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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re)	Case No. 11-62436-B-7
Kevin Wayne Martin and)	
Susan Martin,)	
Debtors.)	
_____)	
Kevin Wayne Martin, et al.,)	Adv. No. 12-1131
Plaintiffs,)	DC No. US-1
v.)	
Internal Revenue Service,)	
Defendant.)	
_____)	

**MEMORANDUM DECISION REGARDING
MOTION FOR SUMMARY JUDGMENT**

Boris Kukso, Esq., appeared on behalf of the moving party and defendant, the Internal Revenue Service.

The debtors and plaintiffs, Kevin Wayne Martin and Susan Martin, appeared *in propria persona*.

Before the court is a motion for summary judgment (the “Motion”) brought by the defendant in this adversary proceeding, the Internal Revenue Service (the “IRS”). This Motion is opposed by the debtors and plaintiffs, Kevin and Susan Martin (the “Martins”), who have asked the court to rule in their favor based on the same set of undisputed facts. The Martins seek a determination that their debt to the IRS, arising

1 from personal income taxes owed for the years 2004, 2005, and 2006, has been
2 discharged in this chapter 7 case. The IRS argues that the taxes are excepted from the
3 discharge by application of 11 U.S.C. § 523(a)(1)(B)(i)¹ because the Martins' Form 1040
4 tax returns were not filed until *after* the IRS made assessments of the Martins' tax
5 liability and initiated collection efforts. There are numerous decisions dealing with this
6 problem, and the courts are split on the correct result. The "minority" view essentially
7 holds that the timing of the filing of a tax return, as opposed to the return's form and
8 content, is not a consideration under § 523(a)(1)(B)(i). For the reasons set forth below,
9 this court finds the minority view on this issue to be persuasive. Accordingly, the IRS's
10 Motion will be denied, and judgment will be entered in favor of the Martins.

11 The bankruptcy court has jurisdiction over this adversary proceeding pursuant to
12 28 U.S.C. § 1334, 11 U.S.C. § 523, and General Orders No. 182 and 330 of the U.S.
13 District Court for the Eastern District of California. This is a core proceeding pursuant
14 to 28 U.S.C. § 157(b)(2)(I).

15 **BACKGROUND AND UNDISPUTED FACTS.**

16 There are no triable issues of material fact in this adversary proceeding, and the
17 parties have not disputed the admissibility of the proffered documents. Accordingly, the
18 court has considered all of the documents which the parties have filed with their various
19 pleadings, the detailed chronology of facts offered by the IRS in its separate statement of
20 undisputed facts, and the Martins' opposition to the Motion. The history of this matter
21 appears to be fully and fairly set forth in the IRS's Motion and accompanying papers.

22 **The Late-Filed Tax Returns.** The Martins did not file their federal income tax
23 returns for the 2004, 2005, and 2006 tax years when those returns became due. As a

24
25 ¹ Unless otherwise indicated, all chapter, section, and rule references are to the
26 Bankruptcy Code, 11 U.S.C. §§ 101–1330, and to the Federal Rules of Bankruptcy Procedure,
27 Rules 1001–9036, as enacted and promulgated *after* October 17, 2005, the effective date of the
28 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub. L. No.
109-8, 119 Stat. 23. References to "IRC" are to the Internal Revenue Code, 26 U.S.C.
§§ 1–9834.

1 result, the IRS initiated an audit examination on June 16, 2008, to determine the Martins'
2 tax liability for those three tax years. On August 19, 2008, the IRS mailed to the Martins
3 a notice of deficiency for each of the three years.² The notice of deficiency, also known
4 as a "90-day letter," informs taxpayers that they may file a petition with the tax court for
5 a redetermination of the deficiency within 90 days of the mailing of the notice.³ The
6 Martins did not respond to the 90-day letter or seek relief from the tax court.

7 Instead, beginning on August 28, 2008, a few days after receiving the 90-day
8 letter, the Martins sought the services of an accountant named Andrea Shallcross to
9 prepare their tax returns. Ms. Shallcross completed and signed the Martins' Form 1040
10 tax returns for each of the three tax years on December 18, 2008. However, for reasons
11 unclear to the court, the Martins did not sign and file the Form 1040s until several
12 months later.

13 On March 16, 2009, having not received anything from the Martins, the IRS made
14 assessments of the Martins' tax liability for the years 2004, 2005, and 2006, in the
15 amounts of \$18,432, \$9,928, and \$32,133, respectively, along with interest and
16 penalties.⁴ The IRS issued its first notice of unpaid balance and demand for payment to
17 the Martins on the same date. Its second notice was issued on April 20, 2009. On
18 May 25, 2009, having still received nothing from the Martins, the IRS finally gave the
19 Martins a due process notice informing them of its intent to collect the assessed tax
20 liability by levy.⁵

21 Shortly thereafter, on June 2, 2009, the Martins signed and mailed to the IRS their
22 previously completed Form 1040s for the three tax years at issue. These returns stated
23

24 ² See IRC § 6212(a).

25 ³ See IRC § 6213(a).

26 ⁴ See IRC §§ 6201, 6203.

27 ⁵ See IRC § 6331(d).

1 the Martins' tax liability to be \$17,358 for the year 2004, a \$1,074 decrease from the
2 IRS's assessment; \$14,852 for the year 2005, a \$4,924 increase from the assessment; and
3 \$27,010 for the year 2006, a \$5,123 decrease from the assessment. The IRS accepted the
4 Martins' three Form 1040s and adjusted its assessments to match the amounts stated
5 therein.⁶

6 **The Bankruptcy and the Adversary Proceeding.** Although the Martins finally
7 filed their missing Form 1040s, they have yet to pay any of the taxes. In November
8 2011, the Martins filed a voluntary petition under chapter 7. Based on their schedules,
9 the Martins own a modest home in Bishop, California, valued at \$210,000 with two
10 mortgages totaling \$131,500. They also own personal property worth a total of \$9,950,
11 which includes two old automobiles, one of which was subject to a secured claim in the
12 amount of \$5,800. All of their property was claimed exempt. According to schedules I
13 and J, Mr. Martin was at the time unemployed and disabled, his only income being social
14 security benefits. Mrs. Martin was regularly employed. Their combined gross income
15 was \$2,735 per month.

16 The Martins' schedule E listed two priority creditors, the California Franchise
17 Tax Board with a claim scheduled in the amount of \$12,600 and the IRS with a claim
18 scheduled in the amount of \$102,000. Schedule F listed unsecured claims in the amount
19 of \$31,262. The Martins received their chapter 7 discharge on February 27, 2012. No
20 proofs of claim were filed, and the case was closed as a "no-asset" case on March 2,
21 2012.

22 The Martins commenced this adversary proceeding, without the assistance of an
23 attorney, on July 30, 2012. They filed and served on the IRS a document entitled
24 "Adversary Complaint," which stated simply, "We cannot afford to pay off our IRS tax
25

26 ⁶ For 2004, the IRS abated \$1,074 of the tax liability, decreasing the assessment to
27 \$17,358; for 2005, it assessed an additional \$4,924 in liability, increasing the assessment to
28 \$14,852; and for 2006, the IRS abated \$5,123 of the liability, decreasing the assessment to
\$27,010.

