

by Bryan T. Camp

The Function of Forms

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This column generally explores the laws and policies of tax administration to help guide readers through the thickets of particular procedural problems while also giving a sense of the larger tax administration forest.

Prof. Camp thanks Steve Johnson, Leandra Lederman, and the ever-percipient "Anonymous" for challenging ideas and pointing out errors. Remaining errors are the author's fault; he promises to do better next time.

Prof. Camp dedicates this column to his fall semester Texas Tech students who did a remarkable job mastering not only the substance of tax practice and procedure but also all the forms he threw at them.

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Introduction

In January 2005 my wife and I made it our New Year's resolution to paint the outside trim on our home. We agreed to paint it blue. But we had a problem. I would buy a small can that said "blue" and paint part of the trim and she would say "that's too gray." She would then buy another can that said "blue" and I would say "that's too green." That went on all year. Our neighbors have kindly informed us that variegated trim is not the fashion. Now, in January 2006, our New Year's resolution is to let the painter decide. You see the familiar problem: We agreed on blue but disagreed on what content to give the term.

You can find much the same disagreement between Judges Posner and Easterbrook in the case of *In re Payne*, 2005 U.S. App. LEXIS 27243, Doc 2005-25079, 2005 TNT 240-10 (7th Cir. Dec. 14, 2005). There, two of the greatest legal minds on the current federal bench quarrel over the meaning of the term "return" (as in tax return), with one preferring form to function and the other vice versa. Although that case was a bankruptcy case, their disagreement provides a wonderful window into substance and form in tax administration. So this column explores the function of the formal requirement in section 6011 that taxpayers "make a return or statement according to the forms and regulations prescribed by the Secretary." Part I maps out the borderlands of tax administration and bankruptcy. Part II reviews the facts and opinions in *Payne*, which presents the most common interplay of tax

and bankruptcy administration. Part III explains why Judge Posner is right and Judge Easterbrook is wrong in applying the tax administration concept of "return" to bankruptcy cases like *Payne*. Part IV then argues that Judge Posner is wrong to adopt a facts and circumstances test. Finally, Part V looks at the likely (ill) effects of the recently enacted bankruptcy reform legislation on those types of cases. So sit back, open some uneaten holiday candy, and read on.

I. The Borderlands

A. Tax Administration

At the core of tax administration is the act of filing a tax return. To collect the proper tax, the IRS must first determine, or "assess," the liability. Central to that task in a population of more than 130 million individual taxpayers is the self-reporting of tax liabilities by those taxpayers.¹ They do so on a document called a "return." As I've explained before (and will doubtless do again), the common truism that ours is a voluntary system of tax is but a polite and politically correct veneer.² Administratively, the tax system is designed to overcollect at the source whenever possible, and thus "encourage" self-reporting. In that way, consistent with our democratic theories of political economy, self-interest leads to self-reporting and is in that sense "voluntary." But the law requires taxpayers to make a yearly accounting of their financial transactions. And lurking behind the administratively created carrot of a refund from overwithholding are the legislatively created sticks of statutory penalties for failure to file a return and the filing of a false return.

The requirement to file a return is found in section 6011. It requires taxpayers to "make a return or statement according to the forms and regulations prescribed by the Secretary." The return is not the assessment. Taxpayers do not "self-assess" their taxes. They simply self-report their transactions and, if they so desire, calculate the taxes due based on that self-reporting. It is the IRS that assesses the taxes. Section 6201(a) gives the IRS the

¹I extrapolate the data on the number of taxpayers from the IRS Data Book 2004, available at <http://www.irs.gov/pub/irs-soi/04databk.pdf> (last visited Dec. 26, 2005). The IRS annually processes some 230 million tax returns of various sorts, not including information returns like Form 1099s.

²For my more extended analysis of that feature of modern tax administration, see Bryan T. Camp, "Tax Administration as Inquisitorial Process and The Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998," 56 *Fla. L. Rev.* 1 (2004). For a condensed version of that point, see my first *Tax Notes* column, "The Inquisitorial Process of Tax Administration," June 21, 2004, p. 1549.

discretion to make an assessment on the basis of what the taxpayer reports.³ The IRS long ago made the bulk-processing decision to exercise that discretion and initially accept as true whatever taxpayers report on their returns (for those returns that it can process). In fact, the language in section 6501 that permits the IRS to go to court without even making an assessment seems quaint and outdated, a relic from before the first income tax in 1862. The IRS tries to assess and collect taxes with as little resort to courts as possible. Filing returns is central to the efficient administration of tax.

**The return is not the assessment.
Taxpayers do not 'self-assess' their
taxes.**

Despite the importance of returns to tax administration, the tax code does not define the term "return." And perhaps that is just as well because, as I hope to show, returns serve different purposes and what may serve for one purpose may not serve for another. In the leading case of *Beard v. Commissioner*,⁴ the Tax Court synthesized decades of disparate Supreme Court doctrine into four requirements a document must *generally* meet to qualify as a "return."

First, there must be sufficient data to calculate tax liability; second, the document must purport to be a return; third, there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and fourth, the taxpayer must execute the return under penalties of perjury.⁵

The third requirement is what is most important to this column. I suggest that the focus of the case law interpreting the third requirement is on whether a document serves the *primary* purpose of a return, to fulfill the taxpayer's reporting burden to allow the IRS to accept the document submitted as the *taxpayer's* accurate report of the taxpayer's financial transactions and resultant tax liability. The purpose of requiring returns from taxpayers

³The Tax Court has noted that "our tax system is rooted in the concept of voluntary compliance which does not permit the Government to arbitrarily assess tax without a proper list or report." *Milsap v. Commissioner*, 71 T.C. 926, 931 n. 10 (1988). The taxpayer's return provides that report and, accordingly, the taxpayer is deemed to accede to the tax calculated on the basis of self-reported transactions.

⁴82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986).

⁵*Id.* at 777. See also *Badaracco v. Commissioner*, 464 U.S. 386 (1984) (on reasonable attempt to comply with the law); *Zellerbach Paper v. Helvering*, 293 U.S. 172 (1934) (same); *Florsheim Bros. Drygoods v. United States*, 280 U.S. 453 (1930) (on documents purporting to be returns); *Lucas v. Pilliod Lumber*, 281 U.S. 245 (1930) (on unsigned returns). Most courts follow the *Beard* formulation. See cases collected in *In re Hindenlang*, 164 F.3d 1029, Doc 1999-3668, 1999 TNT 16-11 (6th Cir. 1999). But one should keep in mind that it is just a restatement of the general requirements; each requirement has its exceptions. One should also note that each requirement stems from different fact patterns.

and allowing the IRS to use the returns as the basis for its assessment of tax is to allow the IRS to administer the tax code efficiently, without the constant and cumbersome need to resort to courts. I will refer to that as the section 6011 purpose. Two doctrines illustrate the primacy of the section 6011 purpose in deciding what documents are returns: (a) the "one return" doctrine and (b) the treatment of substitutes for returns under section 6020. Both doctrines support my suggestion that the "honest and reasonable attempt" requirement refers primarily to the reporting burden imposed by section 6011.

