# Circuit Court Split: The One-Day-Late Rule and Dischargeability of Tax Debt



J. Kate Stickles
Cole Schotz P.C.; Wilmington, Del.

Section 727(b) of the Bankruptcy Code provides for the discharge of debts that arose prior to the petition date. Section 523(a)(1)(B), however, excepts from discharge a tax debt "with respect to which a return, or equivalent report or notice, if required — (i) was not filed or given; or (ii) was filed or given after the date on which such return … was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition."[1] Case law interpreting the definition of a "return" for purposes of § 523(a) has resulted in the development of the "one-day-late rule" and conflicting circuit court opinions addressing what constitutes a "return" for dischargeability purposes.

## The Hanging Paragraph

Prior to the enactment of BAPCPA in 2005, neither the Bankruptcy Code nor the Internal Revenue Code defined "return."[2] Courts typically applied a four-part test, the *Beard* test, to determine whether a document qualified as a "return" in order to discharge the debt under § 523(a).[3] Under the *Beard* test, for a document to be deemed a return, it must: (1) purport to be a return; (2) be executed under penalty of perjury; (3) contain sufficient data to allow calculation of a tax; and (4) represent an honest and reasonable attempt to satisfy the requirements of the tax laws.[4]

With the enactment of the BAPCPA amendments, an unnumbered subparagraph was added to the end of § 523(a), referred to as the "hanging paragraph," which defines "return" for discharge purposes, in relevant part, as follows:

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (*including applicable filing requirements*).[5]

**The "One-Day-Late Rule"**

The First, Fifth and Tenth Circuits have held that a tax return that is filed late under applicable nonbankruptcy law is not a "return" for bankruptcy discharge purposes under § 523(a).[6] These jurisdictions interpret the phrase "the applicable filing requirements" in § 523(a)(*) to include the applicable filing deadline. As a result, a late-filed return (unless filed pursuant to a safe-harbor provision such as 26 U.S.C. § 6020(a)) does not constitute a "return" for bankruptcy discharge purposes under the plain language of the statute. This approach is referred to as the "one-day-late rule" — meaning that a late return, even by one day, cannot be considered a "return" for discharge. Courts applying the one-day-late rule reason that "BAPCPA amended § 523(a) to provide an unambiguous definition of 'return,' obviating the need to return to the pre-BAPCPA *Hindenlang* [*Beard*] test."[7]

**The *Beard* Test**

The majority of appellate courts have applied the *Beard* test in determining whether a late-filed form qualifies as a "return." These courts examine the facts related to the late filing, and the analysis generally focuses on the fourth prong of the *Beard* test: whether the document represents an "honest and reasonable attempt to satisfy the requirements of the tax law." [8] The Third, Fourth, Sixth, Seventh, Ninth and Eleventh Circuits have held that post-assessment, late-filed returns do not qualify as returns under *Beard* because they do not demonstrate an "honest and reasonable" effort to comply with the tax law.[9] These courts, unlike the Eighth Circuit,[10] focus on the timing of the filing of the tax form, as opposed to the form or content of the document, in determining whether the form evinces an honest and reasonable attempt to comply with the tax law.

In May 2017, the Third Circuit, the latest circuit court to hold that belated filings after assessment do not constitute "returns" under *Beard*, explained in *Giacchi v. U.S. (In re Giacchi)*:

> Forms filed after their due dates and after an IRS assessment rarely, if ever, qualify as an honest or reasonable attempt to satisfy the tax law. This is because the purpose of a tax return is for the taxpayer to provide information to the government regarding the amount of tax due. If a taxpayer does not file a return, the IRS is required to independently assess the taxpayer's liability….

> Once the IRS assesses the taxpayer's liability, a subsequent filing can no longer serve the tax return's purpose, and thus could not be an honest and reasonable attempt to comply with the tax law.[11]

Importantly, the Third Circuit in *Giacchi*, the Eleventh Circuit in *Justice,* and the Ninth Circuit in *Smith* acknowledged, but did not apply, the one-day-late rule. The Third Circuit noted that it "need not reach the question of whether the 'one-day-late rule' is correct."[12] The Eleventh Circuit stated, "We can assume *arguendo*, although we expressly do not decide, that the one-day-late rule is incorrect."[13] The Ninth Circuit found "*Hatton* [*Beard*] applies to the [B]ankruptcy [C]ode as amended."[14]

## Conclusion

In light of the circuit courts' conflicting approaches interpreting "return" in § 523(a), and the potential disparate rulings, the issue is ripe for Supreme Court review or congressional intervention. The Supreme Court, however, has denied *certiorari* in *Mallo*, *Smith* and *Justice*. Until clarity is provided, discord exists in the application of the provisions of § 523, and uncertainty continues for courts addressing late-filed returns, for taxpayers who do not know whether the failure to file a timely return will bar a discharge, and for the taxing authorities administering returns.