1 debts for the years 2004, 2005 and 2006.”⁷ Attached to the complaint were copies of
2 four documents offered to show that Mr. Martin is permanently disabled and undergoing
3 serious medical treatment. The form and content of the pleading did not comply with the
4 procedural rules for the commencement of an adversary proceeding, specifically Federal
5 Rules of Civil Procedure 8(a) and 10. However, the IRS filed a responsive pleading that
6 focused immediately on the issue to be decided. It denied the substantive allegations in
7 the complaint and alleged, as an affirmative defense, that the adjusted tax assessments
8 for 2004, 2005, and 2006 were excepted from discharge by application of
9 § 523(a)(1)(B)(i). The IRS prayed “[t]hat the Court adjudicate the interest of the
10 parties.”⁸

11 After the Martins filed an “amended” complaint,⁹ the court held a status
12 conference at which the Martins and the IRS appeared telephonically. After some
13 discussion, the parties agreed to move forward with the adversary proceeding,
14 notwithstanding the procedural irregularities with the Martins’ pleadings. By that time,
15 the issues were clearly framed in the IRS’s responsive pleading, and there appeared to be
16 few, if any, disputed facts. The court then instructed the parties to meet and confer in an
17 effort to work out a stipulated statement of undisputed facts for resolution of the matter
18 by summary judgment. Neither party requested an evidentiary hearing, and this Motion
19 is the result of those discussions.

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21 ///

23 ⁷ Pls.’ Compl. 1, July 30, 2012, ECF No. 1.

24 ⁸ Def.’s Answer 3:2, Nov. 8, 2012, ECF No. 13.

25 ⁹ One of the documents attached to the original pleading contained personal identifying
26 information, which should not have been placed in the public record pursuant to Bankruptcy
27 Rule 9037. On December 14, 2012, this court issued an order restricting the original pleading
28 from public access and requiring that the Martins file a properly redacted form of the pleading.
A one-page “Amended Complaint” was then filed on January 18, 2013.

1 **SUMMARY JUDGMENT STANDARD.**

2 Summary judgment in favor of the moving party is appropriate “if the movant
3 shows that there is no genuine dispute as to any material fact and the movant is entitled
4 to judgment as a matter of law.” Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Bankr.
5 P. 7056. “[T]he mere existence of *some* alleged factual dispute between the parties will
6 not defeat an otherwise properly supported motion for summary judgment; the
7 requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty*
8 *Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (emphasis in original). “A fact is ‘material’
9 when, under the governing substantive law, it could affect the outcome of the case.”
10 *Thrifty Oil Co. v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 322 F.3d 1039, 1046 (9th Cir.
11 2003).

12 The parties may use summary judgment to dispose of all or part of the asserted
13 claims for relief. *See* Fed. R. Civ. P. 56(a). Additionally, the court may *sua sponte* grant
14 summary judgment in favor of the nonmoving party, as long as “the moving party
15 against whom summary judgment [is] rendered had a full and fair opportunity to
16 ventilate the issues involved in the motion.” *Cool Fuel, Inc. v. Connett*, 685 F.2d 309,
17 312 (9th Cir. 1982). The filing of a formal cross-motion is not necessary. *See* Fed. R.
18 Civ. P. 56(f); *Portsmouth Square, Inc. v. Shareholders Protective Comm.*, 770 F.2d 866,
19 869 (9th Cir. 1985).

20 As noted above, there are no disputed issues of material fact. All of the facts
21 necessary to decide this case have been fully and fairly presented by the IRS in its
22 Motion and supporting papers. Based on the number of reported decisions dealing with
23 this § 523(a)(1)(B)(i) issue on virtually identical facts and the fact that they have been
24 cited in the IRS’s papers, it is clear that the IRS is very familiar with all of the arguments
25 on the issue and that it has had a full and fair opportunity to brief those arguments in this
26 case. Therefore, this adversary proceeding appears to be ripe for resolution by summary
27 judgment.

28 ///

1 **ISSUE PRESENTED.**

2 It is undisputed that in June 2009, the Martins filed three Form 1040s for the
3 2004, 2005, and 2006 tax years. Those documents were filed approximately three
4 months after the IRS assessed the Martins’ tax liability for the subject tax years and more
5 than two years before the commencement of the Martins’ bankruptcy case.

6 The IRS contends that the Martins’ tax debt is excepted from their discharge
7 under § 523(a)(1)(B)(i) because the Martins did not file their tax returns until *after* the
8 IRS made its assessments and began its collection efforts. It offers two theories in
9 support of its position. First, according to the IRS, when an assessment is made, the
10 resulting “debt” is based on the assessment, not upon the subsequently filed tax return.
11 This tax debt cannot be dischargeable under § 523(a)(1)(B)(i) if it is not actually based
12 on a filed tax return. Alternatively, the IRS contends that a Form 1040, filed after an
13 assessment is made and collection efforts are initiated, does not constitute a “return”
14 within the meaning of § 523(a)(1)(B) for purposes of determining dischargeability. The
15 IRS has not raised any issues with the form and content of the Martins’ Form 1040s; the
16 IRS only takes issue with the timing of the Form 1040s’ filing in relation to the
17 assessments and collection activity.¹⁰

18 **ANALYSIS AND CONCLUSIONS OF LAW.**

19 **The Chapter 7 Discharge.** Generally, and with few exceptions, a chapter 7
20 debtor will receive a discharge of all debts that arose before the petition date. *See*
21 § 727(b). Section 523 of the Bankruptcy Code defines the kinds of debts that are
22 excepted from the discharge. When a dispute arises, these exceptions to discharge
23 should be strictly construed against the creditor in light of the “fresh start” policy
24

25
26 ¹⁰ Indeed, the IRS accepted the Form 1040s and processed them to determine the amount
27 of the tax debt, just as if they had been timely filed. As a result, the IRS only seeks relief for the
28 adjusted amount of assessed taxes due after the Form 1040s were filed. The IRS concedes that
the post-assessment increase for the 2005 tax liability, along with all interest and penalties, was
discharged.

1 underlying the Code. *See Snoke v. Riso (In re Riso)*, 978 F.2d 1151, 1154 (9th Cir.
2 1992).

3 The discharge exception applicable here is found in § 523(a)(1)(B)(i).¹¹ It applies
4 to a tax debt “with respect to which a return . . . if required . . . was not filed or given.”
5 In other words, a debtor cannot discharge “a tax liability debt if: (1) the tax underlying
6 the tax liability debt required a return; and (2) the debtor failed to file the required
7 return.” *Cal. Franchise Tax Bd. v. Jackson (In re Jackson)*, 184 F.3d 1046, 1050 (9th
8 Cir. 1999). In cases involving § 523(a)(1)(B)(i), when the debtor has filed a Form 1040
9 or other document which purports to report his or her tax liability, the focus shifts to the
10 question of what constitutes a filed “return,” with “[t]he IRS [having] the ultimate
11 burden of proof as to whether a return has been filed,” *United States v. Nunez (In re*
12 *Nunez)*, 232 B.R. 778, 783 (9th Cir. BAP 1999).

14 ¹¹ In its entirety, § 523(a)(1)(B) identifies two categories of tax debts which are excepted
15 from discharge:

16 (a) A discharge under section 727 . . . of this title does not discharge an
17 individual debtor from any debt—

18 (1) for a tax or a customs duty—

19 . . .

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

22 (i) was not filed or given; or

23 (ii) was filed or given after the date on which such return,
24 report, or notice was last due, under applicable law or
25 under any extension, and after two years before the date of
26 the filing of the petition

27 Here, it is undisputed that the Martins filed their Form 1040s for the tax years 2004,
28 2005, and 2006 more than two years before their bankruptcy. Therefore, the discharge
exception in § 523(a)(1)(B)(ii) is not applicable in this case.

1 **The Definition of a Tax “Return”: the *Beard* Test.** Prior to enactment of the
2 BAPCPA in 2005, the term “return” was undefined by the Bankruptcy Code. As a
3 result, many courts, including the Court of Appeals for the Ninth Circuit (the “Ninth
4 Circuit”), adopted the four-element test developed by the tax court in *Beard v.*
5 *Commissioner*, 82 T.C. 766 (1984), *aff’d per curiam*, 793 F.2d 139 (6th Cir. 1986), to
6 determine what constitutes a tax “return” for purposes of § 523(a)(1)(B). *See United*
7 *States v. Hatton (In re Hatton)*, 220 F.3d 1057, 1060–61 (9th Cir. 2000); *Colsen v.*
8 *United States (In re Colsen)*, 446 F.3d 836, 839 (8th Cir. 2006); *In re Payne*, 431 F.3d
9 1055, 1057 (7th Cir. 2005); *Moroney v. United States (In re Moroney)*, 352 F.3d 902,
10 905 (4th Cir. 2003); *United States v. Hindenlang (In re Hindenlang)*, 164 F.3d 1029,
11 1033–34 (6th Cir. 1999).