First, there can be only one return. That is mainly because section 6501 provides that "the return" is what triggers the statute of limitations for assessment.⁶ Although a return allows the IRS to assess based on the taxpayer's self-reporting, the IRS can later examine the return to verify its accuracy. If the IRS disagrees with what was reported, it must generally follow the deficiency procedures set out in sections 6211 through 6215, which allow a taxpayer to force the IRS into court to review the propriety of the IRS's proposed deficiency. Generally, the IRS has three years to examine a return for accuracy. If a taxpayer fails to report more than 25 percent of gross income, section 6501(c) gives the IRS six years to examine the return; if a taxpayer files a fraudulent return, the IRS has unlimited time.

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The basic rule is that the last filed return *before* the filing date (including extensions) serves as "the return." For example, if a taxpayer files a return that fails to report more than 25 percent of gross income, an amended return filed *after* the due date that corrects the omission does not change the limitations period.⁷ But if a taxpayer files an amended return correcting the omission *before* the return due date, that last filed document will become "the

⁶*Badaracco v. Commissioner*, 464 U.S. 386, 393 (1984) (noting that only one return is required by law and "an amended return is a creature of administrative origin and grace"). *Zellerbach Paper v. Helvering*, 293 U.S. 172, 180 (1934) (once a document is filed that is sufficient to trigger the statute of limitations for assessment, that is "the return" and an amended return will not affect the running of the limitations period). The Court noted that "perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such, and evidences an honest and genuine endeavor to satisfy the law. This is so though even at the time of filing the omissions or inaccuracies are such as to make amendment necessary." See also *Lancaster Lens Co. v. Commissioner*, 10 B.T.A. 1153 (1928) (collecting even older cases).

⁷See the excellent discussion and analysis in SCA 1998-024, Doc 98-27897, 98 TNT 177-60 (May 12, 1998).

return" and so the three-year assessment limitation period — not the six-year period — will apply.⁸

Similarly, a return that is false in any material respect leaves the entire tax period open to IRS examination for an unlimited period.⁹ On one hand, the Supreme Court has held that a taxpayer cannot reinstate the three-year limitation period by filing a nonfraudulent amended return *after* the filing due date.¹⁰ On the other hand, filing a nonfraudulent amended return *before* the due date will "cure" the fraud in that it will become "the return" for section 6501 purposes.¹¹

Taxpayers who amend their returns do not thereby create a new return but simply confess error; it is what they filed before the due date that counts in deciding how well they fulfilled the reporting burden.

That "one return" doctrine promotes the section 6011 purpose of returns by encouraging taxpayers to provide both timely and accurate information to serve as the basis for the assessment. Taxpayers who amend their returns do not thereby create a new return but simply confess error (either in favor of the taxpayer or of the government); it is what they filed before the due date that counts in deciding how well they fulfilled the section 6011 reporting burden.

The treatment of nonfiling taxpayers under section 6020 also illustrates how the key to analyzing the term "return" is whether it serves the purposes of section 6011: When, for whatever reason, a taxpayer does not file a valid return, section 6020 authorizes the IRS to prepare a substitute for return (SFR). That section creates two types of SFRs. Under section 6020(a), the IRS prepares the SFR based on the taxpayer's "consent to disclose all information necessary for the preparation thereof" and the taxpayer signs it. Also, under section 6020(b), the IRS prepares the SFR without the taxpayer's consent or acknowledgment. Section 6020(a) SFRs are considered the taxpayer's return and therefore start the assessment limitation period. A section 6020(b) SFR, however, is not considered "the return" of the taxpayer and does not start the assessment limitation period.¹²

⁸*Haggar Co. v. Helvering*, 308 U.S. 389 (1940) (an amended return filed before the due date is treated for most purposes as the taxpayer's original return).

⁹*Lowy v. Commissioner*, 288 F.2d 517, 520 (2d Cir. 1961) (Hand, J.), cert. denied, 368 U.S. 984 (1962) ("if a return be fraudulent in any respect with intent to evade a tax, it deprives the taxpayer of the bar of the statute for that year, and permits a general reaudit of the return throughout").

¹⁰*Badaracco v. Commissioner*, 464 U.S. 386 (1984) (once a fraudulent return, always a fraudulent return; an amended return merely confesses error).

¹¹See SCA 1998-024 (May 12, 1998) (applying the rule in *Haggar Co. v. Helvering*, 308 U.S. 389 (1940)).

¹²Section 6501(b) (3). Note that while section 6020(b) returns are not considered returns of the taxpayer for section 6501

(Footnote continued in next column.)

The distinction between section 6020(a) and section 6020(b) SFRs — and hence the distinction between a document that serves as the taxpayer's return and one that does not — lies in the timing of the taxpayer's cooperation with the IRS. That is similar to how courts analyze the timing of amended returns in deciding which document is "the return" of the taxpayer. The key analytical point is not *whether* taxpayers cooperate but *when* they do: whether they have cooperated before or after the IRS makes its institutional judgment, in the form of the notice of deficiency. If the taxpayer agrees with a proposed assessment, even if the taxpayer did not provide *all* the information, then the SFR will be a section 6020(a) SFR and will be treated as the taxpayer's return.¹³ But once the taxpayer, by refusing to cooperate earlier, forces the IRS to issue a 90-day letter representing its institutional commitment to a stated deficiency, the taxpayer has lost the opportunity to file a return, even if the taxpayer later agrees to a stipulated judgment.¹⁴ In short, regardless of later cooperation, the SFR remains a section 6020(b) SFR.¹⁵ That is just another way of saying that the

purposes, section 6651(g)(2) provides that for purposes of the failure to pay penalty imposed by section 6651(a)(2), a return prepared by the IRS under section 6020(b) will be treated as a return filed by the taxpayer. See *Millsap v. Commissioner*, 91 T.C. 926 (1988), acq. in result in part, 1991-2 C.B. 1 (good discussion of history and explanation of section 6020).

¹³*U.S. v. O'geirson*, 284 F. Supp. 655, 659 (D.N.D. 1968) (husband and wife who signed a Form 870 with attached schedules computed on the basis of joint filing status held to have filed a return electing joint filing status and, accordingly, assuming joint liability for unpaid liabilities). Similarly, the Tax Court in *Healer v. Commissioner*, 115 T.C. 316, 323, Doc 2000-26545, 2000 TNT 200-38 (2000), suggested that if a taxpayer had signed the SFR sent to her by the IRS, that would have created a return under section 6020(a), which would have been sufficient to trigger the three-year lookback period in section 6511(b); because she did not sign the SFR, the court applied the two-year lookback period to deny her refund claim.

¹⁴*Gentry v. U.S.*, 223 B.R. 127 (M.D. Tenn. 1998) (good discussion of case law on why stipulated Tax Court judgments do not constitute what the court called "constructive returns" for discharge purposes).