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[1] 11 U.S.C. § 523(a)(1)(B).

[2] *Mallo v. IRS (In re Mallo)*, 774 F.3d 1313, 1318 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2889 (2015).

[3] The *Beard* test was established in the tax court decision *Beard v. Comm'r*, 82 T.C. 766, 774-79 (1984), *aff'd sub nom.,* 793 F.2d 139 (6th Cir. 1986).

[4] *See U.S. v. Hindenlang (In re Hindenlang*), 164 F.3d 1029, 1033 (6th Cir. 1999), *cert. denied*, 528 U.S. 810 (1999).

[5] 11 U.S.C. § 523(a)(*) (emphasis added).

[6] *See Fahey v. Mass. Dep't of Revenue (In re Fahey)*, 779 F.3d 1, 5 (1st Cir. 2015) (holding that "[a] return filed after the due date is a return not filed as required, *i.e.*, a return that does not satisfy 'applicable filing requirements.'"); *Mallo*, 774 F.3d at 1327 (holding that "the plain and unambiguous language of § 523(a) excludes from the definition of "return" all

late-filed tax forms, except those prepared with the assistance of the IRS under § 6020(a)"); *McCoy v. Miss. State Tax Comm'n (In re McCoy)*, 666 F.3d 924, 932 (5th Cir. 2012) (holding that "[u]nless it is filed under a 'safe harbor' provision similar to § 6020(a), a state income tax return that is filed late under the applicable nonbankruptcy state law is not a 'return' for bankruptcy discharge purposes under § 523(a)").

[7] *McCoy*, 666 F.3d at 929.

[8] *U.S. v. Hatton (In re Hatton),* 220 F.3d 1057, 1060-1061 (9th Cir. 2000).

[9] *See Giacchi v. U.S. (In re Giacchi),* 856 F.3d 244, 249 (3d Cir. 2017) (holding that taxpayer's "belated filings after assessment are not an honest and reasonable effort to comply with the tax law under the *Beard* test and, as such, the filings do not constitute returns"); *Justice v. U.S. (In re Justice)*, 817 F.3d 738, 744 (11th Cir. 2016), *cert. denied sub nom.,* 137 S. Ct. 1375 (2017) (applying *Beard* and holding taxpayer's "[f]ailure to file timely return, at least without a legitimate excuse or explanation, evinces the lack of a reasonable effort to comply with the law"); *Smith v. IRS (In re Smith),* 828 F.3d 1094, 1097 (9th Cir. 2016), *cert. denied sub nom.,* 137 S. Ct. 1066 (2017) (holding that taxpayer's post-assessment tax return "was not an 'honest and reasonable' attempt to comply with the tax code," but not deciding "whether *any* post-assessment filing could be 'honest and reasonable'"); *see also U.S. v. Payne (In re Payne),* 431 F.3d 1055 (7th Cir. 2005); *Moroney v. U.S. (In re Moroney),* 352 F.3d 902 (4th Cir. 2003); *Hindenlang,*164 F.3d 1029 (*Payne, Moroney* and *Hindenlang* applied *Beard* pre-BAPCPA and held that forms filed after IRS assessment were not "returns").

[10] The Eighth Circuit, in *Colsen v. U.S. (In re Colsen)*, 446 F.3d 836, 840 (8th Cir. 2006), applied *Beard* because the debtor's petition was filed pre-BAPCPA and held "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 reasons for it. The filer's subjective intent is irrelevant." Under that court's approach, a taxpayer could file a post-assessment "return" and discharge the debt.

[11] *Giacchi,* 856 F.3d at 248 *(citations omitted).*

[12] *Id.* at 247.

[13] *Justice*, 817 F.3d at 743.

[14] *Smith,* 828 F.3d at 1097. *See also U.S. v. Martin (In re Martin)*, 542 B.R. 479, 480 (B.A.P. 9th Cir. 2015) (Bankruptcy Appellate Panel for the Ninth Circuit rejected one-day-late rule's literal construction citing concerns arising from a contextual reading of § 523(a)

(*) and concluding that binding pre-BAPCPA precedent in the circuit instructed how to determine a return and that such authority was not abrogated by the 2005 amendments.)

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