NOS. 14-9004, 14-9005, 14-9006. 14-9007
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NOS. 14-9004 AND 14-9006

IN RE: TIMOTHY P. PENDERGAST, Debtor

TIMOTHY P. PENDERGAST,

Appellee, Cross-Appellant

V.

MASSACHUSETTS DEPARTMENT OF REVENUE,

Appellant, Cross-Appellee

NOS. 14-9005 AND 14-9007

IN RE: STEVEN P. WOOD, Debtor

STEVEN P. WOOD,

Appellee, Cross-Appellant

V.

MASSACHUSETTS DEPARTMENT OF REVENUE,

Appellant, Cross-Appellee

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BRIEF FOR *AMICUS CURIAE* UNITED STATES OF AMERICA IN SUPPORT OF AFFIRMANCE

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GLOSSARY

Acronym	Definition
BAP	Bankruptcy Appellate Panel
BAPCPA	Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23
I.R.C.	Internal Revenue Code (26 U.S.C.)
IRS	Internal Revenue Service
MDOR	Massachusetts Department of Revenue
§ 523	Bankruptcy Code § 523 (11 U.S.C.)

This brief is filed by the Department of Justice on behalf of the United States of America as *amicus curiae* in support of affirmance, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and 28 U.S.C. § 517. The United States believes that the decision of the First Circuit Bankruptcy Appellate Panel (BAP), conditioning the dischargeability of a tax debt on whether or not that tax was assessed before the debtor filed a return, should be affirmed.

INTEREST OF *AMICUS CURIAE*

The United States is charged with the proper construction and enforcement of federal statutes, including the Bankruptcy Code (11 U.S.C.), the Internal Revenue Code (26 U.S.C.), and, as particularly relevant here, the provisions governing the dischargeability of tax debts in bankruptcy. While this appeal involves state, rather than federal, tax debts, the construction of Bankruptcy Code § 523(a),[1] the issue here, affects the interests of the United States, as both sovereign and creditor.

These consolidated cases present the question whether, and to what extent, an income tax debt is dischargeable in bankruptcy when a

[1] References to § 523 are to Bankruptcy Code § 523 (11 U.S.C.).

debtor has failed to file timely income tax returns. The United States is a party to appeals currently pending in the Ninth and Tenth Circuits which present this same question, an issue of first impression in this Circuit.[2] Here, the position of the Massachusetts Department of Revenue (MDOR) – that no tax debt reported on a late-filed return can ever be dischargeable – conflicts with the position the United States has taken in its pending cases and does not make sense, both as a matter of statutory construction and sound policy. For the additional reasons explained herein, as well as for the reasons stated in its opinion, the BAP drew the correct line in holding that only the tax debt assessed before any return is filed is nondischargeable.

STATEMENT OF THE ISSUE

Whether the BAP correctly held that, where debtors belatedly filed Massachusetts state tax forms, the tax reported but not yet assessed was dischargeable, but the tax that already had been assessed before any tax forms were filed was nondischargeable under 11 U.S.C. § 523(a)(1)(B)(i).

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[2] *Martin Smith v. United States (In re Smith)* (9th Cir. - No. 14-15857); *Mallo v. United States (In re Mallo)* and *Martin v. United States (In re Martin)* (10th Cir - Nos. 13-1464 and 13-1488 (consol.)).

STATEMENT OF THE CASE

The undisputed facts, detailed in the parties' briefs, are summarized here. Chapter 7 debtors Timothy P. Pendergast and Steven P. Wood (together, "debtors") each belatedly filed Massachusetts income tax forms for multiple tax periods. By the time debtors filed those forms, the MDOR already had made assessments against each debtor for some, but not all, of the tax periods at issue. Each debtor subsequently sought a determination that his liabilities for all of the tax periods at issue were discharged in bankruptcy.

The MDOR contended that none of the tax debts reported on debtors' late-filed tax forms was dischargeable, because no late-filed tax form can qualify as a "return" within the meaning of the flush language in Bankruptcy Code § 523(a). (Add. 6.) [3] In the MDOR's view, a late-filed return could not satisfy "the requirements of applicable nonbankruptcy law (including applicable filing requirements)" under Massachusetts law. (*Id.*; MDOR Br. 14.)

[3] "Add." references are to the Addendum to the MDOR's opening brief.

Debtors argued that a debt reported on an otherwise valid return under Massachusetts law is not excepted from discharge merely because the form was filed late. (Debtors Br. 6-10.) Debtors contended that timely filing is not an "applicable filing requirement." They further contended that their Massachusetts tax debts for all years at issue should be discharged, because their late filed tax forms, regardless of whether they were filed before or after assessment, were "returns" under applicable nonbankruptcy law. (Debtors Br. 2, 16-18.)

