies in full
   2. Non-individuals – Do not receive discharges

B. Chapter 11 –
   1. Individual – Section 523 applies in full
   2. Non-individual "reorganizations" (continuing business) – Super-Discharge
   3. Non-Individual liquidations – Do not receive discharges

C. Chapter 12 – Section 523(a) applies in full

Chapter 13 Exceptions to Discharge

A. Trust fund taxes under § 507(a)(C) [only priority tax excepted]

B. Taxes defined by § 523(a):

   1. (1)(B)[unfiled returns & subject to 2-year rule]

   2. (1)(C)[fraudulent returns or willful attempts to evade or defeat the tax

C. Notably omitted – § 523(a)(7) – Penalties (always dischargeable)

Chapter 13 & the Problem of Non-Priority/ Non-dischargeable Taxes

Principally because of the inclusion of the exception of the 2-Year Rule, which by nature generally relate to non-priority taxes, Chapter 13 debtors faced with the prospect of some non-priority taxes also being non-dischargeable.

Example of the 1% Plan (99% of tax + post-petition Interest still due)

Post-petition Interest on Trust Fund Taxes

Practice Suggestions

1. Dischargeability of federal taxes cannot be determined without IRS “Account Transcripts” (can be of some assistance for state taxes)
2. Check discharge for state and federal taxes after the discharge is entered (60 days suggested)
3. Verify SFR assessment is, in fact, an SFR assessment (if only a single assessment & no abatements at time taxpayer’s actual return was filed, probably not an SFR assessment)
4. For state taxes & IRS audit, have amended return filed, if possible, w/in the statutory periods

Terry Serena
Serena Law, LLC
4555 Lake Forest Drive
Suite 650
Cincinnati, OH 45242
Direct: 513.254.5123
terry@serenalawllc.com

When is a Return Not a Return?

An Overview of How the Circuit Courts Are Defining "Return" for Purposes of § 523

MIDWEST REGIONAL BANKRUPTCY SEMINAR 2017

BETHANY J. HAMILTON, ASSISTANT U.S. ATTORNEY

When is a filed tax return not considered a "return" for purposes of the dischargeability statute?

1) When it's filed after IRS has made a 6020(b) Substitute for Return (SFR) Assessment against the taxpayer

2) When it is filed late, even if by only 1 day

***This is the current rule in the First, Fifth, and Tenth Circuits

Discharge Statute 11 U.S.C. § 523

§ 523. Exceptions to discharge

(a) A discharge under section 727, 11411, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

(1) for a tax or customs duty –

(B) with respect to which a return, or equivalent report or notice, if required—

(i) **was not filed or given**

11 U.S.C. § 523(a)(1)(B)(i)(emphasis added)

Courts Use Nonbankruptcy Law to Define "Return"

- Prior to BAPCPA being enacted in 2005, "return" was not defined by the Bankruptcy Code
- "Return" is also not formally defined in the Internal Revenue Code
- The Sixth Circuit relied on a four-part test outlined by a Tax Court in *Beard* to determine what constitutes a "return" for purposes of § 523.

  United States v. *Hindenlang (In re Hindelang)*, 164 F.3d. 1029 (6th Cir. 1999)

The *Beard* Test

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.

Beard v. Commissioner, 82 T.C. 766, 1984 WL 15573 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986)

Hindelang's Holding

- Filing at issue: Form 1040 filed after a SFR Assessment
- The Court focuses on 4th element of the *Beard* test – whether the document filed "represents an honest and reasonable attempt to satisfy the requirements of the tax law."
- The document is not a "return" if it serves no tax purpose or has no effect under the Internal Revenue Code.
- A tax form filed after a SFR assessment serves no tax purpose.
- Tax debt not dischargeable.

Pre-BAPCPA Cases

Moroney v. United States (In re Moroney), 352 F.3d 902 (4th Cir. 2003)

Same fact pattern, same holding.

Debtor's income tax statements, filed after IRS's SFRs were prepared, did not constitute returns for purpose of discharging his tax liabilities.

United States v. Payne (In re Payne), 431 F.3d 1055 (7th Cir. 2005)

Same fact pattern, same holding.

IRS has no use for the Form 1040 once it has gone to the trouble of estimating the tax liability without the taxpayer's assistance.

However, Court noted that it was not making a per se rule, circumstances beyond the taxpayer's control could have prevented him from filing a timely return before the tax was assessed and these factors can be taken into account on determining whether the taxpayer made an honest and reasonable attempt to comply with the tax laws.

Pre-BAPCPA Cases (continued)

Colsen v. United States (In re Colsen), 446 F.3d 836 (8th Cir. 2006)

Similar fact pattern, different holding.

Here, the post-assessment return changed the calculation of the tax liability.

Court determined that the form was accurate and contained data that was useful to the IRS to accurately calculate the taxpayer's obligations.

Taxpayer's attempt to comply with tax law should be determined by form itself and not from the filer's delinquency or the reasons for it. "The filer's subjective intent is irrelevant."

Held the 1040 Form was an honest and genuine attempt to satisfy the tax laws.

**Circuit Split: Whether the timing – the fact that the return was filed late – is relevant to the question of dischargeability

Addition of the Hanging Paragraph

- BAPCPA added a new hanging paragraph to § 523(a) which defined the term "return" for discharge purposes.

11 U.S.C. § 523(a)(*)(emphasis added)

"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.

Post-BAPCPA – New Rule Develops

McCoy v. Mississippi State Tax Commission (In re McCoy), 666 F. 3d 924 (5th Cir. 2012)

-State income tax returns were filed late, but filed more than 2 years prior to the filing of her Chapter 7 bankruptcy petition.

-State tax law required return to be filed by a certain date. It was not timely filed.

-Return did not meet "applicable filing requirements."

-Finding that unless a return was filed under a "safe harbor" provision similar to § 6020(a), a state income tax return that is filed late under the applicable state law is not a "return" for bankruptcy discharge purposes under § 523(a).

**** Note – These were just late-filed state tax returns.**

No SFR assessment or similar procedure utilized by taxing authority.

Post-BAPCPA – New Rule Develops

Mallo v. Internal Revenue Service (In re Mallo)

774 F.3d 1313 (10th Cir. 2014)

-Form 1040 tax return filed after a SFR assessment made by IRS

-Explaining that the plain language of the phrase "applicable filing requirements" means something that must be done with respect to filing a tax return. 26 U.S.C. § 6072(a) states a federal return shall be filed on or before the 15th day of April.

-Return was not filed timely as required by the statute.

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

-Applies rule to federal income taxes.

Post-BAPCPA – New Rule Develops

Fahey v. Massachusetts Department of Revenue (In re Fahey), 779 F.3d 1 (1st Cir. 2015)

-Tax debt was from late-filed tax returns filed more than 2 years prior to the petition date.

-Massachusetts law does require timely filing of its tax returns, it is a "filing requirement," and therefore, a late-filed return is not a "return" for purposes of § 523.

**** Note – Again, just late-filed state tax returns.**

No SFR assessment or similar procedure utilized by taxing authority.

"One-Day Late Rule" Defined

- If a tax return is filed late, even if only by 1 day, it is not considered a "return" for purposes of11 U.S.C. § 523 because it does not comply with the "applicable filing requirements."

- The only identified exception to this rule is a return prepared under 26 U.S.C. 6020(a) by IRS with the assistance of the taxpayer.

Creation of "One-Day Late Rule"

- Plain meaning of the statute

- "If Congress intended § 523 to define a return through application of the *Beard* test, Congress could simply define a return as one that "satisfies the requirements of applicable nonbankruptcy law," without qualifying the statement with the phrase "including applicable filing requirements."

Criticism of "One-Day Late Rule"

- Incredibly harsh result
- Exceptions to discharge must be narrowly construed in favor of the debtor

  See Grogan v. Garner, 498 U.S. 279, 286 (1991)
- Reads the 2-Year Rule for late-filed returns (523(a)(1)(B)(ii)) out of the statute
- Only exception is for returns prepared through 6020(a) seems unfair – called the "6020(a) safe harbor provision"

  Example:

  Taxpayer mails return late by 1 week – debt never dischargeable in bankruptcy

  Taxpayer fails to file return for several years, submits all information to IRS needed to prepare return, IRS prepares a return for taxpayer under 26 U.S.C. § 6020(a), taxpayer signs return – debt dischargeable through the 6020(a) safe harbor exception.

  *Taxpayer has no right to demand that the IRS prepare a return under this provision.

  *Does not encourage self-reporting of tax liability

  *Rarely done due to limited resources

6020(a) Return v. 6020(b) Return

"Section 6020(a) returns are those in which a taxpayer who has failed to file his or her returns on time nonetheless discloses all information necessary for the I.R.S. to prepare a substitute for return that the taxpayer can then sign and submit. *See* 26 U.S.C. § 6020(a).

In contrast, a § 6020(b) return is one in which the taxpayer submits either no information or fraudulent information, and the I.R.S. prepares a substitute return based on the best information it can collect independently. *See* 26 U.S.C. § 6020(b)."

In re McCoy, 666 F.3d 924, 928 (5th Cir. 2012)

***Substitute for Returns or SFRs refer to procedures outlined in 6020(b)

Circuits Still Relying on *Beard* Post-BAPCPA

Justice v. United States (In re Justice), 817 F.3d 738 (11th Cir. 2016)

-Form 1040 tax returns filed late and after SFR assessment by IRS

-Declined to address "one-day-late rule"

-BAPCPA definition of "return" also requires that the return satisfy "the requirements of applicable nonbankruptcy law" and that the term "applicable nonbankruptcy law" incorporates the *Beard* test.