12 Relying on Supreme Court precedent, the tax court in *Beard* set forth the
13 requirements for a valid tax return (the “*Beard* Test”). *See* 82 T.C. at 777–78 (citing
14 *Badaracco v. Comm’r*, 464 U.S. 386 (1984); *Zellerbach Paper Co. v. Helvering*, 293
15 U.S. 172 (1934); *Florsheim Bros. Drygoods Co. v. United States*, 280 U.S. 453 (1930)).
16 Under the *Beard* Test, a document submitted to the IRS by a taxpayer qualifies as a
17 return if it (1) purports to be a return; (2) is executed under penalty of perjury;
18 (3) contains sufficient data to calculate the tax liability; and (4) represents an honest and
19 reasonable attempt to satisfy the requirements of the tax law. *See id.* at 777.

20 In pre-BAPCPA nondischargeability cases, the dispute generally focused on the
21 fourth *Beard* Test element,¹² and the courts tended to disagree on whether this “honest-
22 and-reasonable-attempt” inquiry incorporates the debtor’s delinquency (i.e., whether the
23 tax return was untimely filed and the reasons for its untimeliness) or is limited to the face
24 of the purported return (i.e., the form and content of the documents filed). *Compare*
25 *Colsen*, 446 F.3d at 840 (considering face of the documents only), *and Payne*, 431 F.3d
26

27 ¹² Here, there is no dispute that the Martins’ Form 1040s satisfy the first three elements
28 of the *Beard* Test.

1 at 1061–62 (Easterbrook, J., dissenting), *with Payne*, 431 F.3d at 1057–58 (majority
2 opinion) (considering timeliness of the return), *Moroney*, 352 F.3d at 906, and
3 *Hindenlang*, 164 F.3d at 1034–35.

4 With enactment of the BAPCPA in 2005, Congress attempted to clarify the
5 meaning of the term “return” by adding a “hanging paragraph” to the end of § 523(a).
6 See BAPCPA, Pub. L. No. 109-8, § 714, 119 Stat. at 128–29. This hanging paragraph
7 reads,

8 For purposes of this subsection, the term “return” means a return
9 that *satisfies the requirements of applicable nonbankruptcy law (including*
10 *applicable filing requirements)*. Such term includes a return prepared
11 pursuant to section 6020(a) of the Internal Revenue Code of 1986, or
12 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.

13 § 523(a) para. (emphasis added).

14 Unfortunately, Congress’s attempt to bring clarity to the process has only created
15 more ambiguity, resulting in significant disagreement between the courts which have
16 endeavored to apply the new law. Some courts have interpreted the BAPCPA’s addition
17 of the hanging paragraph to mean the end of the *Beard* Test. See *McCoy v. Miss. State*
18 *Tax Comm’n (In re McCoy)*, 666 F.3d 924, 929–30 (5th Cir. 2012) (“BAPCPA amended
19 § 523(a) to provide an unambiguous definition of ‘return,’ obviating the need to return to
20 the pre-BAPCPA [*Beard*] test.”); *Gonzalez v. Mass. Dep’t of Revenue (In re Gonzalez)*,
21 ___ B.R. ___, BAP No. MW 13-026, 2014 WL 888460, at *7 (1st Cir. BAP Mar. 6, 2014);
22 *Casano v. IRS (In re Casano)*, 473 B.R. 504, 507 (Bankr. E.D.N.Y. 2012); *Creekmore v.*
23 *IRS (In re Creekmore)*, 401 B.R. 748, 751–52 (Bankr. N.D. Miss. 2008); see also *Payne*,
24 431 F.3d at 1060 (Easterbrook, J., dissenting). However, other courts have continued to
25 apply the tax court’s *Beard* Test, believing it represents the “applicable nonbankruptcy
26 law” referred to in the hanging paragraph. See *Mallo v. United States (In re Mallo)*, 498
27 B.R. 268, 281 (D. Colo. 2013) (adopting *Hindenlang* version of *Beard* Test as the
28 “applicable nonbankruptcy law”); *Rhodes v. United States (In re Rhodes)*, 498 B.R. 357,

1 369 (Bankr. N.D. Ga. 2013) (adopting *Colsen* version of *Beard* Test); *Brown v. Mass.*
2 *Dep't of Revenue (In re Brown)*, 489 B.R. 1, 5–6 (Bankr. D. Mass. 2013), *aff'd on other*
3 *grounds sub nom. Gonzalez*, 2014 WL 888460. Still, others have declined to take a
4 position on the *Beard* Test's post-BAPCPA relevance. See *Wogoman v. IRS (In re*
5 *Wogoman)*, 475 B.R. 239, 250–51 (10th Cir. BAP 2012) (concluding that tax debt was
6 nondischargeable whether using *Beard* Test or other tests); *Perry v. United States*, 500
7 B.R. 796, 803 (M.D. Ala. 2013); *Smythe v. United States (In re Smythe)*, Case No. 10-
8 49799, Adv. No. 11-04077, 2012 WL 843435, at *4 (Bankr. W.D. Wash. Mar. 12,
9 2012).

10 **The Tax “Debt” Is Not Established by the IRS’s Assessments.** Leaving the
11 *Beard* Test aside for a moment, the IRS first argues that the Martins’ tax debt is
12 nondischargeable under § 523(a)(1)(B)(i) because the underlying “debt” is established
13 by the IRS’s assessments, rather than the Form 1040s that the Martins filed
14 subsequently. The IRS attempts to force a distinction between a tax liability based on an
15 assessment and a tax liability based on a subsequently filed document, in this case, a
16 Form 1040. According to the IRS, it does not matter if a debtor files a Form 1040 after
17 the IRS’s assessment has been made because the assessment has already created a legally
18 enforceable “debt” that carries the force of a judgment. See *Hibbs v. Winn*, 542 U.S. 88,
19 101 (2004) (“[T]he assessment is the official recording of liability that triggers levy and
20 collection efforts.”); *Bull v. United States*, 295 U.S. 247, 260 (1935) (“The assessment
21 supersedes the pleading, proof, and judgment necessary in an action of law, and has the
22 force of such a judgment.”). If the court follows the IRS’s argument here, then there
23 would be no need to determine whether a post-assessment Form 1040 qualifies as a
24 “return” within the meaning of § 523(a)(1)(B) and the hanging paragraph. The
25 subsequently filed Form 1040 would be irrelevant because the “assessed debt” would
26 independently constitute a tax debt “with respect to which a return . . . was not filed or
27 given.” § 523(a)(1)(B)(i).

1 However, the IRS’s argument is unpersuasive and will not be adopted by this
2 court. The IRS has not cited any binding authority for this interpretation of the
3 Bankruptcy Code, and the court has only found two decisions, both unpublished, that
4 seem to agree with the IRS. *See Smythe*, 2012 WL 843435, at *2–3; *Wogoman v. IRS (In*
5 *re Wogoman)*, Case No. 11-11044-SBB, Adv. No. 11-01117-SBB, 2011 WL 3652281, at
6 *5 (Bankr. D. Colo. Aug. 19, 2011), *aff’d on other grounds*, 475 B.R. 239. Conversely,
7 a number of courts have disagreed with the IRS on this issue under nearly identical facts.
8 *See Martin v. United States (In re Martin)*, 500 B.R. 1, 7–8 (D. Colo. 2013); *Mallo*, 498
9 B.R. at 277; *Rhodes*, 498 B.R. at 362; *see also Savage v. IRS (In re Savage)*, 218 B.R.
10 126, 132 (10th Cir. BAP 1998) (pre-BAPCPA). The bankruptcy court in *Rhodes*
11 succinctly disposed of the IRS’s argument:

12 The statutory definitions of “debt” and “claim” focus on the nature
13 and source of the debt (federal income tax liability), not the mechanism to
14 determine the debt (assessment versus return). Under these definitions, a
debtor has a “debt” when a right to payment accrues, regardless of how or
when the extent of the debtor’s liability becomes fixed or due.