¹⁵See ILM 200113026, Doc 2001-9196, 2001 TNT 63-36 (memo dated Feb. 7, 2001, from Kathy Zuba, chief, Branch 2 (collection, bankruptcy, and summonses) to Keith Fogg, associate area counsel, small business/self employed, GL-100623-01); 1992 FSA LEXIS 198 (memo dated Aug. 6, 1992, from assistant chief counsel (field service) to assistant commissioner (examination), CC:TL-N-8272-92); 1990 GLB LEXIS 5 (memo dated June 20, 1990, from chief, Branch 2 (general litigation) to district counsel (Seattle), CC:GL-0394-90). See also Rev. Rul. 2005-59, 2005-35 IRB 443, Doc 2005-16555, 2005 TNT 149-2 (implying that an IRS employee who creates a Form 1040 based on taxpayer cooperation has prepared a section 6020(a) SFR, but that an IRS employee who creates a Form 1040 without any cooperation from the taxpayer has prepared a section 6020(b) SFR). Rev. Rul. 2005-59 also addresses a third situation, in which, instead of the IRS employee preparing and offering the taxpayer a completed Form 1040 for signature, the IRS employee instead puts the proposed tax liability on a Form 870, ("Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment") and attached worksheets or schedules to

(Footnote continued on next page.)

taxpayer will forever be adjudged as having failed to meet the section 6011 reporting burden.

Both the "one return" doctrine and the doctrinal distinction between section 6020(a) and section 6020(b) SFRs promote the section 6011 purpose of allowing the IRS to administer the tax code on the basis of taxpayer consent without resort to courts. When cases discuss whether the taxpayer has made an "honest and reasonable attempt to satisfy the requirements of the tax law," the thrust of that analysis, whether explicit or implicit, is whether the taxpayer has complied with the section 6011 reporting burden, which is providing a document that the IRS can process as the basis of its assessment without judicial help. Accordingly, it is safe to say that once the Service has made an assessment, there is no section 6011 purpose served by any document the taxpayer can file. If the taxpayer has not made a return before assessment, it is too late after assessment to submit "the return," even if it is not too late to provide the IRS with more information to make the assessment more accurate or to serve other purposes.¹⁶

B. Bankruptcy

At the core of modern American bankruptcy law are the twin ideas of orderly distribution and fresh start.¹⁷ The first idea is that the debtor's assets will be distributed to creditors in an orderly and predictable payout scheme. Roughly speaking, creditor claims fall into one of three categories: secured, priority, or general unsecured. Secured claims are those secured by perfected liens on the

the Form 870 and asks the taxpayer to sign that form. Previously, the IRS had decided, in Rev. Rule 74-203, that a Form 870, Form 1902E, or Form 4549 signed by the taxpayer in response to a proposed SFR was a return of the taxpayer for purposes of section 6020(a), regardless of whether the taxpayer signed a jurat clause. Rev. Rul. 2005-59 revokes that holding, but it is quite confusing on just why, and now it stands in contradiction to almost 40 years of case law like *Olgeirson*, *supra* note 13, and tax practice.

¹⁶The use of returns to trigger the applicable period for filing refund claims under section 6511 is another example of how the definition of return might vary with the purpose for which the return is required. *See, e.g., Domtar Newsprint Sales, Ltd. v. United States*, 193 Ct. Cl. 505 (1970) (return filed postassessment by a foreign corporation under the regulation that required a return only when the foreign corporation was seeking a refund held sufficient to trigger the three-year period in section 6511(a) for making a refund claim).

¹⁷Although beaten down by Congress last year with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BARF), P.L. 109-8, 119 Stat. 23, the concepts still survive. BARF essentially forces taxpayers to carry debts for five additional years, decreases the number of debts that can be discharged, and diminishes payouts to general unsecured creditors.

The acronym expresses my opinion of this awful legislation. At some point during its bizarre six-year history, the legislation was titled something like "Bankruptcy Reform Act" and I first saw the acronym (short for Bankruptcy Abuse Reform Fiasco) on the bankruptcy Listserv maintained by Bob Lawless at UNLV. Of course, no sober law review article will ever use the sobriquet "BARF," but as this is an opinion column and that's my opinion, I'm sticking to it.

debtor's property. They generally get paid first. The remaining assets next go to the priority claims in the order specified in Bankruptcy Code section 507. Last come the general unsecured claims, which share pro rata in what, if anything, is left after payment to the secured and priority claims. For this column the important point to note is the inherent tension between those classes of creditors and their claims. For example, the smaller the amount of claims that are classified as secured or priority, the more assets that will leave for distribution to the general unsecureds.

The key analytical point is not whether taxpayers cooperate but when they do: whether they have cooperated before or after the IRS makes its institutional judgment, in the form of the notice of deficiency.

All tax claims are secured by the tax lien created by section 6321, which arises after the IRS has made a proper assessment, given the taxpayer proper notice of the unpaid liability and demand for payment, and the taxpayer fails to pay in full. Moreover, the tax lien is perfected under federal law the moment it arises.¹⁸ Nonetheless, for reasons not entirely coherent, both the IRS and bankruptcy courts treat tax claims as unsecured unless the IRS has filed a notice of federal tax lien (NFTL) before the debtor petitions for bankruptcy relief.¹⁹ Thus, tax claims for which the IRS has filed an NFTL before bankruptcy are secured; all others are unsecured.

Three types of unsecured tax claims are given priority status under Bankruptcy Code section 507(a)(8); the rest are grouped with the general unsecured claims. First, taxes for which the return was due within the three-year period looking back from the bankruptcy petition date get priority. Second, regardless of the return's due date, those taxes that were actually assessed within the 240-day period before the petition date also get priority. Third, tax liabilities that were not actually assessed before the petition date but could have been assessed are given priority status, unless the liabilities were unassessed

¹⁸That is true even though the lien is still in its "secret" form and even though the lien is just a general lien over all the taxpayer's property or rights to property. Nonetheless, the Supreme Court has long held that the lien is perfected because it identifies the claimant (the United States), the amount of the claim (the assessed tax liability, plus interest, additions to tax, and so on), and the identity of the property (all). *See United States v. City of New Britain*, 347 U.S. 81 (1954).

¹⁹The courts and the IRS apparently believe that if the IRS has not filed the NFTL, the bankruptcy trustee can avoid the tax lien using the avoidance powers granted the trustee under Bankruptcy Code section 545. Why that is incoherent is beyond the scope of this column but will doubtless make for an interesting future column. *See In re Walter*, 45 F.3d 1023, Doc 95-1900, 95 TNT 27-26 (6th Cir. 1995).

because of the taxpayer's bad behavior, like not filing any return or filing a fraudulent return.²⁰

The second basic idea of American bankruptcy law is that a debtor gets discharged of any further personal liability for some debts. Bankruptcy Code section 524 creates a discharge injunction; it enjoins creditors from going after debtors or their property to collect discharged debts after bankruptcy. The more debts a debtor can wash off through the bankruptcy discharge process, the fresher the start.

