

DEC 17 2015

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

5	In re:)	BAP No.	EC-14-1180-KuKiTa
)		
6	KEVIN WAYNE MARTIN and SUSAN)	Bk. No.	11-62436
	MARTIN,)		
7)	Adv. No.	12-01131
	Debtors.)		
8	_____)		
)		
9	UNITED STATES,)		
)		
10	Appellant,)		
)		
11	v.)	OPINION	
)		
12	KEVIN WAYNE MARTIN; SUSAN)		
	MARTIN,)		
13)		
	Appellees.)		
14	_____)		

Argued and Submitted on November 19, 2015
at Pasadena, California

Filed - December 17, 2015

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable W. Richard Lee, Bankruptcy Judge, Presiding

Appearances: Boris Kukso argued for appellant United States;
Appellees Kevin Wayne Martin and Susan Martin
argued pro se.

Before: KURTZ, KIRSCHER and TAYLOR, Bankruptcy Judges.

KURTZ, Bankruptcy Judge:

1 **INTRODUCTION**

2 When is a tax return not a tax return? According to an
3 increasing number of courts, including some courts of appeal, the
4 answer is: when the tax return, otherwise wholly compliant with
5 applicable tax laws, is filed a second (or more) late. According
6 to these courts, by way of the 2005 Bankruptcy Code amendments,
7 Congress intended to make a substantial and exceptionally harsh
8 change to nondischargeability law by adding a hanging paragraph
9 at the end of 11 U.S.C. § 523(a)¹ defining the term "return" to
10 exclude any taxpayer filing that does not wholly and strictly
11 comply with all applicable return filing requirements, even if
12 the taxing authority itself could and would forgive that
13 noncompliance. Indeed, the United States rejects this statutory
14 interpretation in this appeal.

15 The courts adopting a literal construction of the "return"
16 definition more or less admit that their unforgiving view of
17 congressional intent cannot be squared within the context of
18 § 523(a), or even within the narrower context of the hanging
19 paragraph itself, without running into some significant
20 conundrums. The second sentence of the hanging paragraph
21 expressly includes within the definition of "return" some types
22 of returns that the taxing authority prepares on behalf of the
23 taxpayer, when the taxpayer never gets around to it. Why
24 Congress would want to treat a taxpayer who files a tax return a

25
26 ¹Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. All "Civil Rule" references are to
the Federal Rules of Civil Procedure.

1 month or a week or even a day late - possibly for reasons beyond
2 his or her control - so much more harshly than a taxpayer who
3 never files a tax return on his or her own behalf is a mystery
4 that literal construction adherents never adequately explain.
5 Nor have they adequately explained why, later on in the second
6 sentence of the hanging paragraph, Congress felt a need to
7 explicitly exclude from the "return" definition another type of
8 return filed by taxing authorities on behalf of taxpayers when
9 that exclusion is superfluous if one accepts a literal
10 construction of the first sentence of the hanging paragraph.

11 When one looks beyond the hanging paragraph, at the context
12 of the nondischargeability statute as a whole and Congress'
13 scheme for nondischargeable debts, one encounters additional,
14 even-more-serious problems with the literal construction of the
15 "return" definition. Section 523(a)(1)(B)(ii), which pre-existed
16 the 2005 amendments, already contains a specific and carefully-
17 balanced treatment of tax debts associated with untimely-filed
18 tax returns. Literal construction of the "return" definition
19 renders § 523(a)(1)(B)(ii) all but meaningless - reducing the
20 potential application of that provision to a minuscule scope.
21 And, according to the literal construction adherents, Congress
22 intended the "return" definition to accomplish this dramatic re-
23 balancing of the dischargeability of tax debt without a single
24 legislative comment to that effect.

25 In light of these concerns arising from a contextual reading
26 of the hanging paragraph, we reject the literal construction of
27 the "return" definition. We further conclude that there is
28 binding Ninth Circuit authority predating the 2005 amendments

1 instructing us how to determine when a taxpayer filing should be
2 treated as a return for nondischargeability purposes and that
3 authority was not abrogated by the 2005 amendments.

4 The bankruptcy court erred because it declined to apply the
5 existing Ninth Circuit test as to what constitutes a "return," so
6 we VACATE the bankruptcy court's ruling declaring the Martins'
7 tax debt dischargeable, and we REMAND so that the bankruptcy
8 court can apply the Ninth Circuit test.