15 At the end of each [taxable year], the United States had a *right to*
16 *payment* of income tax for [the] year (although unmatured and unfixed),
17 and the Debtor was liable for the tax at the time. Thus, the Debtor had a
18 *debt* that existed regardless of the Debtor’s filing of the return or the IRS’s
assessment. The distinction between assessment and return is not relevant
to the existence of a “debt” for bankruptcy purposes or to the
dischargeability inquiry under § 523(a)(1)(B).

19 498 B.R. at 362 (emphasis in original); *cf. Edelson v. Comm’r*, 829 F.2d 828, 834 (9th
20 Cir. 1987) (“[T]ax liabilities, though unassessed, are deemed obligations due and owing
21 at the close of the taxable year.”). The court finds this analysis in *Rhodes* to be
22 persuasive, and the IRS’s first argument must therefore be rejected.

23 **Interpretation of the Hanging Paragraph.** Turning to the IRS’s alternative
24 argument, the court now shifts its attention to § 523(a)’s hanging paragraph to determine
25 what falls within the “requirements of applicable nonbankruptcy law (including
26 applicable filing requirements).” Specifically, in this case, the court must decide if and
27 how the timing of the filing of the Martins’ Form 1040s affects their qualification as
28

1 “returns” for dischargeability purposes. In other words, is the timing of a Form 1040’s
2 filing an “applicable filing requirement” within the meaning of the hanging paragraph?

3 Again, the courts are split in their response to this question, and three approaches
4 have emerged. First, the Court of Appeals for the Fifth Circuit (the “Fifth Circuit”) has
5 adopted a rigid, unforgiving interpretation in *McCoy* (hereinafter referred to as the “one-
6 day-late” result), with most courts following *McCoy* and its bright-line test. *See*
7 *Pendergast v. Mass. Dep’t of Revenue (In re Pendergast)*, 494 B.R. 8, 14–15 (Bankr. D.
8 Mass. 2013); *Shinn v. IRS (In re Shinn)*, Bankr. No. 10-83750, Adv. No. 10-8139, 2012
9 WL 986752, at *6 (Bankr. C.D. Ill. Mar. 22, 2012); *Hernandez v. United States (In re*
10 *Hernandez)*, Bankr. No. 10-53962-C, Adv. No. 11-5126-C, 2012 WL 78668, at *3
11 (Bankr. W.D. Tex. Jan. 11, 2012); *Cannon v. United States (In re Cannon)*, 451 B.R.
12 204, 206 (Bankr. N.D. Ga. 2011); *Links v. United States (In re Links)*, Bankr. No. 07-
13 31728, Adv. No. 08-3178, 2009 WL 2966162, at *5 (Bankr. N.D. Ohio Aug. 21, 2009);
14 *Creekmore*, 401 B.R. at 751–52.

15 Conversely, some courts have adopted the Court of Appeals for the Sixth
16 Circuit’s (the “Sixth Circuit”) pre-BAPCPA approach in *Hindenlang*, which judicially
17 constructed a more flexible, but seemingly arbitrary answer to this question (hereinafter
18 referred to as the “post-assessment” approach). *See Martin*, 500 B.R. at 8; *Mallo*, 498
19 B.R. at 280–81; *see also Wogoman*, 475 B.R. at 251; *Perry*, 500 B.R. at 810. Lastly, the
20 minority view, relying on the Court of Appeals for the Eighth Circuit’s (the “Eighth
21 Circuit”) pre-BAPCPA decision in *Colsen*, holds that the hanging paragraph’s reference
22 to “requirements of applicable nonbankruptcy law (including applicable filing
23 requirements)” does not impose any temporal restriction on the definition of a tax return
24 for dischargeability purposes (hereinafter referred to as the “no-time-limit”
25 interpretation). *See Rhodes*, 498 B.R. at 369; *Martin v. United States (In re Martin)*, 482
26 B.R. 635, 640–41 (Bankr. D. Colo. 2012), *rev’d*, 500 B.R. 1.

1 For the reasons set forth below, this court declines to adopt either the one-day-late
2 result or the post-assessment approach and will instead apply the minority no-time-limit
3 interpretation to the hanging paragraph.

4 **The Fifth Circuit’s One-Day-Late Result.** In *McCoy*, the Fifth Circuit applied a
5 literal and seemingly harsh interpretation of the hanging paragraph by holding that, with
6 certain limited exceptions, a “return that is filed late under the applicable nonbankruptcy
7 . . . law is not a ‘return’ for bankruptcy discharge purposes under § 523(a).” 666 F.3d at
8 932.

9 The Fifth Circuit’s analysis looked strictly at the plain language of the first
10 sentence of the BAPCPA’s hanging paragraph. *See id.* at 928–29 (emphasizing that “the
11 plain language meaning of the [Bankruptcy] Code should rarely be trumped” even if
12 “awkward” or “ungrammatical” (alteration in original) (internal quotation marks
13 omitted)). Under the *McCoy* interpretation, the statutory due date for filing a tax return
14 represents one of the “applicable filing requirements” referred to in the first sentence.
15 *See id.* at 928. For federal income taxes, a tax return must be filed, unless an extension
16 has been granted,¹³ “on or before the 15th day of April following the close of the
17 calendar year.” IRC § 6072(a). As a result, a court following the *McCoy* analysis would
18 hold that debtors who file their own tax returns on April 16, as little as one day after the
19 statutory due date, would be unable to discharge their tax debt in bankruptcy because
20 one-day-late returns do not literally satisfy “applicable filing requirements.” *See, e.g.,*
21 *Creekmore*, 401 B.R. at 752 (noting that debtor did not file returns by April 15 deadline).

22 Although some courts adopting this strict interpretation have acknowledged its
23 potentially harsh results, they reasoned that the plain language of the statute should
24 nevertheless control. *See Pendergast*, 494 B.R. at 14 (“While I recognize that there is
25 something unsavory about saying that a ‘late-filed return’ is not a ‘return’ under 11

27 ¹³ If the IRS grants an extension, that filing deadline would typically be extended
28 another six months. *See* IRC § 6081(a).

1 U.S.C. § 523(a) by virtue of its tardiness, I cannot characterize this result as absurd.”).
2 Yet, as other courts have pointed out, the *McCoy* analysis runs afoul of several other
3 canons of statutory construction that should trump the apparent plain language of the
4 statute. *See Wogoman*, 475 B.R. at 248–49; *Brown*, 489 B.R. at 5, *aff’d on other*
5 *grounds sub nom. Gonzalez*, 2014 WL 888460; *Martin*, 482 B.R. at 639, *rev’d*, 500
6 B.R. 1. Even the IRS has expressed its own lack of support for the Fifth Circuit’s one-
7 day-late interpretation.¹⁴

8 First, it is difficult, if not impossible, to harmonize the one-day-late interpretation
9 with the hanging paragraph’s second sentence. *See Wogoman*, 475 B.R. at 248–49. The
10 one-day-late result requires reading the hanging paragraph’s first sentence in isolation
11 and without regard to the second sentence. *See id.* at 248 (“Each of the two sentences in
12 this paragraph appears quite straightforward when standing alone. However, when the
13 two are read together, we are not convinced, as some other courts are, that the precise
14 meaning and effect of the hanging paragraph is clear.”). But as the Supreme Court has
15 instructed, “It is a cardinal principle of statutory construction that a statute ought, upon
16 the whole, to be so construed that, if it can be prevented, no clause, sentence, or word
17 shall be superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31
18 (2001) (internal quotation marks omitted); *accord Hibbs*, 542 U.S. at 101. Further, “one
19 provision should not be interpreted in a way which is internally contradictory or that
20 renders other provisions of the same statute inconsistent or meaningless.” *Bayview*
21 *Hunters Point Cmty. Advocates v. Metro. Transp. Comm’n*, 366 F.3d 692, 700 (9th Cir.
22 2004) (internal quotation marks omitted).