-Joins the majority of Circuits, failure to timely file a return, at least without a legitimate excuse or explanation, evinces the lack of a reasonable effort to comply with the law. Delinquency in filing a tax return is relevant. Rejects 8th Cir. holding in *In re Colsen*.

-Significant factor in Court's decision is the fact that our system of taxation relies on prompt and honest self-reporting by taxpayers.

-Court does not adopt a *per se* rule. "Circumstance not presented in this case might demonstrate that the debtor, despite his delinquency, had attempted in good faith to comply with the tax laws." *Justice*, 817 F.3d at 747, n.8

Circuits Still Relying on *Beard* Post-BAPCPA

Smith v. *United States (In re Smith)*, 828 F.3d 1094 (9th Cir. 2016)

- Similar fact pattern (return increased tax liability), same holding

- IRS agreed increase in the assessment based on the late-filed form was dischargeable

-Applies *Beard* test (adopted test in pre-BAPCPA case, *In re Hatton*, 220 F.3d at 1061, but in that case no returns were actually filed by taxpayer; debtor tried to discharge the actual SFR assessments).

-Also, does not make a *per se* rule.

Circuits Still Relying on *Beard* Post-BAPCPA

Giacchi v. United States (In re Giacchi), No. 15-3761, 2017 WL 1753244 (3rd Cir. May 5, 2017).

-Same fact pattern, same holding

-Declines to rule on "One-Day-Late Rule"

-Adopts *Beard* test as "applicable nonbankruptcy law."

-Joins majority that timing of the filing of a tax form is relevant to determining whether the form evinces an honest and reasonable attempt to comply with tax law and rejects 8th Circuit's holding in *In re Colsen*.

Circuit Split?

Primary Split:

First, Fifth and Tenth Circuits – Tax debt can never be discharged if return was filed even one day late.

Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits – Using four-part *Beard* test.

Secondary Split:

-Timing of filing of tax form is relevant to determining whether form evidences an honest and reasonable attempt to comply with tax law.

Justice, 817 F.3d at 746; *Payne*, 431 F.3d at 1057-60; *Moroney*, 352 F.3d at 907; *Hatton*, 220 F.3d at 1060-61; and *Giacchi*, 2017 WL 1753244 at 16.

-Timing is not relevant. Inquiry focuses on the content of the form, not circumstances of its filing. Delinquency in filing the return or the reason for the delinquency is irrelevant.

Colsen, 446 F.3d at 840.

Supreme Court Avoiding Issue

Supreme Court denied cert on 2 occasions:

1) *In re Mallo*, 774 F.3d 1313 (10th Cir. 2014), *cert. denied.* *Mallo v. IRS*, 135 S.Ct. 2889, 192 L.Ed.2d 924 (2015)

2) *In re Smith*, 828 F.3d 1094 (9th Cir. 2016), *cert. denied.* *Smith v. IRS*, No. 16-497 (Feb. 21, 2017)

Internal Revenue Service's Position

- Chief Counsel's Notice 2010-016 (September 2, 2010)

  Reading § 523(a) to "create[] the rule that no late-filed return could qualify as a return" would result in a superfluous reading of § 523(a)(*), since all 6020(b) returns are always prepared after the due date." The notice concludes that 523(a) in its totality does not create the rule that every late-filed return is not a return for dischargeability purposes."

  I.R.S. Chief Couns. Notice No. CC-2010-016 at 2 (Sept. 2, 2010).

- Other Taxing Authorities:

  Ohio Department of Taxation - ???????

  Local - ??????

What's a Practitioner to Do?

1. Your client filed a Form 1040 after a SFR Assessment was made.

- It's going to be an uphill battle; great weight of the authority against you.

"Forms filed after their due dates and after an IRS assessment rarely, if ever, qualify as an honest or reasonable attempt to satisfy the tax law." *Giacchi,* 3rd Cir.

- Cases have left some wiggle room. *See, e.g., In re Earls*, 549 B.R. 871 (Bankr. S.D. Ohio 2016)
- The right facts may lead to a different conclusion:
  1) Look at the timing - Return filed prior to 6020(b) assessment
  2) Reason for not filing return timely (illness?, hospitalization?)
  3) If filed return increased tax liability, IRS may agree to discharge that tax debt

     See Smith, 9th Cir. and Chief Counsel Notice 2010-016.

What's a Practitioner to Do?

2. What about late-filed returns generally?

-Case law is still developing. The tax debt is not dischargeable in 3 circuits so far.

-Sixth Circuit has not directly addressed the issue of the impact on the definition of "return" added to the Bankruptcy Code in BAPCPA.

In *Hindenlang*, the Court specifically noted that it was not addressing the issue as it relates to state, municipal, or other tax liability. 164 F.3d at 1033 n. 4.

Judge Walter sternly rejected "one-day-late" rule in *McBride v. City of Kettering (In re McBride)*, 534 B.R. 326 (Bankr. S.D. Ohio 2015).

We do have 1 unreported decision from N.D. Ohio adopting the "one-day-late" rule. Debtor was pro se. *See In re Links*, Nos. 08-3178, 07-31728, 2009 WL 2966162 (Bankr. N.D. Ohio Aug. 21, 2009).

In Closing

"Far from achieving its clarifying purpose, § 523(a)(*) stirred more controversy about whether a document qualifies as a return."

McBride v. City of Kettering (In re McBride), 534 B.R. 326, 333 (Bankr. S.D. Ohio 2015)(citing *Perkins v. Mass. Dept. of Revenue (In re Perkins)*, 507 B.R. 45, 49 (D. Mass. 2014), *aff'd*, 779 F.3d 1).

By: Terry Serena, Esq.
Serena Law LLC
4555 Lake Forest Drive, Suite 650
Cincinnati, OH 45242
Direct: (513) 254-5123; terry@serenalawllc.com

Midwest Regional Bankruptcy Seminar – August 23, 2017

Dangerously Simplified Outline for Dischargeability of Federal Taxes

Practice Note: Determinations require *recent* IRS "Account Transcripts"; obtainable by client at "Get a Transcript" at irs.gov, or by practitioner from the Practitioner's Priority Line (also noted at irs.gov) which requires Form 2848 POA, or the presence of client during the call.

	11 USC §
I. All taxes (debts) are dischargeable unless a specific exception applies (are dischargeable if *any* exception applies), and are *non-dischargeable if any* exception applies.	
II. Exceptions arise under Sections 523, which incorporates Section 507, in part, and the Sections applicable to each Chapter:	
III. **Exceptions Applicable to All Taxes –** Nondischargeable If *An*y of the Following Apply; Dischargeable if none of the following apply:	
A. Taxes arising during "gap period" (involuntary cases) and certain priority taxes (below).	523(a)(1)(A)
B. Return or "equivalent report", if due (required), not filed prior to bankruptcy petition date).	523(a)(1)(B)(i)
C. Return or equivalent report delinquently **"filed after 2 years before the filing of the petition"** – **"2-year Rule"** (for most situations, filed within 2 years of the bankruptcy.	523(a)(1)(B)(ii)
D. Taxes with respect to which the debtor (i) filed a **fraudulent retur**n or (ii) **willfully attempted in any manner to evade of defeat**.	523(a)(1)(C)
IV. **Exceptions Applicable to Pre-Petition Income Taxes ("tax on or measured by gross income")**	523(a)(1)(A) incorporating portions of § 507
A. Taxes for which required return, is last due (**including extensions)** after 3-years before the bankruptcy filing – "**3-Year Rule"**	507(a)(8)(A)(i)
B. Taxes assessed within 240 days of petition date (**"240-Day Rule")** as 240 days is expended by Offer in Compromise "pending or in effect", or prior bankruptcy pending **within** the 240 days.	507(a)(8)(A)(ii)
C. Taxes which are "**not assessed but assessable after the commencement of the case**", subject to noted exceptions by references to Section 523(a)(1)(B) and 523(a)(1)(C).	507(a)(8)(A)(iii)
V. **Withholding taxes for which the debtor is liable in any capacity**.	507(a)(8)(C)
VI. **Taxes on prepetition priority wage claims under Section 507(a)(4)** subject to 3-year rule.	507(a)(8)(D)
VII. **Excise taxes** – subject to a modified 3-year rule.	507(a)(8)(E)
VIII. **Penalties – Non- Dischargeable** if they relate to non-dischargeable tax **and** were incurred **within 3 years** of the petition date; **Dischargeable** if they either relate to a dischargeable tax **or** were incurred more than 3 years before the bankruptcy filing.	523(a)(7)
IX. **Interest** – goes with the tax or penalty as to whether it is dischargeable or non-dischargeable.	See accompanying outline
X. **Tolling** extends the above-referenced time periods under specific circumstances.	

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By: Terry Serena, Esq.
Serena Law LLC
4555 Lake Forest Drive, Suite 650
Cincinnati, OH 45242
terry@serenalawllc.com
serenalawllc.com

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Dischargeability of Federal Tax Debts Under Chapters 7, 9, 11, 12 & 13

Table of Contents

I. Overview of Dischargeability Scheme.

All debts are dischargeable in bankruptcy unless a specific exception applies. 11 U.S.C. §§ 727(b), 944(b), (c), 1141(d), 1228(a) & 1328(a)(2). "The party seeking to establish an exception to the discharge of a debt must prove the requisite elements by a preponderance of the evidence." Pazdzierz v. First American Title Ins. Co. (In re Pazdzierz), 718 F. 3d 582, 586 (6th Cir. 2013)(*citing* Grogan v. Garner, 498 U.S. 279, 291 (1991); JP Morgan Chase Bank, N.A., v. Zwosta (In re Zwosta), 395 B.R. 378, 382 (B.A.P. 6th Cir. 2008). In dischargeability proceedings, "[e]xceptions to discharge must be strictly construed in favor of the Debtors." Steinkrauss v. United States (In re Steinkrauss), 313 B.R. 87, 91 (Bankr. D. Mass. 2004), *citing*, Grogan v. Garner, 498 U.S. 279 (1991).