In both cases, the Bankruptcy Court agreed with the MDOR that timely filing was an "applicable filing requirement" necessary for a tax form to meet the definition of a "return" in § 523's flush language. (Add. 21-35.) Debtors' tax forms, filed late, failed to satisfy this "applicable filing requirement." (Add. 31.) The Bankruptcy Court concluded that debtors' tax debts were all nondischargeable. (Add. 21-35.)

Each debtor appealed to the BAP, where their cases were consolidated. The BAP affirmed in part and reversed in part. Following *Gonzalez v. Mass. Dept. of Revenue (In re Gonzalez)*, 506 B.R.

317 (1st Cir. B.A.P. 2014),[4] the BAP rejected the Bankruptcy Court's holding that timely filing is an "applicable filing requirement." The BAP opined that "Massachusetts state law provides the 'applicable nonbankruptcy law,'" but concluded that it "discerned no timeliness requirement" under Massachusetts law "governing the case of a late-filed, but pre-assessment, income tax return in Massachusetts." (Add. 14.) The BAP rejected the MDOR's suggestion of a *per se* rule, under which any failure to file a return on time rendered all tax debt for a given year nondischargeable. (Add. 16-17.)

The BAP held that, for periods where debtors' belated tax forms had been filed before the MDOR's assessment of tax, debtors' forms met the "requirements of applicable nonbankruptcy law" and qualified as "return[s]." (Add. 17.) Debtors' tax obligations for those periods were therefore dischargeable. (*Id.*)

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[4] Appeals from the BAP's *Gonzalez* decision are currently pending before this Court (1st Cir. - Nos. 14-9002 and 14-9003 (consol.)), and have been consolidated with *Fahey v. Mass. Dept. of Revenue* (1st Cir. - No. 14-1328) and *Perkins v. Mass Dept. of Revenue* (1st Cir. - No. 14-1350), which present the same issue.

The BAP held, however, that "[i]f a return is filed late, dischargeability depends on the taxpayer's cooperation with the taxing authorities." (Add. 16.) For the periods where debtors' tax forms had not been filed until after the MDOR had assessed debtors' tax liabilities, the late-filed forms were not "return[s]" within the meaning of § 523(a), and debtors' tax liabilities for those periods were not dischargeable. (Add. 17.) Citing the Massachusetts regulation governing applications for abatement and information provided by the MDOR in *Gonzalez*, the BAP reasoned that "a post-assessment return is not treated as a return; rather it is deemed a request for an abatement of the previous assessment." (Add. 16; 830 Code Mass. Regs. 62C.37.1(5)(a)(1).) Accordingly, the BAP concluded that debtors' post-assessment tax forms were not "returns," and that the tax debts for which no purported return had been filed before assessment were nondischargeable.

The MDOR appealed, and debtors cross-appealed.

SUMMARY OF ARGUMENT

The BAP's holding is correct and consistent with the United States' position in federal tax cases. While the United States offers a different perspective, our analysis is fundamentally consistent with the

BAP's analysis, and reaches the same result. Under either analysis, the dischargeability of a tax debt under § 523(a) turns on "the taxpayer's cooperation with the taxing authorities." (Add. 16.) The BAP's analysis appropriately conditions the dischargeability of a debt on whether debtors' tax forms are filed before or after the taxing authority has made its own assessment of the tax.

1. Some courts, including the Fifth Circuit and the bankruptcy courts below, have interpreted "applicable filing requirements" to include any statutory due date, so that all tax liabilities for a tax year are nondischargeable if the required return is filed even one day late. The MDOR urges that these cases should be followed here. The BAP did not adopt this analysis, nor should this Court. It produces overly harsh results, allows general statutory language to govern over more specific provisions, and renders other statutory language meaningless, contrary to the cardinal rule of statutory construction that no part of a statute should be rendered superfluous.

More likely, the phrase "applicable filing requirements" was meant to address requirements other than the due date, including a requirement that returns be filed in sufficient time to serve their

intended tax purpose: reporting information from which the taxing authority may determine and assess tax. This reading of the phrase "applicable filing requirements" gives the entire statute meaning.

2. Once a tax debt is assessed, it is too late for a later-filed tax form to be a "return" with respect to the previously assessed debt. Bankruptcy Code § 523(a)(1)(B)(i) excepts from discharge those tax debts "with respect to which a return" "was not filed." A tax debt assessed by a taxing authority before a debtor files a return is excepted from discharge, because that tax debt is *not* a "debt for a tax" "with respect to which a return" was filed.