23 Here, if the first sentence of the hanging paragraph is construed to support the
24 one-day-late result (i.e., excluding any late-filed document from the definition of a
25

26 ¹⁴ The IRS candidly disclosed its reluctance to advocate for the one-day-late result,
27 stating, “The United States does not adopt this position, which creates a harsh result that
28 appears inconsistent with the statute’s intent.” Def.’s Mem. Supp. Summ. J. 12:20–21, July 30,
2013, ECF No. 47.

1 “return”), then that interpretation is internally inconsistent with the second sentence’s
2 reference to an IRC § 6020(a) return, and it also renders the second sentence’s reference
3 to an IRC § 6020(b) return meaningless. This is because returns filed pursuant to both
4 IRC §§ 6020(a) and 6020(b) are necessarily “late” returns. The IRS would not even
5 prepare these “substitute” returns until some time after the taxpayer has failed to timely
6 file his or her own return (i.e., once the April 15 statutory deadline has passed). *See* IRC
7 § 6020(a), (b)(1); I.R.S. Chief Couns. Notice CC-2010-016, 2010 WL 3617597 (Sept. 2,
8 2010) (noting that an IRC § 6020(b) return “is always prepared after the due date”); *see*
9 *also McCoy*, 666 F.3d at 931 (acknowledging that “filings under § 6020 of the Internal
10 Revenue Code are not returns that satisfy ‘applicable filing requirements’”).

11 Thus, it is contradictory to impose *McCoy*’s strict temporal condition in the
12 definition of “return,” while including a necessarily late IRC § 6020(a) return as one of
13 those “returns.”¹⁵ By the same logic, there is also no need for the hanging paragraph to
14 specifically exclude a necessarily late IRC § 6020(b) return if the general definition of
15 “return” in the first sentence already excludes all late-filed returns.¹⁶ Conversely, if the
16 first sentence of the hanging paragraph is interpreted to *not* impose a temporal condition
17 in the definition of a tax return, then the first and second sentences of the hanging
18

19
20 ¹⁵ In response, those courts adopting the one-day-late result have reasoned, without
21 much analysis, that the reference to an IRC § 6020(a) return is intended to represent a very
22 narrow exception or safe harbor to the general definition of a “return” found in the first
23 sentence. *See McCoy*, 666 F.3d at 931; *Pendergast*, 494 B.R. at 15; *Creekmore*, 401 B.R. at
24 752. But, as one court has observed, “[N]either the Fifth Circuit’s decision, nor the bankruptcy
court decisions it cites, offer a satisfactory explanation for why Congress allegedly ‘carves out a
narrow exception to the definition of ‘return’ for § 6020(a) returns.’” *Wogoman*, 475 B.R. at
249.

25 ¹⁶ Further, the reference to an IRC § 6020(b) return in the hanging paragraph is
26 superfluous since an IRC § 6020(b) return is not a “return” for statute-of-limitations purposes
27 under “applicable nonbankruptcy law.” *See* IRC § 6501(b)(3) (“Notwithstanding the provisions
28 of paragraph (2) of section 6020(b), the execution of a return by the Secretary pursuant to the
authority conferred by such section shall not start the running of the period of limitations on
assessment and collection.”).

1 paragraph can be read in harmony with one another. The hanging paragraph would be
2 internally consistent, and neither sentence would render the other meaningless. *See*
3 *Bayview Hunters Point*, 366 F.3d at 700.

4 Additionally, Congress has already addressed the “time-of-filing” question in
5 another manner, which further supports the conclusion that timely filing is not a
6 “requirement” in the hanging paragraph. Specifically, the Bankruptcy Code deals with a
7 late-filed return in § 523(a)(1)(B)(ii), and *McCoy’s* one-day-late interpretation would
8 render that subsection meaningless as well. *See Rhodes*, 498 B.R. at 366. Pursuant to
9 § 523(a)(1)(B)(ii), a tax debt is not discharged if a return was filed after its due date (i.e.,
10 it was untimely) and within two years prior to the bankruptcy filing.¹⁷ For the purposes
11 of defining that “return,” the definition in the hanging paragraph applies to both
12 subsections (i) and (ii) of § 523(a)(1)(B). *Cf. Gustafson v. Alloyd Co.*, 513 U.S. 561, 570
13 (1995) (stating “the normal rule of statutory construction [is] that identical words used in
14 different parts of the same act are intended to have the same meaning” (internal
15 quotation marks omitted)). However, if the hanging paragraph is interpreted to make
16 timely filing a requirement in the definition of a tax return, thus excluding all returns that
17 are not filed on time, then a creditor has no need to ever resort to the two-year rule long
18 recognized in § 523(a)(1)(B)(ii), given that § 523(a)(1)(B)(i) would suffice to disqualify
19 all untimely returns.¹⁸ *See Rhodes*, 498 B.R. at 366 (“Thus, if timeliness is part of
20

21 ¹⁷ Specifically, that provision states that a tax debt “with respect to which a return . . . if
22 required . . . was filed or given after the date on which such return . . . was last due, under
23 applicable law or under any extension, and after two years before the [petition date]” is not
24 discharged.

25 ¹⁸ In response to this argument, one court has suggested that an IRC § 6020(a) return
26 may qualify as a late-filed return under § 523(a)(1)(B)(ii), meaning that subsection would not be
27 rendered meaningless by the one-day-late interpretation. *See Pendergast*, 494 B.R. at 15 &
28 n.33. However, an IRC § 6020(a) return can never be a return “filed . . . after the date on which
such return . . . was last due, under applicable law or under any extension” because an IRC
§ 6020(a) return has no filing deadline and is filed in the IRS’s discretion. *See IRC § 6020(a);*
see also IRC § 6072(a). Thus, § 523(a)(1)(B)(ii) would not apply to a late-filed IRC § 6020(a)

1 ‘applicable filing requirements’ . . . , a late-filed return is not a ‘return’ for clause (ii) of
2 § 523(a)(1)(B) either.”).

3 Lastly, the court must also consider the argument that the one-day-late
4 interpretation of the hanging paragraph yields a potentially absurd result. *See Hartford*
5 *Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (“[W]hen the
6 statute’s language is plain, the sole function of the courts—at least where the disposition
7 required by the text is not absurd—is to enforce it according to its terms.” (internal
8 quotation marks omitted)); *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) (“[T]o justify a
9 departure from the letter of the law upon that ground, the absurdity must be so gross as to
10 shock the general moral or common sense.”). Even the IRS acknowledges that it would
11 be “a harsh result that appears inconsistent with the statute’s intent” to except tax debts
12 from discharge when debtors have filed their tax returns as little as one day after the
13 applicable deadline,¹⁹ which is why the IRS has expressly declined, in this case and
14 many others, to urge adoption of the one-day-late result espoused in *McCoy* and its
15 progeny. In so doing, the IRS has implicitly conceded that timely filing (i.e. by April 15)
16 is not a “requirement” for a tax return under applicable nonbankruptcy law.

17 In conclusion, because the one-day-late interpretation would (1) make it
18 impossible to read the first and second sentences of the hanging paragraph in harmony,
19 (2) render § 523(a)(1)(B)(ii) superfluous, and (3) produce a potentially absurd result, this
20 court declines to adopt the one-day-late interpretation of the hanging paragraph and
21 concludes that timely filing is not a “requirement” for determining what constitutes a tax
22 “return” for dischargeability purposes.