9 **FACTS**

10 The facts are undisputed. The Martins did not file their
11 tax returns for 2004, 2005 and 2006 at the time they were due.
12 Consequently, the Internal Revenue Service ("IRS") conducted an
13 audit examination beginning in June 2008 to fix the amount of the
14 Martins' tax liability for those three years. Without the
15 benefit of the Martins' self-reported income tax data in the form
16 of tax returns, the IRS duly followed the deficiency and
17 assessment procedures set forth in the Internal Revenue Code.
18 See 26, U.S.C. § 6201, et seq. In August 2008, following the
19 completion of the audit examination, the IRS issued a notice of
20 deficiency for each of the three tax years.

21 The Martins did not respond to the notices of deficiency,
22 but the notices did spur the Martins to hire a new accountant to
23 prepare the missing tax returns. In December 2008, the
24 accountant signed and completed the Martins' tax returns for
25 2004, 2005 and 2006, but the Martins did not get around to
26 signing and filing the tax returns until six months later in June
27 2009. There is no evidence explaining the reason for the
28 Martins' several-year delay in preparing their 2004, 2005 and

1 2006 tax returns, nor is there any evidence explaining the
2 Martins' delay in signing and filing the completed returns.²

3 _____
4 ²While it does not constitute evidence in the strict sense,
5 at the summary judgment oral argument, the Martins attempted to
6 explain the delays. With respect to their initial failure to
7 timely prepare their 2004, 2005 and 2006 tax returns, Ms. Martin
8 stated:

9 [W]e had problems with our previous accountant. Her
10 husband died and she had to let us go and -- and so she
11 -- basically we were trying to -- she had her assistant
12 try to finish us up. And she got sick and held on to
13 our taxes for over a year. And we repeatedly tried to
14 get them back from her, and she kept saying she was
15 going to finish them.

16 And then by the time we realized -- finally we
17 demanded them back, and we had to find a new accountant
18 who had to start fresh. And that was Andrea, and
19 that's when she started reassessing and doing all our
20 taxes to help get us caught up.

21 Hr'g Tr. (Aug. 29, 2013) at 6:4-15. With respect to the six-
22 month delay in signing and filing the completed returns, the
23 bankruptcy court and Ms. Martin engaged in the following
24 colloquy:

25 THE COURT: Why didn't the tax returns get filed [six]
26 months earlier, when the accountant signed them?

27 SUSAN MARTIN: Because she actually finished them on
28 12-18-08. And I believe we were waiting for two other
years that were behind, '07 and '08, to be completed
before we put them all in together.

THE COURT: Why? Why. Why didn't -- why didn't --

SUSAN MARTIN: I don't know. I -- I just feel like we
were trying to get it all in at once. I -- I guess
that's why we waited. I was wondering the same thing,
why we didn't get them in right away. But we had so
many back taxes that we were just trying to get them
all done. And that's why they sat for a little while.

(continued...)

1 Meanwhile, having not heard from the Martins, the IRS made
2 assessments against the Martins for the 2004, 2005 and 2006 tax
3 years in March 2009. Thereafter, the IRS twice sent the Martins
4 notices of the unpaid taxes and demands for payment - once in
5 March 2009 and another time in April 2009. The IRS then gave the
6 Martins notice of its intent to collect the assessed taxes by
7 levy.

8 Only after the IRS threatened to collect the unpaid taxes
9 did the Martins finally file their 2004, 2005 and 2006 tax
10 returns. The IRS accepted the untimely returns and adjusted the
11 Martins' tax liability based on the information set forth in the
12 returns. The IRS adjusted their 2004 tax liability downward by
13 roughly \$1,000 (from \$18,432 to \$17,358), their 2005 tax
14 liability upward by roughly \$5,000 (from \$9,928 to \$14,852), and
15 their 2006 tax liability downward by roughly \$5,000 (from \$32,133
16 to \$27,010).

17 The Martins commenced their chapter 7 bankruptcy case in
18 November 2011 and commenced pro se the adversary proceeding from
19 which this appeal arises in July 2012. By way of their
20 complaint, they sought a determination that their 2004, 2005 and
21 2006 tax debt was dischargeable. The IRS responded to the
22 complaint by alleging that the subject tax debt was
23 nondischargeable pursuant to § 523(a)(1)(B)(i), as a tax debt for
24 which a tax return was required but never filed.³

25
26 ²(...continued)
Hr'g Tr. (Aug. 29, 2013) at 5:7-19.