When a debtor fails to file a timely return, the taxing authority is forced to determine his obligations and assess his taxes without the debtor's assistance. Once assessment without the debtor's cooperation occurs, a tax form filed thereafter can no longer be a "return" with respect to the debt already assessed, because any document merely restating the amount assessed cannot serve the primary tax-law purpose of a return: to report the information necessary to assess that tax debt.

Even if a later-filed tax form were to report an increase or request an abatement of tax, nothing submitted by the debtor after assessment can change the character of the previously assessed debt as one for which no return was filed. The BAP thus drew the correct dividing line in holding that debtors' tax debts not yet assessed when returns were filed were dischargeable, and that their remaining tax debts were nondischargeable.

The majority of the courts of appeals to address this issue before § 523(a) was amended in 2005 also viewed assessment as the relevant dividing line. Although those courts focused on the meaning of a return, they similarly emphasized that, where a debtor delays filing a required form until after the taxing authority has assessed his liabilities on its own, his belated submission cannot be serve the tax-law purpose of a return – *i.e.,* reporting information from which the taxing authority can assess tax.

The BAP's decision is correct and should be affirmed.

ARGUMENT

The BAP correctly held that debtors' income taxes, assessed without debtors' assistance before any tax forms were filed, were not dischargeable under Bankruptcy Code § 523(a)(1)(B)(i)

A. Introduction

In general, in a Chapter 7 bankruptcy case, an individual debtor receives a discharge under Bankruptcy Code § 727(b) from all personal liabilities that arose before the bankruptcy petition was filed. *See* 11 U.S.C. § 727(b); *see also* 11 U.S.C. § 524(a). Certain types of debts, however, are excepted from discharge. *See* 11 U.S.C. §§ 523, 727(b). As relevant here, § 523(a)(1)(B)(i) provides that "any debt" "for a tax" "with respect to which a return . . . if required" "was not filed" is excepted from discharge.

Most courts that have addressed dischargeability under § 523(a)(1)(B)(i) have focused on what constitutes a "return." For federal tax purposes, a "return" is not defined in the Internal Revenue Code or regulations.[5] Before amendments in 2005, the Bankruptcy

[5] Historically, the term "return" was used as a synonym for "report." *See, e.g., N. Am. Oil Consol. v. Burnet*, 286 U.S. 417, 422 (1932) (using "return" and "report" interchangeably in the same sentence).

Code did not define the term either. In 2005, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23, §§ 701-20 (2005), Congress amended § 523(a) to include the following definition of a "return":

> 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) (flush language).

Before this statutory definition was enacted, numerous courts, including several courts of appeals in cases involving dischargeability of federal tax debts, applied the four-part test formulated in *Beard v. Commissioner*, 82 T.C. 766 (1984), *aff'd,* 793 F.2d 139 (6th Cir. 1986), to determine whether a taxpayer's submission constituted a valid tax return. Under the so-called "*Beard* test," a document is a return if it (1) contains sufficient data to calculate tax liability; (2) purports to be a return; (3) is signed under penalty of perjury; and (4) reflects an honest

and reasonable attempt to satisfy the requirements of the tax law. *Beard*, 82 T.C. at 777.

Applying this test, four circuits held that a tax form filed after the IRS had assessed tax was not a "return" that could serve to discharge already-assessed tax liabilities. *See United States v. Hindenlang (In re Hindenlang)*, 164 F.3d 1029 (6th Cir. 1999); *United States v. Hatton (In re Hatton)*, 220 F.3d 1057, 1061 (9th Cir. 2000); *Payne v. United States (In re Payne)*, 431 F.3d 1055 (7th Cir. 2005); *Moroney v. United States (In re Moroney)*, 352 F.3d 902 (4th Cir. 2003). The majority of circuits concluded that a tax form filed after assessment – when it was too late to serve a return's intended purpose of assisting the IRS in determining the tax due – was not a "return," because it did not satisfy the requirement that a return reflect an honest and reasonable attempt to satisfy the tax laws. *Id.* These courts emphasized that the primary purpose of a return was the reporting of information from which tax can readily be assessed, and that a belated filing after assessment can no longer serve that purpose. *See Hatton*, 220 F.3d at 1061 (purpose of a return is not only to get tax information in some form, but "'to get it with such uniformity, completeness, and arrangement that the physical

task of handling and verifying returns may be readily accomplished.'") (quoting *Commissioner v. Lane-Wells Co.*, 321 U.S. 219, 223 (1944)); *Hindenlang*, 164 F.3d at 1033 (relevant purpose of returns is reporting information based on which tax can be assessed).[6]