23 **The Sixth Circuit’s Post-Assessment Approach.** The court turns now to the
24 post-assessment approach originating from the Sixth Circuit’s pre-BAPCPA decision in
25 *Hindenlang* applying the *Beard* Test. It stands for the proposition that a late-filed tax

26 _____
27 return.

28 ¹⁹ Def.’s Mem. Supp. Summ. J. 12:20–21, July 30, 2013, ECF No. 47.

1 return can still constitute a “return” within the meaning of § 523(a)(1)(B) and the
2 hanging paragraph *up until* the time the IRS makes an assessment and commences
3 collection efforts for that tax year. Immediately after the IRS makes its assessment, then
4 as a matter of law any document the debtor may file, including, as here, the official Form
5 1040, loses its identity as a tax return for dischargeability purposes, even though it may
6 be accepted by the IRS and processed for all other purposes for which a tax return is
7 required. *See Mallo*, 498 B.R. at 281 (concluding that “untimely returns filed by Debtors
8 in this case after the IRS determined their tax liability negates ‘an honest and reasonable
9 attempt to comply with tax law’ under the fourth prong of the [*Beard*] test”); *see also*
10 *Hindenlang*, 164 F.3d at 1034–35.

11 The biggest problem with the post-assessment approach for defining what
12 constitutes a tax return is that it is a judicially constructed fiction that lacks any support
13 in the “applicable nonbankruptcy law” (i.e., the relevant tax statutes, regulations, and
14 case law). Further, it puts the IRS in complete control of the issue of timeliness and the
15 ultimate result of nondischargeability. To simply tie the definition of a tax return to the
16 timing of the IRS’s assessment would yield totally arbitrary and potentially
17 unconscionable results.

18 The post-assessment approach forces us to revisit the initial question asked by the
19 court: does “applicable nonbankruptcy law” referred to in § 523(a)’s hanging paragraph
20 contemplate that timely filing is a “requirement” in the definition of a tax return, or does
21 it not? The answer can be “yes” only if relevant tax statutes, regulations, or case law
22 provides for such a requirement. Courts adopting the one-day-late result answer with a
23 “yes,” citing to tax statutes such as IRC § 6072(a) as support for the temporal
24 requirement. However, the court has already explained the difficulty with application of
25 the one-day-late result above, so *McCoy*’s strict temporal rule does not work.

26 The IRS disagrees with *McCoy*’s one-day-late result but still argues that the
27 answer to the court’s question is “yes” based on a different theory, the post-assessment
28 approach. However, where is the support from “applicable *nonbankruptcy* law” for such

1 a requirement that a return must be filed before the IRS makes its assessment? In
2 response, the IRS offers *Hindenlang* and the cases following it as support. Yet, while
3 the court agrees that the *Beard* Test in its basic form may represent a part of the
4 “applicable nonbankruptcy law” referenced in the hanging paragraph,²⁰ the IRS’s
5 supporting authority, *Hindenlang* and its progeny, is better characterized as “applicable
6 *bankruptcy law*.” The IRS has not cited to any cases adopting the post-assessment
7 approach in a nonbankruptcy tax context. Thus, *Hindenlang*’s judicially constructed rule
8 also does not work, and without another temporal-requirement option supported by
9 “applicable nonbankruptcy law,” the answer to the court’s initial question must be “no.”

10 Additionally, in light of the policy to strictly construe dischargeability exceptions
11 against the creditor, *see Riso*, 978 F.2d at 1154, the court declines to adopt a definition of
12 “return” that essentially puts the dischargeability “trigger” entirely in the hands of the
13 creditor. Although the post-assessment approach focuses on one particular date to
14 determine whether a return has been filed (i.e., when the IRS makes an assessment), that
15 date is a moving target that is ultimately controlled by the IRS. Other than the statutory
16 restriction in IRC § 6213(a), which compels the IRS to wait 90 days after mailing the
17 deficiency notice before making its assessment, the IRS appears to have unfettered
18 discretion in deciding when to initiate the assessment process (once those 90 days have
19 run). With this discretion, the IRS could potentially mail a deficiency notice to a debtor,
20 who did not file his or her tax return by the April 15 due date, on the next day, April 16,
21

22 ²⁰ The *Beard* Test in general has remained a widely accepted authority for determining
23 what constitutes a “return” in a variety of tax contexts. The IRS has referenced the *Beard* Test
24 in its revenue rulings and other materials. *See* Rev. Rul. 2005-59, 2005-2 C.B. 505 (2005)
25 (clarifying when documents constitute valid returns under *Beard* Test in context of joint filers);
26 I.R.S. Chief Couns. Notice CC-2004-032, 2004 WL 3210764 (Sept. 9, 2004) (“The four part
27 test set forth in [*Beard*] is widely accepted as the analysis for determining what constitutes a
28 return for purposes of the Internal Revenue Code.”). Courts facing tax issues have also applied
the test. *See Mendes v. Comm’r*, 121 T.C. 308, 329–30 (2003) (Vasquez, J., concurring) (noting
that courts have relied on the *Beard* Test for a number of provisions in the Internal Revenue
Code).

1 and proceed to assess the debtor’s tax liability on the 91st day after that. Under the post-
2 assessment approach, the tax debt would hypothetically become nondischargeable even
3 if the debtor otherwise made a reasonable attempt to file his or her return 92 days after
4 the April 15 due date, but one day after the IRS has made its assessment. At the same
5 time, a return filed years after its due date, as had occurred here, would be treated as a
6 return for dischargeability purposes so long as the IRS has not yet made its assessment.
7 The post-assessment approach is simply too arbitrary in its application and grants too
8 much power to the IRS to control the timing of the dischargeability issue.

9 For these reasons, the court cannot adopt the post-assessment approach as support
10 for the proposition that the time of filing is a “requirement” in the hanging paragraph’s
11 definition of a tax return for dischargeability purposes.

12 **The No-Time-Limit Minority View.** After careful consideration of the
13 arguments for and against the various solutions to this problem, the court is persuaded
14 that the most reasonable and consistent interpretation of the hanging paragraph comes
15 from the minority no-time-limit approach, derived from the Eighth Circuit’s pre-
16 BAPCPA decision in *Colsen* also applying the *Beard* Test. As mentioned above, the
17 court agrees that the tax court’s *Beard* Test can be considered as part of the “applicable
18 nonbankruptcy law” referenced in the hanging paragraph and rejects *McCoy*’s
19 conclusion that the BAPCPA eliminated the need to rely on the *Beard* Test. However, in
20 deciding which version of the *Beard* Test to apply, the court must side with *Colsen* over
21 *Hindenlang*. *Colsen*’s observation—that “the fourth *Beard* criterion contains no mention
22 of timeliness,” 446 F.3d at 840—represents the better analysis of the original *Beard* Test
23 that more closely follows the actual “requirements of applicable nonbankruptcy law
24 (including applicable filing requirements)” that make a return a “return.” See *Rhodes*,
25 498 B.R. at 369 (“This approach is consistent with [*Beard*], the case from which the
26 four-prong test originates.”).

27 In *Colsen*, the Eighth Circuit acknowledged the post-assessment approach taken
28 in *Hindenlang* but declined to follow it or impose any temporal condition in the

1 definition of a tax “return” for dischargeability purposes. *See Colsen*, 446 F.3d at
2 839–40. The court noted that the *Beard* Test’s requirement of an “honest and genuine
3 attempt to satisfy the [tax] laws” related to the form and substance of the documents
4 filed, not to the time of their filing. *See id.* at 840 (citing *Badaracco*, 464 U.S. at 396–97
5 (observing that fraudulent returns can still be returns for statute-of-limitations purposes if
6 they “appeared on their faces to constitute endeavors to satisfy the law”)). The court
7 observed,

8 [T]he fourth *Beard* criterion contains no mention of timeliness or the filer’s
9 intent. We have been offered no persuasive reason to create a more
10 subjective definition of “return” that is dependent on the facts and
11 circumstances of a taxpayer’s filing. We think that to do so would increase
12 the difficulty of administration and introduce an inconsistency into the
terminology of the tax laws. We therefore hold that the honesty and
genuineness of the filer’s attempt to satisfy the tax laws should be
determined from the face of the form itself, not from the filer’s delinquency
or the reason for it. The filer’s subjective intent is irrelevant.