II. Sections 523 and 507 As Starting Points for Dischargeability Determinations.

Aside from categorical exceptions, such as where a creditor in a Chapter 7 Asset or Chapter 13 case fails to receive notice in time to file a claim, 11 U.S.C. § the starting point for determining the dischargeability of a particular tax debt is a matter of understanding the extent to which the discharge provision of a particular Chapter incorporates Bankruptcy Code Section 523. This provision, entitled "Exceptions to discharge", is only fully incorporated in the discharge provisions of Chapters 7, and, but is referenced to some extent in every discharge provision except that governing non-individual Chapter 11 discharges.[1] Section 523, in turn, incorporates Section 507(a)(3)("gap period" taxes), which is rarely applicable, and 507(a)(8)(prepetition taxes), which controls the discharge of tax in the majority of instances. Not all of Section 523(a)(8) is incorporated into the discharge provision of particular Chapters. For example, Section 1328(a)(2) only incorporates Section 507(a)(8)(C)(trust fund taxes) and not the entirety of the subsection for Chapter 13 cases.

[1] Id., § 1141(d)(1).

Terry Serena
Attorney-at-Law
Cincinnati, OH
terry@serenalawllc.com
serenalawllc.com

A. Sub-Section 523(a)(1)(A).

1. Certain "gap period" taxes under Section 507(a)(3).

Taxes, and debts in general, that arise in involuntary cases are allowable as prepetition priority claims pursuant to Sections 507(a)(3) and 502(f). 11 U.S.C. § 523(a)(1)(A). These provisions encompass any debt which arises during the time in an involuntary case between the commencement of the case and the earlier of the appointment of a trustee or entry of an order for relief.[2] Such debts are deemed to have arisen immediately before the filing of the involuntary petition. *See, e.g.*, In re BAAB Steel, Inc., 495 B.R. 530 (Bankr. D. Colo. 2013); In re Black Diamond Mining Co., LLC, Case No. 08-70066, Bankr. E.D. Ky., Feb. 10, 2010 (both cases involving the provision of legal services during the gap period).

2. Priority taxes under Section 507(a)(8).

Priority taxes are discussed in the Section I. C. of this paper.

B. Sub-Sections 523(a)(1)(B)(i) and 523(a)(1)(B)(ii).

These provisions apply to Chapter 7, individual Chapter 11, Chapter 12 and, post-BAPCPA, to Chapter 13 cases.

1. – Subsection (i): Taxes relating to unfiled returns.

In the wording of the statute, taxes "with respect to which a return, or equivalent report or notice, if required— (i) was not filed or given" are excepted from discharge.

The nondischargeability of taxes relating to unfiled returns is not controversial. However, taxes relating to the "functional equivalent" of an unfiled return are the subject of all disputes over whether a return filed after the tax authority has already assessed tax under "substitute for return" procedures (including state and local counterparts), and whether a delinquent return, without more (the "1-day late rule"), are "tax returns" for purposes of dischargeability.

2. – Subsection (ii): Taxes for the return was delinquently filed "after 2 years before" the petition date ("2-year rule").

The statutory wording encompasses "with respect to which a return, or equivalent report or notice, if required — . . . **(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". The corollary is that taxes relating to a return that was delinquently filed more than 2 years before the petition date are dischargeable.

This provision is in dispute in return-after-SFR, and 1-day late rule, cases. While the assertion of either principle is based on the premise that the delinquent return was not a return for dischargeability purposes, debtors opposing either principle advance the proposition that the return in question was outside the 2-year rule and the related taxes are therefore dischargeable (i.e., that the tax return document, such as a Form 1040, was a return that was filed more than 2-years before the bankruptcy filing. These issues are discussed elsewhere in this outline.

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[2] Id., § 502(f).

a. "Or Equivalent Report or Notice"

The phrase "return or equivalent report or notice, if required", in Section 523(a)(1)(B)(i), has provided some hope for debtors who have not filed actual returns, but have executed and/or filed documents that serve the principal purpose of tax returns, which is to allow for the assessments of tax. This phrase, though, has been consistently interpreted as a restriction rather than an expansion of circumstances allowing for the dischargeability of taxes. That is, the phrase is understood to mean that taxes are not dischargeable if a required return is not filed, *or* if a required equivalent report is not filed, or if a required notice is not filed, by the taxpayer. "Equivalent report or notice" does not allow the substitution of a comparable document *instead* of a tax return. State of Maryland v. Ciotti (In re Ciotti), 638 F.3d 276, 279-280 (4th Cir. 2011); Green v. Internal Revenue Service (In re Green), 472 B.R. 347, 365 (Bankr. W.D. Tex. 2012). For example, where state law requires taxpayers to report any IRS adjustments to their federal AGI, the failure to do so can constitute a failure to file an equivalent report or notice. Ciotti, at 279. In such an instance, a taxpayer would have to have filed an original return and the subsequent equivalent report or notice in order to cause the related taxes to be dischargeable (assuming no other exception to discharge applied).[3]

b. Application in individual Chapter 11 and Chapter 13 cases.

1. Chapter 13 Cases

The importance of the addition of the 2-year rule to Chapter 13's discharge provision, Section 1328(a)(2), cannot be understated since it will capture many liabilities which were previously discharged, and because the 2-year rule wrecks particular havoc for affected Chapter 13 debtors due to the unique nature of Chapter 13 practices and procedures. Because taxes for which the 2-year rule is applicable are often if not usually for older tax years (with return due dates more than 3 years before the commencement of the bankruptcy), they are, and must be claimed by the IRS as, general unsecured debts (unless secured) which are typically paid at a low percentage. Thus, in a 1% Chapter 13 Plan, 99% of the debt plus postpetition interest remains due from the post-discharge debtor. This result obtains with taxes relating to unfiled returns, as well, which was also added to Section 1328(a)(2) by BAPCPA, but incorporation of the 2-year rule in Chapter 13 cases, it is submitted, is more startling and less justified than the situation of unfiled returns (which are often weeded out under BAPCPA's return requirements, in any event).

2. Individual Chapter 11 Cases.

Section 1141 incorporates Section 523 *in toto,* thereby equating discharges in individual Chapter 11 cases with individual Chapter 7 discharges. Only non-individual, non-liquidating reorganizations under Chapter 11 receive a "super discharge" that discharges all prepetition and administrative period debts by substituting the debt with the applicable provisions under the Chapter 11 Plan (with the exception of tax debts based in fraud and similar conduct). This is the result of the statutory section making no reference to Section 523, in distinction to the discharge provisions for all other Chapters and types of debtors. For narrow fraud exception to discharges in non-individual, non-liquidating cases, see 11 U.S.C. § 1141(d)(6).

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[3] States generally require the filing of an amended return, or a comparable form ("equivalent to an amended return"?), to report the increased taxable income where the IRS has adjusted the taxpayer's federal return to assess additional tax. *See*, *e.g.*, Ky. Rev. Stat. § 141.210(1), (4)(b)(30 Days); amended return required: Ohio Rev. Code § 5747.10 (60 Days), and Ind. Code § 6-3-4-6 (120 Days).

Terry Serena
Attorney-at-Law
Cincinnati, OH
terry@serenalawllc.com
serenalawllc.com

C. Taxes relating to a fraud or "willful attempts to evade or defeat" – § 523(a)(1)(C).

Subsection 523(a)(1)(C) excepts from discharge taxes with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat . . .."

1. Taxes Relating to Fraudulent Returns.

Under Title 26, "[f]raud is an intentional wrongdoing designed to evade tax known or believed to be owing." Mason v. Commissioner, T.C. Memo. 2004-247; McGee v. Commissioner, T.C. Memo. 2000-308; Edelson v. Commissioner, 829 F.2d 828, 833 (9th Cir. 1987). Put another way, tax fraud is engaging in acts designed to obtain a benefit to which the taxpayer knows he is not entitled. "The required state of mind is one which, 'if translated into action, is well calculated to cheat or deceive the government.'" Sowards v. Commissioner, T.C. Memo. 2003-180. The elements of civil tax fraud have been found to be synonymous with the term "willful" as used in the criminal prohibitions of I.R.C. § 7201, *et seq*., and are the "voluntary, intentional violation of a known legal duty." Niedringhaus v. Commissioner, 99 T.C. 202, 217 (1992).

Actual determinations of civil fraud under I.R.C. § 6663, or its criminal counterpart under I.R.C. § 7201, are rare. Where encountered, the tax and the interest on tax would be nondischargeable, and the fraud penalty (and interest on the penalty) would also be nondischargeable *if and only if* the "transaction or event" (generally the filing of the return) occurred within 3 years of the petition date. 11 U.S.C. § 523(a)(7), discussed below. *E.g.,* May v. Missouri Dep't of Revenue (In re May), 251 B.R. 714, 719 (B.A.P. 8th Cir. 2000) (United States conceded the point); Miller v. United States (In re Miller), 176 B.R. 266, 268 (Bankr. M.D. Fla. 1994).