The term "applicable nonbankruptcy law," added in 2005 to § 523(a), is generally understood to incorporate the tax law in the relevant jurisdiction. *See McCoy v. Miss. State Tax Comm'n (In re McCoy)*, 666 F.3d 924, 927-28 (5th Cir. 2012). The 2005 BAPCPA amendments did not displace the *Beard* test, however. Its continuing applicability as the relevant test has been reaffirmed in jurisdictions that had adopted that test prior to the enactment of BAPCPA. *See Maryland v. Ciotti* (*In re Ciotti)*, 638 F.3d 276, 280 (4th Cir. 2011). In the federal context, where there is no statutory definition of a "return,"

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[6] The Eighth Circuit alone concluded that whether the purported return constituted an honest and reasonable attempt to comply with the tax laws should be discerned from the face of the return, without regard to whether it was filed too late to assist with assessment. *Colsen v. United States (In re Colsen)*, 446 F.3d 836, 840 (8th Cir. 2006). Neither party has advocated following *Colsen* here; we note that it conflicts with the better reasoned opinions of four other circuits and should not be followed.

the *Beard* test continues to provide the "applicable nonbankruptcy law" definition of a return. *Flint v. Commissioner*, 104 T.C.M. (CCH) 437 (Tax Ct. 2012).[7]

In contrast with the federal law, which lacks a statutory or regulatory definition of a "return," Massachusetts regulations define 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 Code Mass. Regs. 62C.26.1(2). But, as the BAP concluded both in this case and in *Gonzalez*, "based upon information provided to [it] by the MDOR" and 830 Mass. Code Regs. 62C.25.1(6)(f)-(i), a document that otherwise meets the requirements of a return is not treated as a "return" under Massachusetts law if it is filed after assessment. (Add. 15-16); *Gonzalez*, 506 B.R. at 321. Rather, it is treated as a "request for abatement." (*Id.*)

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[7] We thus do not agree with the BAP's suggestion that § 523's flush language "replaces the *Beard* test." (Add. 13 (citing *Gonzalez*, 506 B.R. at 325)). But we do not dispute that, for purposes of Massachusetts tax debts, the "applicable nonbankruptcy law" is Massachusetts tax law.

In our view, the BAP reached the correct result in treating assessment as a key boundary. This outcome is consistent with the United States' position in currently pending federal tax cases, as well as the line drawn by all but one of the circuits that addressed this question before the BAPCPA amendments. It has long been the case that at least some late-filed tax forms are considered "returns" for both tax law and bankruptcy purposes, and the statute contemplates as much. We thus do not agree that the *per se* rule that the MDOR advocates – under which no late-filed tax form can ever be treated as a "return" for § 523(a) purposes – is correct. Rather, because the fundamental purpose of a return is to report income from which tax can be assessed, the correct focus is the point at which the taxing authority finally determines an enforceable debt. Under both federal and Massachusetts law, that point is assessment. A form filed thereafter no longer serves the purpose of a return with respect to any debt previously assessed.

B. The MDOR's position that no tax reported on late-filed tax form is dischargeable should not be adopted

On the theory that timeliness is an "applicable filing requirement" within the meaning of the flush language, some courts have held that late-filed tax forms can never qualify as "returns" for the purpose of

§ 523(a)(1)(B)(i). *See*, *e.g.*, *McCoy,* 666 F.3d 924; *Cannon v. United States (In re Cannon)*, 451 B.R. 204, 206 (Bankr. N.D. Ga. 2011); *Links v. United States (In re Links)*, Nos. 08-3178, 07-31728, 2009 WL 2966162, at *5 (Bankr. N.D. Ohio Aug. 21, 2009); *see also Payne*, 431 F.3d at 1060 (Easterbrook, J., dissenting). This reading, urged by the MDOR, would mandate a finding that none of the tax debts at issue were dischargeable, because debtors' tax forms were uniformly filed late.

The MDOR's reading, while facially plausible, ultimately cannot be reconciled with the statute as a whole, which specifically treats some late-filed forms as "returns." The better reading of "applicable filing requirements," therefore, encompasses other filing requirements, including the requirement that a return be filed by a time (even if not by the filing deadline) and in a manner that assists the taxing authority in assessing tax. Indeed, that several circuits had just emphasized this requirement when Congress adopted this language strongly suggests that this was its intent. *See* pp. 12-13, *supra*; J. SHEPARD, BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, ANALYSIS

AND EXPLANATION OF THE TITLE VII TAX PROVISIONS OF PUB. L. NO. 109-8, 119 STAT. 23: THE UNPUBLISHED LEGISLATIVE HISTORY, at 12.

The contention that a late-filed tax form can never be a "return" that renders a debt dischargeable does not make sense when § 523 is considered as a whole. Section 523(a)(1)(B)(ii) clearly contemplates that a "return" can include a late-filed form in some instances: it excepts from discharge a debt with respect to which a return was filed after its due date and less than two years before the bankruptcy petition was filed. The MDOR's suggested reading of the flush language deprives § 523(a)(1)(B)(ii) of nearly all meaning, and inappropriately permits general statutory language to govern a more specific provision.