13 *Id.* Thus, although the *Beard* Test does represent “applicable nonbankruptcy law”
14 referred to in the hanging paragraph, “[that] requirement that the return ‘must represent
15 an honest and reasonable attempt to satisfy the requirements of the tax law’ does not
16 incorporate a timeliness requirement.” *Rhodes*, 498 B.R. at 369. As a result, the court
17 need not consider the fact that the Martins filed their Form 1040s after the IRS made its
18 assessments in the § 523(a)(1)(B)(i) analysis.

19 Although the IRS opposes *Colsen*’s no-time-limit interpretation, it has not
20 identified any “applicable nonbankruptcy law” that requires a return to be filed by a
21 certain time in order to qualify as a “return.” *See Hindenlang*, 164 F.3d at 1033
22 (acknowledging that the Internal Revenue Code “does not specify when a late tax form
23 will no longer qualify as a return under the tax law”). As discussed in *Colsen*, such a
24 temporal filing requirement does not actually exist within the fourth element of the
25 original *Beard* Test, *see id.* at 840, so the IRS cannot rely on *Hindenlang* and its
26 progeny. Additionally, the IRS has not cited any other tax statutes, regulations, or case
27 law that otherwise indicates a temporal requirement for filing returns.

1 The only temporal consideration that this court could locate in the tax law is the
2 April 15 filing deadline under IRC § 6072(a). However, unlike other requirements
3 imposed by applicable tax law, a taxpayer’s failure to timely file a return by this
4 statutory deadline does not defeat the purpose of the return or render it a nullity;²¹ the
5 late filing is simply grounds to impose additional penalties and interest on the taxpayer.
6 *See* IRC § 6651(a)(1). A return filed on April 16 is still accepted as a return by the IRS.
7 Furthermore, courts, including the Supreme Court, have recognized that perfect
8 compliance with the applicable tax law in certain situations—more significant than filing
9 a return late—is not required for a return to be deemed valid. *See Zellerbach Paper*, 293
10 U.S. at 180 (“Perfect accuracy or completeness is not necessary to rescue a return from
11 nullity, if it purports to be a return, is sworn to as such, and evinces an honest and
12 genuine endeavor to satisfy the law. This is so though at the time of filing the omissions
13 or inaccuracies are such as to make amendment necessary.” (citation omitted)); *Sakkis v.*
14 *Comm’r*, 100 T.C.M. (CCH) 459, at *7–8 (2010) (finding that valid return was filed even
15 though taxpayers claimed frivolous deduction that brought their tax liability down to
16 zero).

17 Additionally, despite the supposed “requirement” that a tax return be filed before
18 the IRS makes its assessment, the IRS’s own actions suggest that this is not actually a
19 “requirement” within the meaning of the hanging paragraph after all. A “requirement”
20 means “something essential to the existence or occurrence of something else.”
21 Webster’s New Explorer Encyclopedic Dictionary 1561 (Federal Street Press 2006).
22 Thus, to give meaning to the statutory term “requirements” in the hanging paragraph, a
23 document should be considered a “return that satisfies the requirements of applicable
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26 ²¹ For example, a purported return, which has not been signed under penalty of perjury
27 as required by IRC §§ 6061 and 6065, is deemed an invalid return. *See Olpin v. Comm’r*, 270
28 F.3d 1297, 1300–01 (10th Cir. 2001); *United States v. Lee (In re Lee)*, 186 B.R. 539, 541 (S.D.
Fla. 1995) (noting that the tax courts “have consistently held that an unsigned tax return is no
return at all”).

1 nonbankruptcy law” *only if* the document meets all—not some—of the requirements to
2 becoming a return.

3 Here, notwithstanding this supposed temporal “requirement” and the Martins’
4 failure to comply with it, the IRS nevertheless accepted and recognized the Martins’
5 Form 1040s as legitimate “returns” when it increased the assessed tax liability for 2005
6 and partially abated the tax liability for 2004 and 2006. *See* IRC § 6201(a)(1) (requiring
7 the IRS to “assess all taxes determined by the taxpayer or by the [IRS] as to which
8 *returns* or lists are made under this title” (emphasis added)); IRC § 6404(b) (providing
9 that a taxpayer is not entitled to file a “claim for abatement”); *see also* *Colsen*, 446 F.3d
10 at 840–41 (noting that the “information contained in the [debtor’s Form 1040s] was
11 honest and genuine enough to result in thousands of dollars of abatements of tax and
12 interest” and that the “IRS apparently ha[d] found [the] post-assessment returns useful”).
13 By accepting and processing the Martins’ Form 1040s, the IRS effectively
14 acknowledged that those documents did not have to be filed before the assessments in
15 order for the documents to become a legally sufficient tax returns for tax purposes.
16 Otherwise, the Martins’ post-assessment Form 1040s should have been rejected by the
17 IRS as legal nullities. *See, e.g.*, Treas. Reg. § 1.6011-1(b) (providing that if a taxpayer
18 does not “carefully prepare his return and set forth fully and clearly the information
19 required to be included therein,” then that return “will not be accepted as meeting the
20 requirements of the [Internal Revenue] Code” by the IRS). The IRS cannot pick and
21 choose which considerations, such as the time of a tax return’s filing, will count as a
22 “requirement” under different circumstances. Since the hanging paragraph specifically
23 adopts “applicable nonbankruptcy law,” a “return” for tax purposes should also be a
24 “return” for bankruptcy purposes.

25 Given that (1) “applicable nonbankruptcy law” does not exclude a late-filed tax
26 reporting document from being accepted and processed as a “return” for tax purposes,
27 and that (2) the IRS in this case did, in fact, accept the Martins’ late-filed Form 1040s
28 and adjusted their tax liability accordingly, the court concludes that filing a tax return

1 before the IRS’s assessment is not one of the “requirements of applicable nonbankruptcy
2 law (including applicable filing requirements)” under the hanging paragraph. The no-
3 time-limit interpretation must be adopted because it appears to be the only result that is
4 consistent with applicable tax law and actual tax practice.

5 **Applicability of the *Hatton* Decision.** Before concluding, the court will address
6 the IRS’s offer to follow the Ninth Circuit’s pre-BAPCPA decision in *Hatton*.²² In
7 *Hatton*, the bankruptcy court had ruled by summary judgment that the debtor’s tax
8 liability was dischargeable, and the bankruptcy appellate panel affirmed that decision.
9 220 F.3d at 1058. The Ninth Circuit, however, in applying the *Beard* Test, reasoned that
10 the debtor had not filed a “return” within the meaning of § 523(a)(1)(B)(i). *Id.* at 1061.
11 Accordingly, the circuit court reversed the lower courts and concluded that the subject
12 tax was not discharged. *Id.* Although the *Hatton* decision may be binding authority on
13 this court where applicable, it is distinguishable by both its timing and its facts and does
14 not clearly address the time-of-filing issue now before this court. *See Hart v. Massanari*,
15 266 F.3d 1155, 1170–73 (9th Cir. 2001) (“[A] court confronted with apparently
16 controlling authority must parse the precedent in light of the facts presented and the rule
17 announced.”).