2. Willful attempts "in any manner to evade or defeat" (The "Toti Rule").

Willful attempts "in any manner to evade or defeat" a tax can be found in a debtor's omissions of income as well as commissions. *See discussion and citations in,* Steinkrauss v. United States (In re Steinkrauss), 313 B.R. 87, 91-97 (Bankr. D. Mass. 2004); *see also*, Toti v. United States (In re Toti), 24 F.3d 806 (6th Cir. 1994). Applications of this principle of fraud by omission are found in the context of egregious behavior, such as a pattern of not filing returns and paying the tax due, where the debtor had more than the wherewithal to do so. *See also*, May, 251 B.R. at 719, where the Court distinguished between fraud and "willful attempts to evade or defeat . . .."

D. Nonpecuniary loss penalties – Section 523(a)(7).

Nonpecuniary tax penalties are **not** dischargeable if they relate to a nondischargeable tax **and** the penalty is imposed with respect to a transaction or event, which occurred **within** three years of the petition date. Conversely, penalties **are** dischargeable if they relate to dischargeable taxes **or** they arise from transactions or events occurring **more than** three years before the commencement of the bankruptcy case. E.g., In re Brabham, 212 B.R. 999, 1000 (Bankr. M.D. Ala. 1997). See Chart, below.

The wording of the subsection is difficult to follow. "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." Burns v. United States (In re Burns), 887 F.2d 1541, 1544 (11th Cir. 1989); McKay v. United States, 957 F.2d 689, 693 (9th Cir. 1992); Roberts v. United States (In re Roberts), 906 F.2d 1440, 1443 (10th Cir. 1990)(which found this provision straightforward and "neither ambiguous nor difficult to understand). Section 523(a)(7) has been found to operate to discharge penalties, if relating to

Terry Serena
Attorney-at-Law
Cincinnati, OH
terry@serenalawllc.com
serenalawllc.com

events or transactions occurring more than 3 years before the bankruptcy, even where returns not filed prepetition. In re Wright, 244 B.R. 451, 457-458 (Bankr. N.D. Cal., 2000); ; In re Sgarlat, 271 B.R. 688 (Bankr. M.D. Fla. 2001)(conceded by the government).

Examples of nonpecuniary loss penalties under the Internal Revenue Code are those for failing to timely file a return or pay tax under I.R.C. § 6651(a)(1) and (2), failure to properly pay estimated taxes under § 6654(a), negligence and substantial understatement of income tax under § 6662(a), and penalties for filing a fraudulent return under § 6663 (as well as "fraudulent failure to file" under § 6651(f)). Notably, subsection 523(a)(7) does not apply to non-individual Chapter 11 and Chapter 13 discharges, and, as such nonpecuniary loss penalties are always dischargeable in either Chapter.

Chart 1 - Dischargeability of Nonpecuniary Loss Tax Penalties

Dischargeable	Nondischargeable
1. Penalty relates to a dischargeable tax -or- 2. Penalty was imposed with respect to a transaction or event, which occurred more than 3 years prior to the bankruptcy petition date. **Example**. In a bankruptcy filed on August 20, 2014, the IRS has filed a claim for the debtor's **2010** income taxes which includes a fraud penalty under I.R.C. § 6663(a). The tax was assessed based on a determination that the taxpayer filed a fraudulent return on April 15, 2011. The tax and interest on the tax are nondischargeable under Section 523(a)(1)(C), but the fraud penalty is dischargeable under Section 523(a)(7) because it relates to a nonpecuniary loss penalty that was imposed with respect to a transaction or event which occurred more than 3 years of the bankruptcy petition date (the transaction being the filing of the fraudulent return more than 3 years before the commencement of the bankruptcy).	1. Penalty relates to a nondischargeable tax -and- 2. Penalty was imposed with respect to a transaction of occurrence which occurred within 3 years of the bankruptcy petition date. **Example**: In a bankruptcy filed on August 20, 2014, the IRS has filed a claim for the debtor's **2011** income taxes which includes a "substantial understatement of income tax" penalty under I.R.C. § 6662(a). This penalty is imposed on the basis of the debtor's return which was filed, without extension, on April 15, 2012. The tax is a priority claim and thus nondischargeable in any case where Section 523(a)(1) applies, and the penalty was imposed with respect to an event which occurred within 3 years of the bankruptcy petition date.

Pecuniary loss penalties (to the extent such a penalty can be found in the Internal Revenue Code) that relate to priority taxes are themselves priority claims under Section 507(a)(8)(G), discussed below. Interest on a nondischargeable penalty, as with nondischargeable taxes, is also nondischargeable. In re Jaylaw Drug, Inc., 621 F.2d 524 (2nd Cir. 1980); Hanna v. United States, 872 F.2d 829 (8th Cir. 1989).

E. Priority Taxes That Are Incorporated Into Section 523(a)(1)(A).

1. Gap Period Taxes – Sub-Section 507(a)(3).

Discussed above, at I. .

2. Pre-Petition Taxes Entitled to Priority – Sub-Section 507(a)(8).

a. Determining Pre- and Postpetition Status

The principles that distinguish prepetition tax debts from postpetition taxes are relevant to a number of provisions under the Code, most notably with regard to setoffs under Section 553. Essentially, for "non-divisible" taxes, such as income tax, the tax period ends on the last moment of the tax year. Joye v. Franchise Tax Board (In re Joye), 578 F.3d 1070, 1077 (close of tax period determines pre- or postpetition nature of debt in subsequently filed bankruptcy); In re Senczyszyn, 426 B.R. 250 (Bankr. E.D. Mich. 2010; Beaucage v. United States (In re Beaucage), 334 B.R. 353 (Bankr. D. Mass. 2005) (setoff case turning on "mutuality" of debts under § 553, as are many cases discussing this issue); In re Conti, 50 B.R. 142, 148 (Bankr. E.D. Va. 1985)(setoff case deciding that December 31 is the determinative date for character of taxes as pre- or postpetition); compare, United States v. Ripley (In re Ripley), 926 F.2d 440 (5th Cir. 1991)(taxes "become payable" when return is due).

Income taxes, for example, are non-divisible because a taxpayer's tax profile can change up until the end of the period. Divisible taxes, such as employment taxes reported by Form 941, are "divisible" because the liability to date is fixed upon each payment of wages. Employment taxes ("any tax imposed by subtitle C" of the Internal Revenue Code, and the Trust Fund Recovery Penalty under I.R.C. §6672, are also statutorily defined as "divisible". Although Subtitle C includes Form 940 FUTA taxes, although the IRS has traditionally viewed 940 taxes to be an annualized liability.

For divisible taxes, liabilities for the year in which the bankruptcy is filed are always postpetition debts which are not to be prorated between pre- and postpetition periods. E.g., In re Holmes, 312 B.R. 876, 878 (Bankr. W.D. Tenn. 2004). For example, for a bankruptcy filed on February 5, 2014, the debtors 2014 income taxes are a postpetition debt. (See "Determining Pre- and Postpetition Status", below.) The IRS splits Form 941 liabilities as pre- or postpetition debts based on the date the bankruptcy case was filed.

3. Sub-Section 507(a)(8)(A) – Income taxes ("a tax measured by income or gross receipts"):

(i) for which a return was due within 3 years of the petition date ["3-Year Rule"];

(ii) which were assessed within 240 days of the bankruptcy ["240-Day Rule"];

which 240-day period is suspended by the time during which an IRS Offer-in-Compromise "with respect to that tax was *pending or in effect* during [the] 240-day period, plus 30 days"[4] and/or

[4] An Offer-in-Compromise, if accepted by the IRS and consummated by the required payment(s), is "in effect" for the 5-year period from the date of the acceptance. *See* IRS Form 656 Package. In order for this provision to apply, either (1) an existing Offer-in-Compromise would have to encompass unassessed tax (unassessed at the time the Offer was submitted), which is allowed only in limited circumstances; or (2) an Offer would have to be submitted within the 240 days that is either withdrawn or abandoned by the taxpayer in favor of filing bankruptcy, by far the more likely scenario. The possibility of an Offer begin submitted within the 240 days and accepted by the IRS is remote. The unlikeliness of this latter scenario is due to the fact that, as of this writing, the IRS takes more than 240 days to either accept or deny (except on procedural grounds) an Offer.

Terry Serena
Attorney-at-Law
Cincinnati, OH
terry@serenalawllc.com
serenalawllc.com

is suspended by the period of time for which collection was stayed by a prior bankruptcy case during the 240 days, plus 90 days;

(iii) taxes which were not assessed prior to the bankruptcy but which were assessable ["not assessed but assessable"], except for those types of taxes which are specified in Section 523(a)(1)(B) [encompassing taxes based on unfiled returns and returns filed delinquently within 2 years of the petition date] or 523(a)(1)(C) [taxes relating to fraud, willful evasion, *etc.*]. This category typically encompasses proposed audit adjustments which are pending and not yet assessed as of the petition date.

Subsection (B) – Excepts state or local property taxes payable within 1 year prior to the commencement of the bankruptcy from discharge.