Before 1966, federal income tax debts were not dischargeable. Congress deemed the collection of taxes so important that it refused to relieve even the honest but unfortunate debtor of the burden to pay all tax debts. No fresh start for delinquent taxpayers! In 1966 Congress decided to allow some taxes to be discharged. In doing so, Congress struck a "new balance between government revenue needs and the 'fresh start' objectives of the bankruptcy laws."²¹ The basic balance struck was three years: Debtors would be discharged from liability for taxes older than three years. The Senate report opined that would "induce taxing authorities to act to prevent large accumulations of tax claims."²² In other words, the policy choice was to give the IRS three years to collect a tax liability before it became dischargeable.

When Congress overhauled the bankruptcy laws in 1978 to create the current Bankruptcy Code, it kept the same idea. In the 1978 legislation, Congress keyed the discharge provisions to the priority provisions. That is, taxes that received priority status were nondischargeable, but taxes categorized as general unsecured claims were generally dischargeable.

There was one important wrinkle in that priority/discharge scheme: taxes categorized as general unsecured claims because they were older than three years but "to whose staleness the debtor contributed by some wrong-doing or serious fault."²³ Specifically, three types of otherwise "stale" tax liabilities were considered to be more the fault of the taxpayer than the IRS and so were made nondischargeable even though they were not given priority status: taxes for which no return had been filed;

²⁰That third category sometimes causes confusion. Its basic purpose is to prevent taxpayers who are under audit from escaping a proposed deficiency by filing for bankruptcy before the IRS can make the assessment. For example, a taxpayer whose timely filed 1999 return was selected for audit and who received a notice of deficiency dated April 14, 2003, could not file for bankruptcy on May 1, 2003, and wash off the proposed deficiency. If the return were nonfraudulent, the proposed deficiency would become a priority tax claim.

²¹*In re Young*, 233 F.3d 56, 58, Doc 2000-31181, 2000 TNT 235-10 (1st Cir. 2000), *aff'd*, 535 U.S. 43, Doc 2002-5372, 2002 TNT 43-10 (2002). See also *In re Savaria*, 347, B.R. 395, 397, Doe 2005-4322, 2005 TNT 48-12 (9th Cir. B.A.P. 2004), for a good historical review of tax claims in bankruptcy.

²²S. Rep. No. 89-1158, quoted in *In re Young*, 233 F.3d at 58. Congress apparently later felt differently when it decided to give the IRS four additional years to "accumulate" tax claims by extending the section 6502 collection limitations period from 6 to 10 years. Omnibus Budget Reconciliation Act of 1990, P.L. 101-508.

²³S. Rep. No. 96-989, quoted in *In re Savaria*, 317 B.R. at 398.

taxes for which an untimely return had been filed less than two years before the petition date; and taxes for which a fraudulent return had been filed or which the debtor had attempted to evade or defeat, for instance, by hiding assets. Currently, that rule is codified in Bankruptcy Code section 523(a)(1)(B), which makes those three types of tax claims nondischargeable, even though they are not given priority status under section 507(a)(8). "The bankruptcy policy for this treatment is that it is not fair to penalize the [general unsecured creditors] by paying out of the 'pot' of assets in the estate tax liabilities arising from the debtor's deliberate misconduct.... Therefore, these taxes have no priority in payment from the estate but would survive as continuing debts after [bankruptcy]."²⁴

II. The Painful Interplay of Tax and Bankruptcy

A common interplay of tax and bankruptcy administration involves taxes older than three years for which the taxpayer filed a return late but still more than two years before the bankruptcy petition date, and for which the IRS did not file an NFTL. Those tax liabilities will not get priority status under Bankruptcy Code section 508(a)(8) because they are older than three years, the assessment (by definition) was made more than 240 days before bankruptcy or the assessment has been made. Thus, they will be general unsecured claims.

A common interplay of tax and bankruptcy administration involves taxes older than three years for which the taxpayer filed a return late but still more than two years before the bankruptcy petition date.

Whether those taxes are discharged or not, however, is a more difficult question. Normally, general unsecured claims are also discharged by the bankruptcy process. One of the main exceptions to that general rule, however, is for taxes for which no return has been filed.²⁵ That is, Bankruptcy Code section 523 provides that "(a) A discharge... does not discharge an individual debtor from any debt... (1) for a tax... (B) with respect to which a return, if required... (I) was not filed." The bankruptcy purpose for that rule, as noted above, is that the debtor should continue to owe that kind of debt because of some dereliction of duty, some "deliberate

²⁴S. Rep. 95-1106 at 22, quoted in *In re Savaria*, 317 B.R. at 398. To continue my example from note 20, if the IRS determined during audit that the return was fraudulent, the proposed deficiency would not be allowed as a priority claim but would instead be a general unsecured claim. However, it would still not be discharged by the bankruptcy.

²⁵Taxes for which late-filed returns were filed within two years before the bankruptcy petition are also nondischargeable. But in the typical case, such as *Payne*, the well-counseled debtor waits two years to file bankruptcy. Unfortunately for the federal fisc, it is really not that hard to delay collection for that amount of time.

misconduct." Whether there is such dereliction of duty as to warrant a denial of discharge turns on the meaning of the term "return" in the Bankruptcy Code. The debate over the meaning is one of form and function: the function of the Form 1040 in tax and in bankruptcy.

On one hand, if the IRS assessed the tax liability based on the late-filed returns, the returns, although filed late, are still "returns" under any interpretation: They are not only in the form but they also fulfill the taxpayer's reporting obligation under section 6011. The IRS can't say that the taxpayer failed to file a return. On the other hand, if the returns are filed *after* the IRS made an assessment, the IRS can and will argue that the taxpayer has failed to file a return and will urge the courts to deny discharge. In that case, the Form 1040 is simply a document that fails to serve the primary tax administration function of a return and so cannot claim the status of "return."

The bankruptcy court opinion was decidedly formalist. It essentially held that because Payne had filed a Form 1040, the IRS was wrong to say that he had not filed 'a return.'

The IRS has been uniformly successful in using the preassessment/postassessment distinction to determine bankruptcy discharge issues at the circuit court level.²⁶ The *Payne* case is the latest victory. It not only illustrates the common fact pattern, but it also reveals the fault lines between functionalism and formalism.

In *Payne*, the debtor did not file returns for the years 1983-1990. The IRS opened an examination of his 1986 tax year, prepared an SFR under its authority in section 6020(b), and in December 1990 assessed a tax liability of \$64,500 for 1986.²⁷ Nothing in the record suggests that Payne participated or cooperated in the SFR process. In March 1992 Payne filed Form 1040s for tax years 1983-1990. The IRS used those returns to assess his liabilities for 1983-1985 and 1987-1990. It did not need to use the Form 1040 to assess his 1986 taxes, because it had already assessed his liability for that year without his help. Payne then waited more than two years and, on December 31, 1997, filed his petition for bankruptcy relief. He received his discharge in April 1998. The IRS still sought to collect the 1986 taxes.²⁸ Payne thought those had been discharged and so went back to bankruptcy court to get a

²⁶The first victory was in *In Re Hindenlang*, 164 F.3d 1029 (6th Cir. 1999), in which the court held that a postassessment return could not qualify as a "return" for discharge purposes as a matter of law. See also *In Re Moroney*, 352 F.3d 902, Doc 2003-26877, 2003 TNT 245-23 (4th Cir. 2003), and *In re Hatton*, 220 F.3d 1057, Doc 2000-21305, 2000 TNT 158-42 (9th Cir. 2000).