18 In *Hatton*, the debtor never filed a Form 1040 for his 1983 federal income tax.
19 220 F.3d at 1059. Instead, the IRS had to prepare a substitute return, with no help from
20 the debtor, pursuant to IRC § 6020(b). *Id.* The debtor never disputed the IRS’s
21 calculation of the tax and, after months of delay, finally entered into an installment
22 agreement with the IRS to pay the tax at the rate of \$200 per month. *Id.* He
23 subsequently filed a chapter 7 petition before the tax was fully paid and sought a
24 determination that the remainder of the debt was discharged. *Id.*

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27 ²² Specifically, the IRS has argued that “*Colsen* is inconsistent with the Ninth Circuit’s
28 treatment of this issue in [*Hatton*] and should not be followed.” Def.’s Mem. Supp. Summ. J.
15:12–13, July 30, 2013, ECF No. 47.

1 Looking at the four elements of the *Beard* Test, the Ninth Circuit concluded that
2 neither the IRC § 6020(b) return nor the installment agreement constituted a tax return,
3 as a matter of law, within the meaning of § 523(a)(1)(B)(i). *Id.* at 1061. Looking at the
4 form and content of the documents, the court was able to dispose of the issue based on
5 the second element of the *Beard* Test, which required purported returns be executed
6 under penalty of perjury:

7 The installment agreement and the substitute return fail to qualify as
8 a return under *Beard*. First, neither document was signed under the penalty
9 of perjury. The substitute return was never signed by [the debtor], and
10 although the installment agreement contains [the debtor's] signature, his
signature was not provided under the penalty of perjury. Therefore, under
Beard, [the debtor] failed to file a tax return.

11 *Id.* (citation omitted).

12 After concluding that the debtor had “failed to file a tax return” under the second
13 *Beard* Test element, the court went on to address the fourth element. *Id.* It concluded
14 that the IRC § 6020(b) return and the installment agreement, documents prepared by the
15 IRS, also did not “represent an honest and reasonable attempt [by the debtor] to satisfy
16 the requirements of the law.” *Id.* The Ninth Circuit explained,

17 It is undisputed that [the debtor] failed to file a federal tax return on his own
18 initiative for the 1983 tax year as required by section 6012 of the I.R.C. It
19 is also undisputed that [the debtor] never attempted to cure this failure until
20 after the IRS had assessed his tax deficiency and initiated a delinquency
21 investigation. It was only after the IRS threatened to levy his wages and
22 bank account and seize his personal property that [the debtor] elected to
cooperate with the IRS. Moreover, even after [the debtor] finally responded
to the notices sent by the IRS, it still took months of negotiations before the
IRS and [the debtor] could agree on a settlement that ultimately resulted in
the installment agreement.

23 . . . [The debtor's] belated acceptance of responsibility, however, does not
24 constitute an honest and reasonable attempt to comply with the
25 requirements of the tax law. Instead, [the debtor] made every attempt to
26 avoid paying his taxes until the IRS left him with no other choice. Because
[the debtor] never filed a return and only cooperated with the IRS once
collection became inevitable, the bankruptcy court erred in concluding that
section 523 did not except [the debtor's] tax liability from discharge.

27 *Id.* (citation omitted).

1 Relying on the Ninth Circuit’s discussion of the fourth *Beard* Test element, the
2 IRS essentially argues that this circuit has adopted the Sixth Circuit’s post-assessment
3 approach discussed above. However, for several reasons, this court is not persuaded that
4 the Ninth Circuit went so far as to decree a *per se* rule that a document must be filed
5 before the IRS’s assessment to be considered a return for dischargeability purposes.

6 First, the *Hatton* decision came before the BAPCPA’s introduction of the hanging
7 paragraph, so the Ninth Circuit was not called to determine whether the time of filing a
8 return is a “requirement[] of applicable nonbankruptcy law.” The circuit court was
9 simply considering the facts before it, and those facts did not include a debtor filing a
10 Form 1040 after the IRS had made its assessment. Further, there is no indication that the
11 Ninth Circuit intended to go beyond its facts and broadly hold that all efforts by a debtor
12 to satisfy the tax laws once the IRS begins its assessment, such as by filing his or her
13 own return, would never be considered honest and reasonable as a matter of law. Thus,
14 *Hatton* cannot be construed as proclaiming a *per se* post-assessment rule.

15 Second, the Ninth Circuit’s discussion of the honest-and-reasonable-attempt
16 inquiry may be dictum. The court had already decided that the debtor’s documents
17 failed to satisfy the second *Beard* Test element, and there was no reason for the court to
18 further discuss or consider the fourth *Beard* Test element of whether the debtor acted
19 honestly and reasonably on the facts of that case. Had the debtor’s delinquency, and his
20 subjective reasons for it, truly been the deciding issue, then resolution of the case by
21 summary judgment (in favor of the IRS) would have been improper and the case should
22 have been remanded for an evidentiary hearing.

23 Third, even though the Ninth Circuit did conclude as a matter of law that the
24 debtor’s documents did not represent an honest and reasonable attempt to satisfy tax
25 laws, the facts in *Hatton*, particularly the circumstances surrounding the documents at
26 issue, were significantly different than those in this case. There, the debtor never
27 attempted to prepare any of the documents that would have reported his tax liability
28 himself. The IRS was completely on its own in having to make that calculation, which it

1 ultimately did when it prepared the debtor's substitute return. Then, once the tax was
2 determined, the debtor continued to delay any resolution with months of negotiations
3 before entering into the installment agreement. Also, at no point did the debtor contest
4 the amount of his tax liability calculated by the IRS and set forth his own calculation.
5 As the Ninth Circuit pointed out, "[the debtor] never filed a return and only cooperated
6 with the IRS once collection became inevitable." *Id.* at 1061.

7 Here, in contrast, the Martins did not rely on the IRS's calculation of their tax
8 liability nor did they wait until the last possible moment to accept responsibility.
9 Instead, the Martins hired an accountant and commissioned the preparation of their own
10 Form 1040s shortly after receiving the IRS's 90-day letter. Although the IRS did receive
11 the Form 1040s in an untimely manner, there is no dispute that the Form 1040s were
12 accurately and properly prepared. In fact, the IRS accepted those documents and the
13 information contained within them and adjusted the Martins' tax liability as a result of
14 that disclosure. Based on these facts, the court is not persuaded that the Ninth Circuit
15 would necessarily apply *Hatton* and rule that (1) timely filing of a tax return is now a
16 "requirement" of applicable nonbankruptcy law, and (2) the Martins' Form 1040s did
17 not, as a matter of law, represent an honest and reasonable attempt to satisfy the tax laws.

18 For these reasons, it is not clear that the Ninth Circuit's discussion in *Hatton* has
19 application in this case with regard to the time-of-filing issue. The court finds the
20 *Hatton* decision to be distinguishable on its facts and declines to construe it as imposing
21 a *per se* rule that requires a purported tax return be filed before the IRS makes its
22 assessment in order to constitute a tax return under the Bankruptcy Code.

23 **CONCLUSION.**

24 Based on the foregoing, the court finds and concludes that the Martins'
25 Form 1040 tax returns for the years 2004, 2005, and 2006 were "returns" within the
26 meaning of § 523(a)(1)(B)(i) and § 523(a)'s hanging paragraph. The court declines to
27 adopt either the Fifth Circuit's one-day-late result or the Sixth Circuit's post-assessment
28 approach urged by the IRS to define what constitutes a tax return for purposes of

1 determining dischargeability of the tax debt. Instead, the court relies on the Eighth
2 Circuit’s no-time-limit interpretation to conclude that the “requirements of applicable
3 nonbankruptcy law (including applicable filing requirements)” do not include a temporal
4 restriction.

5 Accordingly, the IRS’s Motion will be denied, and the court will enter judgment
6 in favor of the Martins declaring that their 2004, 2005, and 2006 federal income tax debt
7 was discharged in this chapter 7 bankruptcy.

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9 Dated: March 31, 2014

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12 /s/ W. Richard Lee
13 W. Richard Lee
14 United States Bankruptcy Judge
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