4. Subsection (C) – Trust Fund Taxes – Section 507(a)(8)(C).

"[T]ax[es] required to be collected or withheld and for which the debtor is liable in whatever capacity". *Id.*, (C). Although there are several taxes that have trust fund components, such as several excise taxes, trust fund taxes usually relate an employer's obligation to withhold ("collect") and pay over income and FICA taxes which, for the failure to do so, I.R.C. § 6672(a) imposes personal liability on the "responsible person" who "willfully fails to collect" and turn over the trust fund taxes.. The employer's matching portion of FICA and FUTA (Form 940) taxes are not trust fund taxes.[5]

The IRS has stated its position that trust fund taxes will be considered to have been excepted from "Chapter 7" discharges (i.e., discharges which are determined by Section 523 in its entirety) *whether or not the IRS files a claim for these liabilities*. IRM 5.9.17.15.1(1). This would seem to be based upon the language of 11 U.S.C. § 523(a)(1)(A) which states that priority taxes in general are excepted from discharge, where this provision controls, "whether or not a claim is filed or allowed."

5. Subsection (D) – Prepetition employment taxes – Section 507(a)(8)(D).

Prepetition employment taxes on compensation earned from the debtor for which the return was due within 3 years of the petition date, including extensions.

6. Subsection (E) – Certain Excise Taxes – Section 507(a)(8)(E)

Excise taxes on prepetition transactions for which the return was due within 3 years of the petition date, including extensions, or, if no return was required, on transactions which occurred during the 3-year period immediately preceding the filing of the bankruptcy.

7. Subsection (F) – Customs Duties – Section 507(a)(8)(F)

Certain customs duties arising out of the importation of merchandise within 1 year prior to the commencement of the bankruptcy, or, in circumstances requiring a certification by the Secretary of the Treasury, within 4 years of the petition date.

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[5] I.R.C. § 7501 establishes the trust fund nature of taxes which are required to be collected or withheld: such funds "shall be held to be a special fund in trust for the United States."

8. Subsection (G) – Pecuniary Loss Penalties – Section 507(a)(8)(G)

Penalties related to a type of tax described in Sections 507(a)(8)(A) through (F) and are "in compensation for actual pecuniary loss" are themselves priority taxes. Courts have struggled to find an actual penalty under the Internal Revenue Code that fits this description. E.g., In re Cespedes, 393 B.R. 403 (Bankr. E.D. N.C. 2008); In re Allen, 272 B.R. 91(Bankr. E.D. Va. 2002). Clearly, the label which is attached to a particular extraction, whether as a penalty or a tax, is not determinative. United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213, 218 (1996). While the Trust Fund Recovery Penalty under I.R.C. § 6672 is imposed to compensate the government for actual losses, this provision has been held to be a "tax" regardless of its label or placement in the Internal Revenue Code, United States v . Sotelo, 436 U.S. 268 (1978); Mosbrucker v . United States (In re Mosbrucker), 227 B.R. 434, 437 (B.A.P. 6th Cir. 1998), and is separately dealt with by Section 507(a)(8)(C). Liability for trust fund taxes is separately encompassed by subsection 507(a)(8)(C), in any event. Penalties under the tax code are, almost without exception if not without exception, nonpecuniary loss penalties of the type encompassed by Section 523(a)(7), *discussed below*.

F. Priority Taxes *Not* Incorporated Into Section 523(a)

1. Administrative claims – Section 507(a)(2)

Any postpetition tax incurred by the estate within the meaning of Section 503(b)(1)(B), which is incorporated by reference into Section 507(a)(2). Although dischargeable, administrative claims should be paid in full as a second priority claim (to the extent assets are available to do so), with only the legitimately unpaid portion being discharged.

2. Taxes on priority wage claims – Section 507(a)(4)

The Trustee is the "employer" for purposes of the employment tax obligations, including the trust fund taxes, which arise from the payment of wage claims. Otte v. United States, 419 U.S. 43, 57 (1974). Taxes are to be paid to the extent property of the estate is available to do so, with the remaining liability being subject to discharge.

G. Interest Afforded Same Priority As Underlying Tax

As a general proposition, interest on a tax liability is afforded the same treatment as the tax itself.[6] Interest is also a part of the claim for tax debts, United States v. Friendship College, Inc. (In re Friendship College, Inc.), 737 F.2d 430 (4th Cir. 1984)(decided in context of Section 503 analysis); In re Thompson, 67 B.R. 1 (Bankr. N.D. Ohio 1984), and carries the same priority as does the tax. *E.g.*, Miller v. Internal Revenue Service (In re Miller), 300 B.R. 422, 429 (Bankr. N.D. Ohio 2003). Penalties for administrative claims are, by statute, afforded the same treatment as the underlying tax[7], which is not the case for prepetition claims where penalties are separately classified. Interest on a nondischargeable penalty, as with nondischargeable taxes, is also nondischargeable. In re Jaylaw Drug, Inc., 621 F.2d 524 (2nd Cir. 1980); Hanna v. United States, 872 F.2d 829 (8th Cir. 1989).

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[6] IRC §§ 6601(e)(1), 6665(a)

[7] 11 U.S.C. § 503(b)(1)C)

Terry Serena
Attorney-at-Law
Cincinnati, OH
terry@serenalawllc.com
serenalawllc.com

III. Tolling

Tolling in this context is the suspension, and therefore, the prolongation, of the various time periods for determining dischargeability (such as the "3-year" and "240-day" rules) by events or circumstances which transpired or existed between the commencement of the dischargeability period (e.g., due date of return for 3-year rule) and the filing of the bankruptcy in which the dischargeability question arises. Prior to BAPCPA, the rules were judicially created, although statutorily based, often with a view to the equities of the result where the time periods were *not* suspended. BAPCPA, though, codified tolling but with significant differences from prior law.[8]

A. Extension of 240-day rule under Section 507(a)(8)(A)(ii)

Priority taxes include those which were assessed within 240 days of the bankruptcy filing. Prior law excluded from the 240-day calculation (essentially suspending its running) during the time that an offer-in-compromise was pending. BAPCPA modified this to suspend the 240-day calculation during the time an offer was pending *or in effect* during the 240 days, plus an additional 90 days, and for the time that a stay on collection (such as with a CDP proceeding or an intervening bankruptcy) was in existence during the 240 days, plus 90 days.

See also n. 4 and related text, above.

B. General suspension for CDP proceeding or prior bankruptcy

The hanging or flush paragraph following Section 507(a)(8)(G) states that all periods specified in Section 507(a)(8) are "suspended" for the time in which collection is prohibited by reason of a CDP proceeding, plus 90 days, and for the time during which collection was prohibited either by the automatic stay in a prior case or "the existence of 1 or more confirmed plans under this title, plus 90 days."

C. Calculating Tolling

Method 1

Calculate normal period that is relevant to the inquiry (i.e., the 3-year, 240-day or 2-year rules) and add the time during which the period was suspended by reason of 1 or more bankruptcy cases or IRS Collection Due Process proceedings, including the 90-day tack-on period (or the period between prior bankruptcy if less than 90 days) for each bankruptcy.

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[8] Under prior law, tolling was applied through a series of judicial decisions which culminated in Young v. United States, 535 U.S. 43 (2002). Since tolling was not explicitly in the statute prior to BAPCPA, Courts variously relied on the general powers of Sections 105 and/or Section 108's incorporation of nonbankruptcy periods of limitations into Title 11. Some Courts found that tolling was not to be found in the Code at all. Young resolved the conflicts of authority by holding that the three-year look-back is a period of limitations subject to traditional principles of equitable tolling such that the periods for determining dischargeability (or at least the three year period) are suspended during the time the IRS is prohibited from collecting tax by reason of the automatic stay. Although a dischargeability case (albeit one determining dischargeability based on Section 523's incorporation of Section 507's priority provisions), the principles of Young would seemingly apply to priority determinations, as well.

Terry Serena
Attorney-at-Law
Cincinnati, OH
terry@serenalawllc.com
serenalawllc.com

Method 2 (useful as check)

Calculate the amount of time the period is *not* suspended by 1 or more prior bankruptcies or CDP proceedings until the amount of time equals 3 years (1095 days if no intervening leap years; 1096 days with an intervening leap year), 240 days or 2 years, whichever is relevant.

IV. Tax Liens Survive Discharge

A. General Principle

Regardless of whether the underlying tax liability is discharged in bankruptcy, federal tax liens "survive" the bankruptcy discharge. *See, e.g.*, Dewsnup v. Timm, 502 U.S. 410, 417-418 (1992)(Chapter 7 case which stated that commercial lien interests "pass] through bankruptcy unaffected."); Johnson v. Home State Bank, 501 U.S. 78, 84 (1991)(Chapter 13 case which turned upon the survival of a commercial lien in a prior Chapter 7 case, and which found that " . . . a bankruptcy discharge extinguishes only one mode of enforcing a claim -- namely, an action against the debtor in personam -- while leaving intact another -- namely, an action . . . in rem."); Farrey v. Sanderfoot, 500 U.S. 291, 297 (1991); In re Isom, 901 F.2d 744, 745-46 (9th Cir. 1990)(stating that "[a] discharge in bankruptcy prevents the I.R.S. from taking any action to collect the debt *as a personal liability* of the debtor [emphasis added] . . . but that Congress intended for valid tax liens to survive bankruptcy."); United States v. Alfano, 34 F. Supp. 827, 838 (E.D. N.Y. 1999)("discharge does not affect liability in rem and prepetition liens remain enforceable after discharge"); In re Stefenson, 96 B.R. 388 (S.D. Fla. 1988)(also involving attachment to homestead exemption); accord In the Matter of Lively, 74 B.R. 238, 239 (S.D. Ga. 1987), *aff'd*, 851 F.2d 363 (11th Cir. 1988).

B. Property acquired by debtor after bankruptcy

This is a variation in the context of Title 11 on the general rule of after-acquired property, and is dependent upon whether the underlying debt, which is secured by a tax lien, was discharged or not.