Adoption of the MDOR's position would also render nondischargeable every tax reported on a tax form that was filed as little as one day late, and would limit § 523(a)(1)(B)(ii)'s application to that very small number of cases where the IRS prepared a § 6020(a) return, or the debtor stipulated to the liability in a nonbankruptcy tribunal.[8] It is true that § 523(a)(1)(B)(ii) could still determine

[8] Section 6020(a) provides for preparation of a return by the Secretary that is signed by the taxpayer and based on information the (continued…)

dischargeability as to these two very narrow categories of "returns" under the MDOR's approach. But returns prepared under § 6020(a) or taxes resolved by court stipulation represent only a tiny minority of federal cases, and none in Massachusetts. Nothing in the statutory scheme gives any taxpayer a right to an I.R.C. § 6020(a) return. *See* IRS Chief Counsel Notice 2010-016, 2010 WL 3617597 (Sept. 2, 2010). It is a mischaracterization of § 6020(a) to term it a "safe-harbor provision" under which debtors can submit a late return. (MDOR Br. 20.) [9] The more general wording in the flush language should not be

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(…continued)
taxpayer provides, and thus contemplates cooperation (although belated) between the taxpayer and the IRS. In contrast, a § 6020(b) return is prepared by the IRS and executed by the Secretary, without taxpayer involvement.

[9] The availability of § 6020(a) to taxpayers was misunderstood by the court in *In re Kemendo*, 516 B.R. 434 (Bankr. S.D. Tex. Sept. 17, 2014). The *Kemendo* court incorrectly presumed that a substitute for return, prepared by the IRS with taxpayer assistance, constituted a return under I.R.C. § 6020(a), and that the Government bore the burden to show otherwise. An IRS determination made with some help from the taxpayer is not presumed to be a return pursuant to § 6020(a). Taxpayer input is merely one element of a § 6020(a) return. The taxpayer's cooperation, without more, creates no presumption that the other requirements of the statute – including the taxpayer's signature and the IRS's agreement to accept the "return" – were met. *See In re Fernandez*, No. 09-32896-HCM, 2012 WL 5289916, at *4 (Bankr. W.D.
(continued…)

read to override § 523(a)(1)(B)(ii)'s specific language contemplating treatment of a late-filed form as a "return" in certain instances. *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) ("specific statutory language should control more general language when there is a conflict between the two"); *see also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (reading Bankruptcy Code to avoid "the superfluity of a specific provision that is swallowed by the general one"). Indeed, it makes little sense that Congress would have drafted a detailed and nuanced timing rule that contemplates that late-filed forms can be returns, as it did in § 523(a)(1)(B)(ii), and then add a definition of "return" elsewhere that ensures that late returns can almost never qualify. Congress does not usually "give with one hand what it takes away with the other." *Greenlaw v. United States*, 554 U.S. 237, 251 (2008)

(…continued)
Tex. Oct. 25, 2012). Moreover, as is explained in the United States' motion to amend the judgment in *Kemendo* (Bankr. S. D. Tex. Case 07-36408, Doc. 61), that court's reasoning was based on fact finding contrary to evidence in the stipulated record.

Additionally, the MDOR overlooks (MDOR Br.19-25) the fact that, if a late-filed return could never be a return, the specific exclusion of a § 6020(b) return from the definition of a "return" would be completely superfluous, because such returns always are prepared after the filing deadline. It is a cardinal principle of statutory construction that a statute should be construed in a way that does not render any clause superfluous. *See Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) (refusing to read one provision of the Bankruptcy Code to render another superfluous).

As a matter of longstanding bankruptcy practice, a late-filed Form 1040 has historically been treated as a return if the document self-determined the tax and permitted assessment without a deficiency proceeding. *See, e.g., In re Smith*, 96 F.3d 800, 801 (6th Cir. 1996) (recognizing that indisputably late-filed Forms 1040 could be basis for discharge if debtor could show they were filed at least two years prior to petition). Legislative history of the BAPCPA amendments evidences no intent to change this treatment of untimely-filed returns, nor should any be inferred. And the Supreme Court has expressed reluctance to accept arguments that would interpret the Bankruptcy 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 (1992). Because the MDOR's approach imputes significant changes in the law that find no support in the legislative history, *Dewsnup* calls into question the viability of the MDOR's reading. *See also Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

Moreover, the one-day rule is troublesome because it would produce overly harsh results. A debtor who filed his federal tax return one day late because of an honest mistake would fare no better than the debtor who waited years and forced the taxing authority to expend substantial resources to assess his tax liability. And, because the statute defines a return under I.R.C. § 6020(a) as a return, a very delinquent debtor who signs a return prepared by the IRS under § 6020(a) might fare better than a less delinquent debtor who voluntarily files even one day late.