²⁷I take all my facts from the reported opinions of the bankruptcy, district, and circuit courts. I use rounded numbers. Because Payne's employer had reported withholding of \$44,500 for 1986, that left a balance due of about \$20,000 for 1986.

²⁸Because the IRS used Payne's late-filed returns for the other delinquent years to assess his liabilities, those liabilities

(Footnote continued in next column.)

court order saying so.²⁹ Both the bankruptcy and district courts agreed with Payne. The Seventh Circuit sided with the IRS.

The bankruptcy court opinion was decidedly formalist.³⁰ It essentially held that because Payne had filed a Form 1040, the IRS was wrong to say that he had not filed "a return." Whether the Form 1040 actually functioned as a return for tax administration purposes was not relevant to the bankruptcy question. Thus, the bankruptcy court saw the issue as being whether "the Internal Revenue Code trumps the Bankruptcy Code," and decided that "policy-based rationales regarding the disruption of post assessment filings on the tax system cannot result in a strained interpretation of the Bankruptcy Code to disregard or expand upon the statutory language."³¹ In other words, the court decided that the meaning of the term "return" in the Bankruptcy Code was "plain" and the term referred only to the Form 1040 and not to the function it served.³²

The district court also thought the proper analysis was all about the form and not about the function.³³ It accepted the idea that it should apply the doctrines developed in tax administration to decide whether Payne's 1986 Form 1040 was a "return" within the meaning of the section 523(a)(1)(B)(I) discharge exception. But in applying those doctrines, it focused on "the form and content of the tax documents filed to determine whether the taxpayer has made an honest and reasonable attempt to satisfy the tax laws."³⁴ Doing so led it to accept the idea that a Form 1040 filed after assessment can still be a return even though it no longer serves the function of fulfilling the taxpayer's section 6011 reporting burden.

The majority opinion in the Seventh Circuit (written by Judge Posner for himself and Judge Richard D. Cudahy) shifted the focus of the analysis from form to function. The basic thrust of the opinion was that to answer the question what is a return? One must ask

were discharged (unless the returns were fraudulent, but there is no indication in the opinions that they were).

²⁹In bankruptcy, a discharge order does not specify what debts are discharged. It typically just says, "The debtor is hereby discharged from dischargeable debts." So Judge Posner's opinion is incorrect when it says, "Payne filed for bankruptcy and sought, and the following year received, a discharge of his unpaid 1986 tax liability." Payne simply received a generic discharge order, and when he and the IRS could not agree on what tax debts were discharged, they had to go back to court. Note that the parties did agree that all of the other years between 1983 and 1990 were discharged.

³⁰306 B.R. 230, Doc 2004-9309, 2004 TNT 89-26 (Bankr. N.D. Ill. 2004).

³¹306 B.R. at 237.

³²After rejecting the idea that it should use the law developed under the tax code to decide whether Payne's Form 1040 constituted a "return," the bankruptcy court then seems to do just that, continuing on with a facts and circumstances analysis of the *Beard* "honest and reasonable intent" requirement. The court does not explain why it is doing that if the term "return" in the Bankruptcy Code is *sui generis* and is not connected to the "policy-based rationales" inherent in the *Beard* formula.

³³331 B.R. 358, Doc 2005-3423, 2005 TNT 34-13 (N.D. Ill. 2005).

³⁴331 B.R. 358 at 362.

another question: "Why do you want to know?" The meaning of return varies with the legal context: The same document may be used as a return in one context but not in another.³⁵ Judge Posner offered the example of a taxpayer who deliberately sent a properly completed Form 1040 to the wrong office (he suggested Arlington National Cemetery, a play on the concept of a "dead letter"). Such a document could not be a return, said Judge Posner, because, like a postassessment Form 1040, it would not serve the tax administration purposes a return was supposed to serve. The key is to determine just how the document was used, what function it served. Judge Posner thought that, whatever other function Payne's Form 1040 served:

[W]hat is certain is that the belated filing was not a reasonable effort to satisfy the requirements of the tax law, namely, the requirements of filing a timely return and paying the amount of tax calculated on the return. When Payne filed, the IRS had already calculated the tax due from him, which means that he had succeeded in defeating the main purpose of the requirement that taxpayers file income-tax returns: to spare the tax authorities the burden of trying to reconstruct a taxpayer's income and income-tax liability without any help from him.

Judge Frank H. Easterbrook disagreed. Focusing on the document itself, he thought that a return is a return — that is, a properly completed Form 1040 is always a return. If a taxpayer sends it to the wrong office, it is still a return: "The problem with mailing a document to the dead letter office rather than the IRS is that it has not been filed."³⁶ But the document is still a "return" just as a "bearer bond in the purser's safe of the Titanic is still a bearer bond, though the coupons can't be clipped."³⁷ In that way, Easterbrook's opinion, like those of the bankruptcy and district courts, takes the form itself to be more important than how it is used. He separates the form from function by putting the function into the verb "filing."

In a bit of a rear-guard action, Judge Easterbrook also claimed that "post-assessment returns can be useful" because they "replace estimates with facts." That is true enough. The example he used is the administrative requirement that taxpayers who wish to submit an offer in compromise must have filed tax returns for the years they seek to compromise. Because Payne's Form 1040 served *some* purpose, Easterbrook thought, "it is inappropriate for a court to proclaim that the document is worthless and hence not a 'return.'" Thus, the bottom line for Easterbrook was that "the document that Payne filed is a tax return because it contains all of the required information and may have helped the agency."

³⁵That is consistent with both the tax code, see section 6551(g), and other case law interpreting the tax code. See my discussion of how courts interpret the same term ("willfully") differently for different purposes in Bryan T. Camp, "Dual Construction of RICO: The Road Not Taken in *Reeves*," 51 *Wash. & Lee L. Rev.* 61, 83 (1994).

³⁶2005 U.S. App. LEXIS 27243 at *17 (emphasis his).

³⁷*Id.* at *18.

III. Functionalism vs. Formalism

I have shown above that the function of returns in *tax administration* leads to the bright-line rule that a document filed *after* assessment cannot serve as the taxpayer's return for section 6011 purposes. After assessment the taxpayer's misconduct in failing to obey the command of section 6011 is sealed. Just as it becomes too late to undo a fraudulent return after the due date, it becomes too late to fulfill the section 6011 reporting burden after assessment. Whatever other purpose a document reporting the taxpayer's transactions may serve, it does not serve the section 6011 purpose.

The majority opinion in *Payne* in the Seventh Circuit shifted the focus of the analysis from form to function.