1. Discharged debts

Federal tax liens upon discharged debts do not attach to property interests acquired by debtors-taxpayers after commencement of the case, but are limited to prepetition property rights (property of the estate, excluded, exempt and abandoned property) which themselves come through the bankruptcy case. *See*, In re Wessel, 161 B.R. 155, 159 (Bankr. D. S.C. 1993) (stating that tax liens " . . . will not attach to property, or rights to property that [the debtor] acquires post-petition," but also finding that tax liens attach to existing (prepetition) rights to future (postpetition) payments.); In re Leavell, 124 B.R. 535, 540 (Bankr. S.D. Ill. 1991) ("Tax liens securing dischargeable debts, however, do not attach to after-acquired property. [citations omitted]."), partially overruled on other grounds, Dewsnup v. Timm, 502 U.S. 410 (1992); United States v. McGugin (In re Braund), 423 F.2d 718 (9th Cir. 1979) (*per curiam*); Drake v. Mass. Dept of Rev. (In re Drake), 434 B.R. 11, 23 n. 80 (Bankr. D. Mass. 2010); Dishong v. Dep't of Treasury (In re Dishong), 188 B.R. 51, 55 (Bankr. M.D. Fla. 1995).

2. Nondischarged debts

Federal tax liens for nondischargeable debts attach to property acquired by the debtor following commencement of the bankruptcy case. *E.g.*, In re Olson, 154 B.R. 276, 282 (Bankr. D. N.D. 1993)(expressly distinguishing between the reach of tax liens securing nondischargeable and dischargeable tax debts); In re Wukelic, 544 F.2d 285, 291 (6th Cir. 1976).

Terry Serena
Attorney-at-Law
Cincinnati, OH
terry@serenalawllc.com
serenalawllc.com

3. Post-discharge fluctuations in value

Regardless of whether a surviving lien attaches only to property which itself came through the bankruptcy or attaches to property newly acquired by the debtor after the bankruptcy case, the United States' lien interests like those of creditors generally receives the benefit or suffers the detriment of changes in value to the secured assets.

The practical effect of [the debtor's attempt to strip the lien in question from the property of the estate at issue] is to freeze the creditor's security at the judicially determined value. By this approach, the creditor would lose the benefit of any increase in the value of the property by the time of the foreclosure sale. We think, however, that the creditor's lien stays with the real property until the foreclosure. That is what was bargained for by the [parties]. . . . Any increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the creditor, not to the benefit of the debtor and not to the benefit of other unsecured creditors.

V. Section 523 for Purposes of Discharges Under Chapters 7, 9, 11, 12 & 13.

A. Chapter 7 Discharges – 11 U.S.C. § 727(a)

Exceptions to discharge under Chapter 7 are those specified in Section 523, as discussed above.

B. Chapter 9 Discharges – 11 U.S.C. § 944(b)-(c)

Discharges in Chapter 9 cases can be summed up, for the purposes of this presentation, in a sentence: "all debts" are discharged upon confirmation" and (essentially) consummation of a Plan "except those which are excluded by the Plan itself or the Order of confirmation, or are held by a creditor which "had neither notice nor actual knowledge of the case [before confirmation]." 11 U.S.C. § 944(b), (c)

C. Chapter 11 Discharges – 11 U.S.C. § 1141(d)

The extent of Chapter 11 discharges in any given case is dependent upon whether the debtor is an individual or not, and whether, if not, the case is one of liquidation or reorganization (or, more precisely, not a liquidating case).

1. Corporate and other non-individual debtors in reorganization (more precisely, non-liquidating) cases receive discharges of all debts arising prior to confirmation (*cf.*, petition) with the exception, for corporations, of taxes relating to fraudulent returns or willful evasion. 11 U.S.C. § 1141(d)(1) and (6). Thus, administrative claims, which arise after the commencement of the case, are subject to discharge, but should be paid in full in any event.[9]

2. Non-individual liquidations (where "the plan provides for liquidation of all or substantially all of the property of the estate") and the debtor does not thereafter engage in business do not receive discharges.[10]

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[9] 11 U.S.C. § 1129(a)(9)(A)

[10] *Id*, § 1141(d)(3)

3. Individual Chapter 11 debtors are not discharged of any debt specified in Section 523, essentially receiving a Chapter 7 discharge.

D. Chapter 12 Discharges – 11 U.S.C. § 1228(a)

Certain long-term debt and debts "of the kind specified in section 523(a)" are excepted from discharge. 11 U.S.C. § 1228(a).

E. Chapter 13 Discharges – 11 U.S.C. § 1328(a)

Chapter 13 allows for two types of discharges, the generally granted relief from debt under subsection (a) and "hardship" discharges under subsection (b). Prior to BAPCPA, taxes along with most other types of debts were subject to the "super-discharge" of Chapter 13 whereas any tax which was "provided for" (a minimal standard essentially meaning "referenced" in the Plan) were discharged.

Section 1328(a)(2) now expressly excepts several categories of federal taxes from discharge, leaving these debts as personal liabilities of debtors following the entry of a Chapter 13 discharge:

1. Trust fund taxes. Taxes specified in Section 507(a)(8)(C) which are those "required to be collected or withheld and for which the debtor is liable in any capacity". *Discussed above*. The IRS has stated its position, by way of the Internal Revenue Manual ("IRM"), that trust fund taxes will be considered to have been excepted from discharge *whether or not the IRS files a claim for these liabilities*. IRM 5.9.17.15.1(1). This would seem to be based upon the language of 11 U.S.C. § 523(a)(1)(A) which states that priority taxes are excepted from discharge "whether or not a claim is filed or allowed." However, Section 1328(a)(2) incorporates Section 507(a)(8)(C) which do not include the phrase, "whether or not . . .."

2. Taxes relating to unfiled and certain delinquently filed returns not dischargeable. Taxes specified in Section 523(a)(1)(B) which are those relating to a return ("with respect to which a return, or equivalent report or notice", if required") which is either unfiled or was filed delinquently, including extensions, within 2 years of the bankruptcy petition date.

3. Taxes relating to fraud or willful evasion are not dischargeable, as specified in Section 523(a)(1)(C), discussed above.

4. Pre- and postpetition interest on nondischargeable taxes is not dischargeable. Based on authority issued both on or before October 16, 2005, and after that date, interest on nondischargeable debts, to the extent the interest is not paid through the Plan, is also nondischargeable and will remain a personal liability of the post-discharge debtor. This includes both pre- and postpetition interest. *E.g.*, Kielisch v. Educational Credit Mgt. Corp. (In re Kielisch), 258 F.3d 315 (4th Cir. 2001); Cousins v. Internal Revenue Service (In re Cousins), 209 F. 3d 38 (1st Cir. 2000); California State Board of Equalization v. Ward, 225 B.R. 185 (B.A.P. 9th Cir. 1998) (taxing authority did not waive right to collect postpetition interest by failing to object to Plan which did not provide for interest); IRM 5.9.17.7(7).

5. Postpetition interest under the Plan. Interest is not required for payment of priority claims in a Chapter 13 case. 11 U.S.C. § 1322(a)(2)(which omits the triggering phrase that holders of priority claims are to receive "the value, as of the effective date of the plan", which Sections 1129(a)(9)(C) concerning priority tax claims, and 1325(a)(5) concerning secured claims, contain.) Section 1322(a)(1)] *allows* for the payment of postpetition interest on nondischargeable claims, but only to the extent that the debtor has disposable income available to pay interest

"making provision for full payment of all allowed claims."

6. Penalties discharged. Under Section 523(a)(7), nonpecuniary loss penalties, discussed above, are subject Chapter 13 discharge.

7. Priority taxes *in general* are not excepted from discharge by Section 1328. Significantly, Section 1328(a)(2) does *not* incorporate, and therefore does not except from discharge, priority taxes under Section 507(a)(8)*(A)*, which are the most common type of priority tax claims in Chapter 13 cases. Only trust fund taxes both constitute priority claims in all instances and are always excepted from discharge under Section 1328(a).

8. Hardship discharges of tax liabilities unaffected. The hardship provisions of subsections 1328(b) – (d) have not been changed with regard to taxes such that taxes of the kind specified in Section 523(a) – priority taxes, taxes relating to unfiled and certain delinquently filed returns, and taxes "with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax" – are/were not subject to the hardship discharge of Section 1328(c).

VI. Special Cases of Late-Filed Return Preceded by IRS Substitute for Return

Note: This topic and the so-called 1-Day Late Rule are given more extensive treatment in a separate portion of this presentation. The following is intended to provide an outline of the issue, only.

A. Statutory Framework & Central Issue

The issue in these cases is whether a tax return document, such as a Form 1040 that is otherwise, complete and accurate, is a "tax return" for the purposes of Sections 523(a)(1)(B)(**i**) and 523(a)(1)(B)(**ii**). Where a taxpayer has not filed a return in spite of numerous inquiries and notices, the IRS may proceed to the involuntary assessment by an audit procedure under I.R.C. § 6020(b) that allows the IRS to proceed to assessment by "Substitute for Return" ("SFR") procedures which are more that than a document. The taxpayer still has the right to contest the proposed assessment in the United States Tax Court before an assessment of tax and penalties can be entered.

The common scenario is that, following the assessment of income tax through SFR/ deficiency procedures, or merely by SFR audit procedures for other types of taxes, the taxpayer files a corrective return that the IRS assesses to abate the SFR assessments down to the correct amount (subject to the rare audit of the taxpayer's return. If the taxpayer's return was filed more than 2 years before the bankruptcy filing (also common), the 2-year-rule is asserted as the basis for the dischargeability of the self-reported taxes.