For these reasons, we do not advocate the MDOR's approach. We submit that the better reading of the flush language is that "applicable filing requirements" was intended to address filing requirements other than return due dates, including the requirement that a filing serve the fundamental purpose of a return – which under federal law is the reporting, and in Massachusetts is the self-assessment, of tax. An interpretation of "applicable filing requirements" that focuses on whether the form is filed in time for it to accomplish its tax-law purpose of self-determining a tax debt, so that the taxing authority, without more, may promptly assess that debt, harmonizes the statute with longstanding bankruptcy practice and gives the entire statute meaning. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (a statute should be construed to give the entire statute meaning). Under this reading, the BAP correctly rejected the *per se* rule MDOR advocates.

Should this Court find, however, that Massachusetts law compels the adoption of the *per se* rule with respect to Massachusetts income taxes, it should make clear that the rule does not extend to the federal tax context. As discussed above, some late-filed federal tax forms have long been treated as returns, and no provision of federal law dictates

that filing by the specified due date is an "applicable filing requirement" within the meaning of § 523(a).

C. The BAP correctly focused on assessment as the relevant dividing line

1. Tax debts assessed without assistance from the debtor necessarily are "debts" "for which a return was not filed," and the character of those debts cannot be changed by a subsequently filed tax form

As noted above, most courts to consider whether a late-filed tax form can serve to discharge a tax debt have focused their analysis on whether any "return" was filed. But determining whether a debtor's submission qualifies as a "return" is only part of the relevant inquiry, for it is well established that a statute should be viewed as a whole. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (the "words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (internal quotation marks and citation omitted). When § 523(a)'s language is considered as a whole, the statute makes clear that the inquiry is not merely whether the debtor has filed a return. Rather, the determination called for by § 523(a)(1)(B)(i) is whether the particular "debt" sought to be discharged

is "for a tax" "with "respect to which a return" "was not filed." 11 U.S.C. § 523(a)(1)(B)(i); *see also* Chief Counsel Notice 2010-16.

Because only those debts with respect to which a return was filed are dischargeable, the determination whether a particular debt is dischargeable turns not only on whether what was filed was a "return" for some purposes, but also whether it was a "return" with respect to the particular debt sought to be discharged. Assessment is the critical dividing line with respect to whether a document, which otherwise may qualify as a return, is a return with respect to a particular tax debt.

The purpose of returns is to report information to the taxing authority to that it can determine and assess a taxpayer's liability. Where, as here, a debtor has failed to file a return, the taxing authority must determine and assess liability without any input from him (a process that often involves significant costs). Once that assessment is made, the assessed tax is no longer a "debt" with respect to which a return can be "filed," because a subsequent filing can no longer serve the fundamental purpose of a return. Where a tax debt has been assessed without taxpayer assistance, a tax form restating that debt can no longer serve its intended purpose; it cannot report information

sufficient to determine a debt which has already been determined. *See* *Hindenlang*, 164 F.3d at 1034-35 (Forms 1040 showing no tax other than what the IRS already had assessed on its own "serve no tax purpose").

a. Because a return's purpose under federal tax law is to provide information for assessment of tax, any form filed after assessment cannot serve as a return with respect to previously assessed debt

The federal tax law contemplates self-determination of a taxpayer's debt through the filing of a return, and makes clear that the purpose of a return is to report information sufficient to support an assessment of tax. *See* I.R.C. § 6012(a) (requiring filing of a return); Treas. Reg. § 601.103(a) (taxpayers are "required to file a prescribed form of return which shows the facts upon which tax liability may be determined and assessed"); *Payne*, 431 F.3d at 1057 ("main purpose of the requirement that taxpayers file income tax returns" is to "spare the tax authorities the burden of trying to reconstruct a taxpayer's income and income-tax liability" without taxpayer assistance); *Moroney*, 352 F.3d at 906 (the "very essence of our system of taxation" lies in self-reporting accomplished through the requirement of filing returns).

Under federal law, a tax is merely "determined by" a taxpayer when reported on his filed return, but the additional step of a formal assessment is required before a tax debt may be enforced. *See* I.R.C. § 6201(a)(1). Assessment is made "by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary." I.R.C. § 6203. If a taxpayer reports tax on his return, the IRS can immediately assess that self-reported tax. I.R.C. § 6201(a)(1).[10] If, however, the taxpayer fails to report tax, the IRS must go through an often burdensome process before it may assess his unreported tax debt. *See* I.R.C. § 6213(a). The IRS must undertake an investigation, determine a nonfiler's liability from third-party sources (*e.g.,* Forms W-2 and 1099), and complete the deficiency procedures set forth in I.R.C. §§ 6211-6216.