I have also shown above how, in deciding which tax liabilities to discharge, Congress expressed a concern that tax liabilities whose age was caused by culpable action on the part of the debtor should not be discharged. Thus, the *bankruptcy administration* inquiry is a search for a specific kind of culpability: Did the taxpayer throw a wrench in the orderly assessment and collection of tax or not? That is the teaching of *In re Young*, in which the Supreme Court decided that in determining whether a tax claim was older than three years, courts should apply concepts of "equitable tolling" and not count any period during which the IRS was prevented from collecting the tax by a previously filed bankruptcy. The basis for that rule was that the debtor was, in the relevant sense, culpable for the age of the claim. The debtor should not be rewarded with a discharge for using prior bankruptcies to throw a wrench in the IRS's collection machinery and deny the IRS the three-year period to collect taxes.³⁸

What Judge Posner's opinion gets exactly right is the connection between tax administration and bankruptcy. When the debtor has filed postassessment returns, the debtor has behaved badly in exactly the way that should result in a denial of discharge bankruptcy. The debtor has thrown a wrench in the IRS's collection machinery, because the IRS can't collect a dime until there is an assessment and, as I explained above, modern tax administration relies heavily on taxpayers to accurately and *timely* report their financial transactions to provide the IRS with a basis for that assessment. That is what I have called the section 6011 purpose of returns. Waiting until after assessment to file a return in and of itself denies the filed document the status of being a "return" even if it

³⁸"We have acknowledged, however, that tolling might be appropriate in other cases, and this, we believe, is one. . . . Tolling is in our view appropriate regardless of petitioners' intentions when filing back-to-back Chapter 13 and Chapter 7 petitions — whether the Chapter 13 petition was filed in good faith or solely to run down the lookback period. In either case, the IRS was disabled from protecting its claim during the pendency of the Chapter 13 petition." 535 U.S. at 50.

would have qualified as if filed before the assessment. In that way, the bankruptcy rule supports the nonbankruptcy rule's purpose.

Similarly, what Judge Easterbrook's dissent gets wrong is the formalistic notion that if the document filed is in the form of a return and has *any* utility to the IRS, it is a return. That is why he focuses on the requirement that taxpayers who seek to compromise their tax liabilities "must file a return, even if the Service already has gone to the trouble of calculating and assessing the tax." That's the scintilla of function he needs.³⁹ I will first address what I think are his misconceptions about the OIC process and then I will address his more substantive point: If a document is a return for *some* tax administration purpose, it should serve as a "return" for discharge purposes because the act of filing is separate from the document filed.

Section 7122 authorizes the IRS to compromise tax liabilities. Section 6331(k) prohibits the IRS from taking some collection actions while a taxpayer's OIC is "pending." The IRS used to consider OICs in field offices, but has recently consolidated review in the Memphis and Brookhaven campuses. There, before being reviewed on the merits, a low-level IRS employee performs a mechanical review of the OIC package submitted by the taxpayer to determine if the OIC is "processable." Only if the OIC is accepted as "processable" does it become "pending" within the meaning of section 6331(k) to stop collection. The reason for that two-step processing of OICs is to reduce the ability of won't-pay taxpayers to game the system by submitting bogus offers to stop collection action.

What Judge Posner's opinion gets exactly right is the connection between tax administration and bankruptcy.

When Judge Easterbrook claims that taxpayers "must" file a return, he cites to the OIC regulation "implemented by Form 656." His "must" is misleading. There is no legal requirement in the regulation or even in the associated Rev. Proc. 2003-71, 2003-36 IRB 577, *Doc 2003-18194*, 2003 TNT 163-1, that requires taxpayers to file returns for tax periods assessed on the basis of a section 6020(b) SFR. There is nothing in the preamble to the regulations that even hints at such a legal rule.⁴⁰ The closest the regulation comes to requiring returns is in this language in subsection (d): "An offer to compromise a tax liability pursuant to section 7122 must be submitted according to the procedures, and in the form and manner, prescribed by the Secretary." Perhaps Easterbrook means that the regu-

³⁹It certainly does not help matters that the government, apparently, argues in all of these cases that a Form 1040 serves *no* tax administration purpose after assessment. That's not only incorrect, but it also obscures the better point: A Form 1040 filed after an assessment can't fulfill the section 6011 reporting duty.

⁴⁰67 F.R. 48,025 (July 23, 2002).

lation language transforms all instructions in the Form 656 into legal requirements.⁴¹ And it is true that Form 656 states in big bold letters the requirement that, for the IRS to process the OIC, the taxpayer "must file all tax returns that you were legally required to file prior to submitting an offer in compromise." While that language itself does not require returns for already-assessed tax periods, I can easily imagine how low-level IRS employees who have to check off a box that says "all returns filed" could so interpret it. But the language — even if given legal force and effect (whatever that means) by the regulation — is simply circular. It requires the filing of "tax returns." Well, gosh, that's the issue, isn't it?

What Judge Easterbrook's dissent gets wrong is the formalistic notion that if the document filed is in the form of a return and has any utility to the IRS, it is a return.

Assuming Judge Easterbrook is correct that there is some requirement — probably an interpretation of the Form 656 instructions somewhere in the Internal Revenue Manual or in informal practice — he thus confuses an administrative bulk-processing rule with a substantive legal rule. The purpose of the rule is to encourage compliance with the section 6011 filing requirement. Those big bold letters on Form 656 just mean that the IRS wants to be sure that a taxpayer who seeks a break for one tax period is compliant with at least the filing requirements for all prior tax periods. Like all bulk-processing rules, the rule is over- and underinclusive. And to the extent that Payne filed his 1989 Form 1040 to get his OIC processed, that does not make his 1989 Form 1040 any more or less a return.⁴² Payne also filed his other Forms 1040 for 1983-1990 and *those* Forms 1040 *were* returns, because they were filed before the IRS assessed those taxes. They were returns because they complied with Payne's section 6011 reporting requirement, not because he had filed them to get his OIC processed.

Judge Easterbrook, in the great tradition of common law judges, makes up some great reasons why the regulations *might* still require the filing of a Form 1040 even for tax periods that have already been assessed (it will "close off some avenues, narrow the dispute that

⁴¹If that is his reasoning, it proves too much. It would transform all processing instructions into legal rules — even those in the Internal Revenue Manual — and that idea likely runs up against *U.S. v. Caceres*, 440 U.S. 741 (1979).

⁴²Because Payne submitted his OIC before the regulation came into effect and, probably, before the IRS consolidated OIC processing into the campus environment, the individual IRS employee he dealt with may or may not have told him to file. Before consolidation, the OIC program was administered by the various district field offices, each of which were governed by a district director. One of the constant tensions faced by the IRS (and most other bureaucracies from time out of mind) is the tension between the central authority and the field.

remains should litigation ensue, and . . . facilitate compromise [because] both sides have the same information").⁴³ Judge Posner disputes those reasons. But the bottom line is that it should not matter why the IRS might want to make the taxpayer file a Form 1040 after making an assessment; it does not change the fact that once the IRS has assessed a tax without the help of the taxpayer, it is just too late for the taxpayer to fulfill the section 6011 reporting requirement.