However, the IRS/DOJ take the position that, for dischargeability purposes, the Form 1040 is not a "tax return", which puts the taxpayer/debtor in the position of seeking discharge of taxes for which not return was filed. This is, at present, the clear majority rule among Circuit Courts of Appeal, Bankruptcy Appellate Panels, District Courts, and Bankruptcy Courts, with the lead case perhaps being United States v. Hindenlang (In re Hindenlang), 164 F.3d 1029 (6th Cir. 1999), *rev'g* 205 B.R. 874 (Bankr. S.D. Ohio 1997). *See list of accompanying representative cases.*

The basis for the result is federal common law that culminated in the Tax Court case of Beard v. Commissioner, 82 T.C. 766, 777 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986), which announced a 4-part test for determining whether a document is a tax return. Bankruptcy Code Section 523(a)(*)[the flush paragraph following subsection (a)(19)] states that a document prepared

under I.R.C. § 6020(b) is not a "return" for dischargeability purposes, but this is not determinative for the present issue because, in the cases under discussion, the documents in question are tax return documents, utilizing the correct form, etc., rather than the preceding SFR. To constitute a return under Beard and its many progeny:

- The document must purport to be a tax return;
- The document must contain sufficient information to allow for the calculation of the correct amount of the tax liability;
- **The document must evidence (or "represent") "an honest and reasonable attempt to satisfy the requirements of the tax laws"** (sometimes listed as the 4th requirement); and
- The document must be executed under penalties of perjury (which is also required by I.R.C. § 6061(a), as well. S*ee also*, Treas. Reg. § 301.6061-1).

Controversies almost always involve issue of honest and reasonable attempt to satisfy the requirements of tax law. *E.g.,* Justice v. United States (In re Justice), 817 F.3d 738, 744 (11th Cir.

- **Representative Authority**:

  Beard v. Commissioner, 82 T.C. 766, 777 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986); Swanson v. Commissioner, 121 T.C. 111, 123 (2003).

  Finding for Tax Authority

  United States v. Hindenlang (In re Hindenlang), 164 F.3d 1029, 1033 (6th Cir. 1999).
  Earls v. United States (In re Earls), 549 B.R. 871 (Bankr. S.D. Ohio 2016).
  Justice v. United States (In re Justice), 817 F.3d 738 (11th Cir. 2016).
  Marin v. United States (In re Martin), 500 B.R. 1 (D. Colo. 2015), *rev'g* 482 B.R. 635 (Bankr. D. Colo. 2012).
  Casano v. Internal Revenue Service (In re Casano), 473 B.R. 504 (Bankr. E.D. N.Y. 2012).
  Biggers v. Internal Revenue Service (In re Biggers), 528 B.R. 870 (Bankr. M.D. Tenn. 2015).

  Finding for Debtor

  Colsen v. United States (In re Colsen), 446 F.3d 836 (8th Cir. 2006).
  Briggs v. United States (In re Briggs), 511 B.R. 707, 714 (Bankr. N.D. Ga. 2014).
  Rhodes v. United States (In re Rhodes), 498 B.R. 357 (Bankr. N.D. Ga. 2013).

  Finding Against Debtor On the Facts

  Smith v. United States Internal Revenue Service (In re Smith), Case No. 15857, B.A.P. 9th Cir., July 13, 2016.

  Remanded for Factual Determination

  United States v. Martin (In re Martin), 542 B.R. 479 (B.A.P. 9th 2015)(taxpayer's failure to file his own return until 7 years after the IRS made a deficiency assessment constituted the taxpayer's "belated acceptance of responsibility" that "was not an honest and reasonable attempt to comply with the tax code.")

Terry Serena
Attorney-at-Law
Cincinnati, OH
terry@serenalawllc.com
serenalawllc.com

B. Application in Chapter 13 Cases

Because the taxes in question will always relate to returns that are filed more than 2 years before the bankruptcy filing, they are typically non-priority claims that are paid at a low percentage. (If the returns were delinquently filed within 2 years of the bankruptcy, there is no question that they are not dischargeable pursuant to (ii) of Section 523(a)(1)(B).

- In a 1% Plan, for example, if the government's position prevails, 99% of the unsecured claim plus 3-5 years of interest are waiting for the debtor-taxpayer upon the entry of a general discharge.

  There is no way around this result.

C. Substitute for Return Procedures

I.R.C. § 6020, contains two subsections that encompass widely different circumstances, and are employed with greatly different frequencies, with subjection (b) being the far more utilized, significant and controversial provision:

> (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 [sic, probably, "to be 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. (2) *Status of returns*. Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.

See also, Treas. Reg. § 301.6020-1(a), authorizing SFRs in the case of "false, fraudulent *or* frivolous return[s]" in addition to instances of unfiled returns.

1. IRC § 6020(a) – "*Preparation*" of Return by Secretary

Subsection (a) allows the IRS to prepare returns for persons who have not done so, if the taxpayer discloses "all necessary information" in the process. "Section 6020(a)" returns are signed by the taxpayer, and are not referred to as "substitutes for returns" or "SFRs". The resulting document is a "tax return" under anyone's definition. 6020(a) is rarely, if ever, utilized, in large measure because the IRS does not have the resources to complete tax returns for those in need of such service, and perhaps because private tax return services and software are so widely available.

2. Section 6020(b) – "Execution" of Return by Secretary

Subsection (b) authorizes the IRS to create and process "substitutes for return" for the purpose of making assessments in the case of "unfiled, fraudulent, false or frivolous returns". Internal Revenue Manual ("IRM") 4.12.1.8.4. Like subsection (a), the IRS' use of SFR procedures is permissive, not mandatory (i.e., in spite of "the Secretary shall make such return" in subsection (b)(1), the IRS has the discretion as to which unfiled returns it wishes to subject to SFR audit

Terry Serena
Attorney-at-Law
Cincinnati, OH
terry@serenalawllc.com
serenalawllc.com

procedures). Schiff v. United States, 919 F.2d 830, 833-834 (2nd Cir. 1990); IRS Policy Statement P-5-133; IRM 4.12.1.3 (stating "the extent to which delinquency procedures will be enforced will depend upon the facts and circumstances of each case, and by reference to factors ensuring evenhanded administration of staffing and other Service resources."

3. SFRs Are Audit Procedures, Not a Document

SFRs are more of a procedure, involving a number of documents such as transcript summaries of Forms W-2 or 1099 evidencing the taxpayer's receipt of income, a calculation of the tax, than a single document constituting a return. "An SFR, in and of itself, does not constitute a return under IRC 6020(b)." IRM 4.12.1.8.4. The statutory scheme is "merely an internal administrative device necessary for the IRS to commence the assessment process [where assessment is not authorized on the basis of a voluntarily filed return]." In re Driscoll, 379 B.R. 415, 423 at n. 14 (Bankr. D. Conn. 2008)(decided under pre-BAPCPA statute); Rev. Rul. 2007-20, 2007-14 I.R.B. 863 ("Section 6020(b) merely provides the Service with a mechanism for determining the tax liability of a taxpayer who has not filed a return.") An SFR package typically includes the appropriate tax return form, e.g., Form 1040, with minimal identifying information filled in (one referred to as a "dummy return"), but this document is not sufficient to constitute a Section 6020(b) SFR. Millsap v. Commissioner, 91 T.C. 926, 930 (1988); Wheeler v. Commissioner, 127 T.C. 200, 209 (2006).

4. Inherent Inaccuracy of Section 6020(b) Determinations

For income taxes, the IRS assigns the taxpayer single or married filing separate status, to the extent known by the IRS to be applicable (which share the same tax rates subject to varying limitations for certain deductions or credits), the standard deduction and a single personal exemption. *E.g.*, Healer v. Commissioner, 115 T.C. 316, 318 (2000); Cooper v. Commissioner, T.C. Memo. 2006-241.[11] No other deductions or credits are allowed the taxpayer except prepayment credits such as for withholding or estimated payments, and the deduction for one-half of self-employment tax where applicable. In almost all instances, this results in the IRS assessing more tax than would have been the case had the taxpayer filed a return.

Because of this inherent inaccuracy, the IRS encourages taxpayers to file tax returns even after SFR assessments have been made. E.g., IRM 25.6.1.9.4.5.1; "Filing Past-Due Returns", *and* "Notices of Past Due Tax Returns", both at irs.gov.[12]

> This is common enough--preparing an SFR often prompts delinquent taxpayers to file a return on their own. An SFR is not a comprehensive return; the Commissioner uses only one of two filing statuses--single or married filing separately--and he allows only one personal exemption and no business expenses or itemized deductions. [citation to superseded IRM provision omitted] Because an SFR is usually stingy with deductions, a taxpayer who gets the resulting notice of deficiency [discussed below] will often respond by filing a petition [with the Tax Court] . . . and then preparing a return that reflects the much more complete

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[11] Joint filing status is predicated upon express elections by taxpayers, and, therefore, cannot be made by the IRS on its own under Section 6020(b). Treas. Reg. § 1.6013-1; Rev. Rul. 2005-59, IRB 2005-37.

[12] The latter document states: "If the IRS files a substitute return, it is still in your best interest to file your own return to take advantage of all the exemptions, credits and deductions to which you are entitled. The IRS will generally adjust your account to reflect the correct figures."