These procedures require the IRS first to send a notice of deficiency to the taxpayer. I.R.C. §§ 6211(a), 6212(a). The taxpayer

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[10] Because assessment is so simple when the taxpayer files a return, a number of authorities have described the federal tax system as a "system of self-assessment." *Commissioner v. Lane-Wells Co.,* 321 U.S. 219, 223 (1944). Technically, however, a taxpayer does not assess his own tax. It requires a separate act by the Secretary.

then has 90 days in which he may challenge the deficiency determination in the Tax Court. I.R.C. § 6213(a). During that 90-day period, the IRS is prohibited from assessing the deficiency or taking any action to collect the tax. If the taxpayer files a petition with the Tax Court during that period, the IRS is further prohibited from assessing or collecting the deficiency until the Tax Court has entered its decision. I.R.C. § 6213(a). If the taxpayer fails to file a timely Tax Court petition, only then may the IRS assess the tax. I.R.C. § 6213(c); *see also* Treas. Reg. § 301.6203-1. "[T]he assessment is the official recording of liability that triggers levy and collection efforts." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

The assessment of federal tax, whether or not based on a return, is an affirmative administrative action with substantive consequences. It is the assessment of a federal tax debt that creates an enforceable obligation in a specified amount and permits the immediate collection of that obligation. *See, e.g.*, I.R.C. § 6321 (creating a statutory lien upon notice of the assessment and demand for payment); I.R.C. §§ 6321, 6323 (authorizing the filing of a notice of federal tax lien after assessment); I.R.C. § 6331 (authorizing the IRS to collect an assessed tax via levy);

I.R.C. § 7403 (authorizing civil actions to enforce federal tax lien). And assessment starts the clock running on the ten-year period of limitations for collection of that debt. *See* I.R.C. § 6502(a)(1). It is assessment, and not the mere existence or reporting of a federal tax liability, that empowers the United States to collect that debt. Once a tax debt has been assessed, no document filed thereafter can serve as a return with respect to that assessed debt (regardless of its attributes and whether it may be a return for some purposes under applicable nonbankruptcy law), because it is too late for any document to serve the self-reporting purpose of a return with respect to that debt.[11]

b. Assessment in Massachusetts serves as a similar dividing line

Under Massachusetts law, taxes are "deemed assessed" in the amount shown on any original or amended Massachusetts tax return, as of the later of the due date or filing date of the return. *See* M.G.L. ch. 62C, § 26(a). Massachusetts regulations define "assessment"

[11] We are unaware of any Massachusetts case where a late-filed tax form self-assessed additional tax. But, because the tax debt contemplated in § 523(a) is a divisible debt, any incremental tax owed would be a debut for which a return was filed, and thus dischargeable. *See* Chief Counsel Notice 2010-16 (explaining that the statutory scheme contemplates that the tax debt in § 523(a) is a divisible debt).

disjunctively: the term can mean either a determination of liability by the Department of Revenue and the entry of that determination into its official records, *or* "the taxpayer's calculation and declaration of the tax due" as set forth on his return. 830 Code Mass. Regs. 62C.26.1(2)).

In Massachusetts, where a taxpayer fails to file a return, the Commissioner may assess his tax at any time without notice to him, "according to [the Commissioner's] best information and belief." M.G.L. ch. 62C, § 26(d). The Commissioner has the option, but is not required, to notify the taxpayer of a missing or insufficient tax return; the taxpayer then has thirty days from such notice to file the correct return. M.G.L. ch. 62C, § 28. If he fails to do so, the Commissioner "may determine the tax due, according to his best information and belief, and may assess the same at not more than double the amount so determined[.]" M.G.L. ch. 62C, § 28.

As in the federal context, in Massachusetts assessment creates a final determination of the debt that is enforceable and collectable. The statutory scheme imposes both the duty and the costs of doing so on the taxpayer. Thus, if the taxing authority has assessed tax on its own without any information returned by the debtor, any document filed

thereafter cannot be a return with respect to the previously assessed debt, even if it otherwise meets the definition of a return under Massachusetts law. 830 Code Mass. Regs. 62C.26.1(2). [12]

c. Focusing on whether the debt, at assessment, ceases to be one with respect to which a return can be filed, produces sensible and consistent results

This analysis, which reflects the official position of the IRS (*see* Chief Counsel Notice 2010-16, 2010 WL 361759), is consistent with case law that has long emphasized that the purpose of returns is to report information from which tax can be determined. *See United States v. Galletti,* 541 U.S. 114, 122 (2004); *United States v. Boyle*, 469 U.S. 241, 249 (1985); *Lane-Wells,* 321 U.S. at 233. Moreover, by focusing on