Judge Easterbrook's more substantive objection is grounded in formalism, as you can see in the following two rhetorical questions:

One could say that a given document is not a "return" for some purposes even though the IRS uses that label for others, such as talking compromise, but that would slice things too finely. Suppose Payne had sent the same document, with the same description of his 1986 income and deductible expenses, in 1989, two years after it was due but one year before the IRS made its independent calculation. Would it have been a "return" if unaccompanied by payment? What if Payne had filed it on time in 1987 but paid nothing and hid or squandered assets in an attempt to defeat collection? That would have been culpable — but not because Payne failed to make a "return."

I try to avoid asking rhetorical questions because someone might answer them. Judge Easterbrook's questions only reinforce my rhetorical bent. The answer to his first is easy: Yes, it would be a return for tax administration purposes and for discharge purposes. Payment and filing are separate requirements, as Judge Easterbrook recognizes in the very next paragraph. The reason Payne's Form 1040 for 1986 would have been a return if he had filed it in 1989 is because by filing *before* the IRS assessed the tax (even though filing extremely late) he still has fulfilled the section 6011 reporting requirements. The requirement to pay the tax reported is not contained in section 6011 but is found in section 6151. To get the discharge, all Payne needed to do was make an honest and reasonable attempt to comply with section 6011. The tax law is actually pretty generous in deeming taxpayers to have done so even if the IRS prepares a return for them under section 6020(a).

Judge Posner's opinion, however, could be read to imply that a document may not qualify as a "return" for bankruptcy discharge purposes if the debtor's actions had a sufficient nexus to the debt's age. Judge Posner writes, "A return filed after the authorities have borne that burden does not serve the purpose of the filing requirement. Had Payne filed his 1986 return on time, rather than filing for bankruptcy a decade later, the IRS might have been able to collect the entire \$20,000 that he owed." That implies that the bankruptcy discharge answer to Judge Easterbrook's first rhetorical question is "no" because had Payne simply agreed to a section 6020(a) SFR, that would have been a return and yet it still

would have been 10 years late. If that is the implication of Judge Posner's opinion, I would disagree with it as well, for it sweeps too broadly.

Judge Easterbrook's second question is whether taxpayers who properly report a tax but either hide or squander assets should get a discharge for that tax. The simple answer is that they should not, but not because of their failure to file a return. That isn't what prevents their discharge. First, as to the taxpayers who hide assets, the IRS can collect from those assets even after bankruptcy, either by enforcing the tax lien, which remains on the hidden assets, or by imposing transferee liability under section 6901 on whoever received the assets. Discharge does not eliminate the underlying debt, just personal liability for the debt.⁴⁴ More importantly, Bankruptcy Code section 523(a)(1)(C) provides that a debtor can't get a discharge for any tax that the debtor has "willfully attempted in any manner to evade or defeat." That conduct covers both reporting *and* payment. Hiding assets thus prevents the discharge of taxes because it evades payment. Second, as to taxpayers who "squander" assets, there is no bright line. But it will turn on whether they attempted to evade or defeat a tax by their behavior; because they have filed a return, they can't be denied a discharge for that reason. Profligate taxpayers who spend all their assets on sex, drugs, and rock concerts instead of contributing to the commonwealth may or may not still get a discharge. The fresh start applies to lots of debtors who make poor choices in how much credit to run up. Unless they rise to the level of evading tax, idiosyncratic consumption choices are not a basis for denying a fresh start, even if those choices are morally repugnant.

Profligate taxpayers who spend all their assets on sex, drugs, and rock concerts instead of contributing to the commonwealth may or may not still get a discharge.

In sum, Judge Posner reads the "honest and reasonable" requirement from *Beard* narrowly, focusing appropriately on the section 6011 purpose of returns. He focuses on function. Judge Easterbrook would seemingly apply the "honest and reasonable" requirement broadly and whenever a taxpayer files a Form 1040 as long as the form itself "can be useful." That prefers form to function.

IV. Drawing the Line

Some courts have held that a document filed after the IRS has made an assessment can *never* be a "return" for bankruptcy discharge purposes.⁴⁵ In effect, those courts import wholesale into bankruptcy law the bright-line tax

⁴³2005 U.S. App. LEXIS at *16.

⁴⁴See *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991).

⁴⁵The leading case for that proposition is the Sixth Circuit's decision in *In re Hindenlang*, 164 F.3d 1029 (6th Cir. 1999).

administration rule (that a postassessment return can never serve as the taxpayer's return, at least for section 6011 purposes).

Judge Posner rejects the bright-line legal rule in favor of a facts and circumstances test. He believes that "there might . . . be circumstances beyond a taxpayer's control that prevented him from filing a timely return, or even from asking for an extension of the time to file, before the tax was assessed." Accordingly, debtors should be given the chance to show some reasonable cause for their failure to file. That position is nuanced, is sophisticated, and seeks to calibrate fault with punishment, the very essence of dispensing adversary justice. I disagree with it.

Judge Posner (and many other courts who reject the *Hindenlang* bright-line rule) wants to treat the exception for discharge for a taxpayer's failure to file a return as an analog to the tax code's penalties for the same behavior. That is, denial of discharge is punishment imposed by the bankruptcy law on a taxpayer's poor tax compliance with the tax law. As such, it looks a whole lot like the tax law's penalties for that behavior, found in section 6651(a). The tax code allows taxpayers to avoid penalties for that culpable behavior by showing that the failure to file was "due to reasonable cause and not due to willful neglect."⁴⁶ All Judge Posner is doing is importing that same relief to the bankruptcy context.

I don't think the analogy is good enough, for several reasons. First, as Judge Easterbrook might say, by adopting the facts and circumstances test Judge Posner seems to concede that the culpable behavior is a failure to file, not a failure of a document to be a return. Having a good reason for failing to file a return does not transform the document eventually filed into a return. Postassessment documents cannot, by definition, function as returns, in the primary sense of allowing the IRS to assess based on the taxpayer's self-reported transactions. Second, while the tax code incorporates the "reasonable cause" relief into the penalty itself, the Bankruptcy Code does not. A failure to file a return results in denial of discharge, period.

Judge Posner rejects the bright-line legal rule in favor of a facts and circumstances test.

Third, few, if any, debtors will ever meet the facts and circumstances test properly applied. Judge Posner does not appear to appreciate the true burden a debtor bears. Because *any* return filed before assessment will serve the section 6011 purpose, up to and including the taxpayer's agreement to a return prepared by the IRS under section 6020(a), a debtor would have to come up with some reasonable cause that lasts for years *and* that prevented her from signing an SFR prepared by the IRS before it

⁴⁶That is the standard exculpatory language Congress uses in penalty provisions. See, e.g., section 6651(a)(1) (failure to file), (a)(2) (failure to pay reported liabilities), and (a)(3) (failure to pay unreported liabilities).

issued the notice of deficiency. It is not the same as the showing required to avoid the section 6651(a) penalty, that is, that a taxpayer had some good cause to miss the April 15 deadline. It requires showing that the debtor had some good cause to *continually* fail to file a preassessment return. The IRS does not suddenly assess every taxpayer the day after the filing deadline. It takes years. For example, in *Payne*, the IRS did not assess Payne's 1986 liability until December 1990. As Judge Posner wryly noted, "the assessment was hardly precipitate." What he might as well have added is: "Such assessments never are."