> information he has about himself--especially about greater deductions he is entitled to claim, the willingness of his wife to accept married-filing-jointly status, and whether he has children or other dependents.
>
> Meyer v. Commissioner, T.C. Memo. 2013-268, Slip Op. at 3.

5. IRS' Acceptance of Returns Following ""6020(b) Assessments

If the taxpayer does file a return following an SFR assessment, the IRS, as a matter of routine and policy, abates the SFR assessment down to the amount reported by the taxpayers. IRM 5.15.3; IRS Chief Counsel Memorandum 200518001 (March 29, 2005, released May 6, 2005); *see also, e.g.*, May v. Commissioner. T.C. Memo. 2014-194, Slip Op. at 3 ("After receiving the late-filed 2004 return, the IRS abated the tax previously assessed against petitioner-husband in an amount necessary to conform the assessment to the amount petitioners had self-reported.").

VII. "1-Day Late Rule" – Summary of Emerging Exception to Discharge Based on *Any* Filing Delinquency

Three Circuit Courts of Appeal, and several lower courts, have so far ruled that filing a tax return by no later than the last day required by the relevant tax statute is a definitional requirement for the document actually being a "tax return" for purposes of bankruptcy discharges (but not necessarily, or at all, for other purposes). The opinions are based on a reading of the first sentence of Section 523(a)(*):

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (*including applicable filing requirements*). Emphasis added.

Requirements for timely filing federal income taxes under applicable non-bankruptcy law are found at IRC § 6012; Treas. Reg. § 1.6072-1; Automatic 6-Month Extensions: IRC § 6081; Treas. Reg. § 1.60812-4; *see also* Ohio Rev. Code § 5747(G); Ky. Rev. Stat. § 141.160. The "rule" does not appear to be gaining traction within other Circuits, including the lower Courts, although this cannot be assumed in any given case where the issue is one of first-impression. Nonetheless, the most recent adoption of this theory by a Court of Appeals was on February 18, 2015.

Leading Authority:

Pro: McCoy v. Miss. State Tax Comm. (In re McCoy), 666 F. 3d 924 (5th Cir. 2012); Fahey v. Mass. Dep't of Rev. (In re Fahey), 779 F.3d 1 (1st Cir. 2015); Mallo v. Internal Revenue Service (In re Mallo), 774 F.3d 1313 (10th Cir. 2014)(where Court applied the rule over the United States' position that timeliness of filing is not a definitional criteria for tax returns).

Con: United States v. Martin (In re Martin), 542 B.R. 479 (B.A.P. 9th 2015)(**forceful rejection of the 1-day late rule**); McBride v. City of Kettering (In re McBride), 534 B.R. 326 (Bankr. S.D. Ohio 2015)("McBride I)(rejecting "bright line test" that would, per se, render all post-assessment returns a nullity for dischargeability purposes); Rhodes v. United States (In re Rhodes), 498 B.R. 357 (Bankr. N.D. Ga. 2013); Maitland v. New Jersey Dep't of Taxation, 531 B.R. 516 (Bankr. D. N.J. 2015).

Declined to rule: Hindenlang/Beard cases will of necessity also involve the one-day late issue, whether raised by the parties or not. A number of Courts have declined to rule on the 1-day late issue where the Court found against the debtor on a Hindenlang/Beard analysis: Selbst v. United States Dep't of Treas. (In re Selbst), 544 B.R. 289 (Bankr. E.D. N.Y. 2016); Earls, 549 B.R. at 880 n. 6 (also discussing government's position on the issue); Justice v. United States (In re Justice), 817 F.3d 738 (11th Cir. 2016)(where the Court "assumed but expressly [did] not

Terry Serena
Attorney-at-Law
Cincinnati, OH
terry@serenalawllc.com
serenalawllc.com

decide" that the 1-Day Late Rule was an incorrect interpretation of the statute.

Advanced by State and local tax authorities, **not** the position of the IRS or the Department of Justice (yet). *See e.g.*, Earls, 549 B.R. at 880 n. 6; McBride at 334; Justice, 817 F.3d at 743 (Decided March 30, 2016, finding that "Partly because the one-day-late rule limits the application of § 523(a)(1)(B)(ii) to the unusual situations in which the IRS prepares a return with the taxpayer's cooperation under § 6020(a), both the Department of Justice and the IRS argue that the rule is an incorrect interpretation of the statute.")

Proponents of the 1-Day Late Rule attempt to save their interpretation of Section 523(a)(*) from being in direct conflict with the 2-year rules, which presumes delinquency of filing, by pointing to the theoretical possibility for a late-filed return to be valid if it is filed under IRC § 6020(**a**), which, in the real world, is never employed. The instances of "6020(a)" returns has been labeled *by the IRS*' as "illusory" because of the minute number of § 6020(a) returns, McBride at 334, and as occupying "an infinitesimal scope – a scope bordering on zero [instances]." Martin, 542 B.R. at 488.

Terry Serena
Attorney-at-Law
Cincinnati, OH
terry@serenalawllc.com
serenalawllc.com

Dischargeability of Federal Taxes Under Chapters 7, 11, 12 & 13						
2017 Terry Serena, Serena Law LLC, Cincinnati, OH terry@serenalawllc.com 513.254.5123						
		Individual		Non-Individual Chapter 11 (Non-Liquidating)	Chapter 12	Chapter 13
Classification	**Type of Tax Claim**	**Chapter 7**	**Chapter 11**			
Postpetition Taxes	Administrative Period Taxes – §§ 503(b)(1)(B), 507(a)(2)	dischargeable	dischargeable	dischargeable	dischargeable	n/a
	Gap Period Taxes – §§ 507(a)(3) & 523(a)(1)(A)	non-dischargeable	non-dischargeable	dischargeable	n/a	n/a
	Section 1305(a)(1) Claims (post-petition taxes where POC is filed)	n/a	n/a	n/a	n/a	dischargeable
Prepetition Taxes (Priority or Nonpriority)	Taxes Relating to Unfiled Returns – § 523(a)(1)(B)(i)	non-dischargeable	non-dischargeable	dischargeable	non-dischargeable	non-dischargeable
	Taxes Relating to Returns Delinquently Filed "after 2 years before the filing of the petition" – § 523(a)(1)(B)(ii)	non-dischargeable	non-dischargeable	dischargeable	non-dischargeable	non-dischargeable
	Taxes Relating to Fraud/Willful Evasion – § 523(a)(1)(C)	non-dischargeable	non-dischargeable	dischargeable	non-dischargeable	non-dischargeable
Prepetition Priority Taxes	Taxes on Priority Wage Claims – § 507(a)(4)	dischargeable	dischargeable	dischargeable	dischargeable	dischargeable
	Priority Income Tax - § 507(a)(8)(A) [**described below**]:	non-dischargeable	non-dischargeable	dischargeable	non-dischargeable	dischargeable
	(i) for which return was due w/in **3 years** of petition **(ii)** assessed w/in 240 days of petition, as tolled by prior bankruptcy or Offer-in-Compromise pending w/in the **240-day** period, or **(iii)** not assessed but assessable on petition date, except for taxes specified in Section 523(a)(1)(B) [taxes relating to unfiled returns or late filed returns under the "2-year rule"] or (a)(1)(C) [relating to fraud or willful evasion]					
	Trust Fund Taxes – § 507(a)(8)(C)	non-dischargeable	non-dischargeable	dischargeable	non-dischargeable	non-dischargeable
	Priority Employment Taxes – § 507(a)(8)(D) [for which a return was due w/in 3 years of petition]	non-dischargeable	non-dischargeable	dischargeable	non-dischargeable	dischargeable
	Priority Excise Taxes – § 507(a)(8)(E) - [for which a return was due w/in 3 years of petition	non-dischargeable	non-dischargeable	dischargeable	non-dischargeable	dischargeable
Tolling	**Tolling**: The priority time periods are extended by the following circumstances - **240-Day Perio**d: Time Offer-in-Compromise was pending or in effect during 240-day period, plus 30 Days; **All priority time period**s: period during which automatic stay in a prior case prevented collection, and period during with CDP proceeding prevented collection, plus 90 days.				**Hardship Discharges (Chapters 12 & 13)** Chapter 12 & 13 hardship discharges do not apply to any tax (or other debt) that is also encompassed by Section 523(a)(1) - (a)(19)[i.e. taxes that would be excepted from Chapter 7 discharges.	
Prepetition Non-Priority Taxes	Non-Priority Income, Employment & Excise Tax	dischargeable	dischargeable	dischargeable	dischargeable	dischargeable
	Except taxes relating to unfiled returns, returns filed delinquently "after 2 years before" the petition date, and taxes based on fraud or willful evasion	non-dischargeable	non-dischargeable	dischargeable	non-dischargeable	non-dischargeable
Prepetition Penalties § 523(a)(7)	Non-pecuniary loss penalties relating to dischargeable tax **or** were imposed with respect to a transaction or event that occurred **more** than 3 years before the petition date	dischargeable	dischargeable	dischargeable	dischargeable	dischargeable
	Non-pecuniary loss penalties relating to nondischargeable tax **and** imposed with respect to transaction or event that occurred **within** 3 years before petition date	non-dischargeable	non-dischargeable	dischargeable	non-dischargeable	dischargeable
	NOTES: (1) Non-Individual Chapter 7 Debtors & Liquidating Non-Individual Chapter 11 Debtors Do Not Receive Discharges; (2) Liens Generally Survive Discharge Even If the Underlying Tax Does Not; (3) Dischargeability Does Not Affect Payment As May Be Required Under a Particular Chapter or Plan;					