[12] The BAP analogized Massachusetts law to provisions of the Internal Revenue Code cited in § 523(a), but its conclusions in that regard inaccurately characterize federal law. The BAP surmised that assessment by the MDOR of an unreported tax under M.G.L. ch. 62C, § 26(d), was analogous to the execution of a return by the IRS under I.R.C. § 6020(b). (Add. 16.) As explained above, however, before a § 6020(b) return may be effected and a federal tax liability assessed, the IRS must complete an examination (audit) to determine the tax due and comply with statutory deficiency procedures. The MDOR, however, may make an assessment at any time, on information and belief, without notice to the taxpayer. While its analogy of the MDOR assessment process to I.R.C. § 6020(b) was an oversimplification of the latter procedure, the BAP discerned a key boundary in the act of assessment.

whether a document is a return with respect to the particular *debt* sought to be discharged, greater uniformity will be produced. Even within the federal tax context, courts have disagreed on what constitutes a return under "applicable nonbankruptcy law," and have wrestled with the fact that the term "return" can have different meanings in different federal tax contexts. *See Payne,* 431 F.3d at 1058. The statutory or case-law definitions of a "return" vary from state to state, and, as under federal law, may have different meanings in different contexts. Moreover, as discussed below, what Congress intended to include in "applicable filing requirements," or whether "applicable filing requirements" can vary by jurisdiction, is not clear.

While the term "assessment" is not used in every jurisdiction, the concept of finally determining an enforceable liability is a necessary component of any tax system. Analyzing whether the particular debt sought to be discharged has become a final and enforceable obligation, so that it is too late for a return to be filed with respect to that particular debt, conforms to the case law and yields consistent results with respect to state and federal taxes. Accordingly, we submit it offers

the better analysis and should be adopted in affirming the BAP's holding – which reached the same result – here. [13]

2. The BAP's holding is consistent with the holding of a majority of circuits that a delinquently filed tax form is not a "return"

Should this Court reach the question whether debtors' late-filed tax forms are returns, the BAP's holding should be affirmed. The line the BAP drew is consistent not only with the United States' position in its currently pending appeals, but also with the result reached by a majority of the courts of appeals before the BAPCPA amendments were enacted. Those courts held that, when a debtor delays filing a required return until after the taxing authority has determined his liabilities in the absence of self-reported information, he may not enjoy the protection of a discharge under § 523(a)(1)(B)(i). *See Hindenlang*, 164 F.3d 1029; *Hatton*, 220 F.3d 1057; *Payne*, 431 F.3d 1055; *Moroney*, 352

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[13] The MDOR's suggestion (MDOR Br. 8, 11) that Congress would have specifically used the term assessment if its intent was to draw the line at assessment is misplaced, because not every state uses that term. *See Bankruptcy: The Next Twenty Years, Nat'l Bankruptcy Review Comm'n Final Report,* TAXATION AND THE BANKRUPTCY CODE, ch. 4 at 961 (October 20, 1997) (urging Congress to adopt standard language, uniform across all provisions of the Bankruptcy Code that explicitly or implicitly look to assessment, to refer instead to "that time at which a taxing authority may commence an action to collect the tax").

F.3d 902; *but see Colsen*, 446 F.3d 836. As the majority of other circuits has explained, a tax form submitted after the IRS has completed the burdensome process of assessment without taxpayer assistance does not serve the purpose of a tax return: to report information to the IRS with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished. *Id.* Analogously, under the Massachusetts system, a form filed after the MDOR has made an assessment does not serve the basic purpose of a return in that regime – the self-assessment of tax. Thus, the BAP's holding also finds support in this pre-BAPCPA case law.

If, however, this Court should conclude that Massachusetts law defines a "return" as limited to a form filed by the filing deadline (MDOR Br. 27), it should make clear that, under federal law (which has no statutory or regulatory definition of a return), the provision setting forth the time for filing a return (I.R.C. § 6072) is not part of what defines a return. Rather, the *Beard* test, as construed by the majority of circuits, remains the "applicable nonbankruptcy law" in federal tax cases and in cases involving states that similarly lack a definition of a return.

CONCLUSION

The Bankruptcy Appellate Panel's judgment should be affirmed.

Respectfully submitted,

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NOVEMBER 2014

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Attorney for United States of America

Dated: November 3, 2014

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/s/ Julie Ciamporcero Avetta
JULIE CIAMPORCERO AVETTA
Attorney

ADDENDUM

Internal Revenue Code (26 U.S.C.):

§ 6020. Returns prepared for or executed by Secretary

(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 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.