Few, if any, debtors will ever meet the facts and circumstances test properly applied.

Even in the context of administering the section 6651(a) failure-to-file penalties, the Supreme Court has shown a preference for bright-line legal rules. In *United States v. Doyle*, 469 U.S. 241 (1985), the Court resolved a split in the courts over what facts and circumstances would excuse a taxpayer whose failure to file was due to the failure of the taxpayer's agent. The Court resolved the split by rejecting the facts and circumstances test and adopting this bright-line legal rule: "The failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not reasonable 'cause' for a late filing under section 6651(a)(1)."⁴⁷ Part of its reasoning for adopting the rule was that a facts and circumstances test placed too heavy a burden on the government to make "ad hoc determinations."

The time has come for a rule with as "bright" a line as can be drawn consistent with the statute and implementing regulations. Deadlines are inherently arbitrary; fixed dates, however, are often essential to accomplish necessary results. The Government has millions of taxpayers to monitor, and our system of self-assessment in the initial calculation of a tax simply cannot work on any basis other than one of strict filing standards. Any less rigid standard would risk encouraging a lax attitude toward filing dates. Prompt payment of taxes is imperative to the Government, which should not have to assume the burden of unnecessary ad hoc determinations.

I would apply similar reasoning to the discharge provisions in the Bankruptcy Code. Section 523(a)(1)(B)(i)'s exception to discharge does not contain a "reasonable cause" exception and I would not advocate a judicially created one. If a document can't serve the primary purpose of a return because it was filed after assessment, it can't serve that purpose regardless of the reasons it was not filed before that assessment. I candidly admit that cuts against the legislative purpose for the exceptions to discharge listed in section 523(a)(1) — that

⁴⁷469 U.S. at 252. I am grateful to Steve Johnson for pointing out the case to me.

the age of the tax liability be traced to some culpable behavior on the part of the taxpayer. However, because I can imagine so few debtors ever meeting a facts and circumstances test — and because I can imagine every debtor trying — I prefer the no-return-after-assessment rule as a rule of law because that makes the bankruptcy simpler for courts to administer.

V. The Effect of Recent Bankruptcy Reforms

The judicial choice on whether to adopt a bright-line legal rule or not may be foreclosed by the recently enacted Bankruptcy Abuse Prevention and Consumer Protection Act (what I call BARF), which seems, at first blush, to have adopted the bright-line rule.⁴⁸ As newly modified, Bankruptcy Code section 523(a) provides:

For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986 . . . or 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.

Consistent with my disdain for BARF, however, the above language raises as many questions as it solves. First, I suggest that a close reading of the language still permits courts to adopt a facts and circumstances test; it does not force courts into a bright-line rule of law such as the one I advocate and that some courts have adopted, following *Hindenlang*. The statute tells courts only what law to use in deciding what is a "return." As I explained above, the facts and circumstances test is a judicially created relief for debtors who have filed a document the court says is not a return but have a good excuse for failing to file the document. To the extent that the statute suggests that the bankruptcy law should parallel nonbankruptcy law in the discharge determination, it actually lends support to the judicial creation of a facts and circumstances test because the courts are simply creating a bankruptcy analog to the relief given by the tax code for the failure to file penalties.

Second, the statute does a lousy job of defining the term "return." One problem is that it never says plainly that a postassessment document cannot serve as a "return." It just says, "answer this question by reference to nonbankruptcy law," which apparently means the *Beard* formulation. But courts have been using the *Beard* formulation with no uniform success and the statute does nothing to help the courts figure out what that third requirement of *Beard* — the "honest and reasonable attempt to comply with the tax law" — really means.

It gets worse. The statute contains a potential contradiction between "a written stipulation" and "a return made pursuant to section 6020(b)." Recall that if the IRS employee determines a taxpayer's liability without cooperation from the taxpayer and issues a notice of

deficiency, the taxpayer's later stipulation to a Tax Court judgment will not serve as a return.⁴⁹ But the BARF provision now creates uncertainty in the situation in which the IRS issues a notice of deficiency based on a section 6020(b) SFR and the taxpayer later stipulates to a Tax Court judgment. Is the resulting assessment based on a "written stipulation" that section 523(a) now says qualifies as a "return" for discharge purposes, or is it based on a "return made pursuant to section 6020(b)" that section 523(a) says does not qualify as a "return" for discharge purposes?

Under the new rules, a taxpayer/debtor could plausibly argue that when there is *both* a "written stipulation" and a section 6020(b) SFR, the former should count as a "return" even if the latter does not. After all, once you find a document that qualifies as a "return" somewhere, it does not matter how many documents do not qualify. And the new language appears to limit the choice to three documents: a return prepared under section 6020(a), a written stipulation, or a return prepared under section 6020(b). Either of the first two should count as a return and only the latter should not.⁵⁰ Further, one could plausibly impute to Congress the policy rationale that signing a stipulated judgment is sufficient "cooperation" with the IRS to erase any prior culpable conduct. By stipulating to a decision, the IRS does not have to spend further resources before making the assessment.

If a document can't serve the primary purpose of a return because it was filed after assessment, it can't serve that purpose regardless of the reasons it was not filed before that assessment.

That reasoning proves too much. First, it would not distinguish between a stipulated judgment signed at the start of litigation and one signed in the minute before the fact-finder renders judgment. Second, a stipulated judgment is too late in exactly the same way that a postassessment Form 1040 is too late: The IRS has already done the work to figure out the tax liability and the taxpayer has blown the section 6011 reporting requirement. The section 6020(b) SFR is the evidence of the taxpayer's culpability and that can't be undone. It is true that a stipulated judgment might be useful in some ways. As Judge Easterbrook notes about a postassessment Form 1040, a stipulated judgment might "close off some avenues, narrow the dispute that remain[s], and . . . facilitate compromise." That does not make it a return, because that is not the primary tax administration purpose of a return.

⁴⁹See, e.g., *In re Gentry*, *supra* note 14.

⁵⁰One might also read the statute as giving a choice between two documents: (a) a "return" prepared under either 6020(a) or a written stipulation, or (b) a "return" prepared under section 6020(b). So one would still have to find a "return." But because a "written stipulation" is not used to prepare a return, that reading would not make much sense.

⁴⁸PL. 109-8, 119 Stat. 23.

The better reading of the statute should preserve the prior law distinguishing between section 6020(a) returns and section 6020(b) returns. Simply because the form may serve *some* small function postassessment does not make it a "return" for bankruptcy discharge purposes. If I have not convinced you of that in this long column, I hope Judge Posner will, in his much shorter and more elegant opinion.

Conclusion

Just as my wife and I struggle to give content to the term "blue," courts struggle to give content to the term "return." Some focus on the label of the form, others focus on its function. Congress has tried to help but, with a stroke of its collective pen, has now probably muddied the meaning of the term rather than clarified it. I hope our painter does a better job on our house.