27 ³Ultimately, the IRS conceded the dischargeability of the
28 (continued...)

1 The IRS filed a summary judgment motion based on the
2 undisputed facts. The bankruptcy court denied the IRS's summary
3 judgment motion and instead, on the undisputed facts, granted
4 judgment in favor of the Martins. In a thoughtful, thorough and
5 detailed memorandum of decision, the bankruptcy court rejected
6 the IRS's legal theories attempting to explain why a tax return
7 filed post-assessment is the functional equivalent of no tax
8 return at all for both tax purposes and nondischargeability
9 purposes.

10 The bankruptcy court also grappled with the meaning of the
11 word "return" for purposes of the nondischargeability statute,
12 both before and after the 2005 Bankruptcy Code amendments.
13 Ultimately, the bankruptcy court held that the correct standard
14 for determining whether a taxpayer filing qualified as a return
15 for purposes of the nondischargeability statute had not changed
16 as a result of the 2005 amendments. According to the bankruptcy
17 court, the test established in the tax court decision of Beard v.
18 Commissioner, 82 T.C. 766, 774-79 (1984), aff'd 793 F.2d 139 (6th
19 Cir. 1986), should be used to determine whether the debtor
20 taxpayer had filed a return. The Beard test as articulated in
21 Ninth Circuit authority requires courts to consider the following
22 factors:

23 (1) it must purport to be a return; (2) it must be
24 executed under penalty of perjury; (3) it must contain
25 sufficient data to allow calculation of tax; and (4) it
must represent an honest and reasonable attempt to

26 ³(...continued)

27 additional amount assessed for 2005 based on the Martins' 2005
28 tax return. Nor did it contest the dischargeability of the
penalties it assessed and the interest accrued on the penalties.

1 satisfy the requirements of the tax law.
2 United States v. Hatton (In re Hatton), 220 F.3d 1057, 1060-61
3 (9th Cir. 2000) ("Hatton II") (citing United States v. Hindenlang
4 (In re Hindenlang), 164 F.3d 1029, 1033 (6th Cir. 1999)).

5 Instead of utilizing the version of the Beard test as
6 applied in Hatton II and In re Hindenlang, the bankruptcy court
7 utilized a slightly different version of the Beard test. Whereas
8 the honest-and reasonable inquiry in the Hatton/Hindenlang
9 version is broad in scope and at least partially subjective in
10 focus, the honest-and-reasonable inquiry in the version of the
11 Beard test utilized by the bankruptcy court was narrow in scope
12 and exclusively objective in focus. The bankruptcy court only
13 considered the face of the Martins' tax filings and looked at the
14 form and content of those filings in order to determine, from an
15 objective standpoint, that the Martins' filings for the 2004,
16 2005 and 2006 tax years constituted "an honest and reasonable
17 attempt to satisfy the requirements of the tax law."

18 The bankruptcy court concluded that the Martins' 2004, 2005
19 and 2006 tax filings qualified as returns for nondischargeability
20 purposes and granted judgment in their favor on that basis. The
21 IRS timely filed its notice of appeal on April 14, 2014.

22 JURISDICTION

23 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
24 §§ 1334 and 157(b)(2)(I), and we have jurisdiction under
25 28 U.S.C. § 158.

26 ISSUE

27 Did the bankruptcy court apply the correct legal standard
28 for determining whether the Martins' tax filings qualified as tax

1 returns for purposes of the nondischargeability statute?

2 **STANDARD OF REVIEW**

3 This appeal presents a question of statutory construction,
4 which is a question of law we review de novo. Samson v. W.
5 Capital Partners, LLC (In re Blixseth), 684 F.3d 865, 869 (9th
6 Cir. 2012) (per curiam).

7 **DISCUSSION**

8 **A. The Parties' Positions**

9 In this appeal, the IRS has advocated two distinct
10 positions: an official, preferred position and an unofficial,
11 fall-back position. Officially, the IRS contends that the
12 dischargeability of income tax debt associated with a late-filed
13 tax return should hinge on whether the taxpayer filed the return
14 before or after the IRS made any assessment. This position is
15 not new for the IRS. See, e.g., Mallo v. I.R.S. (In re Mallo),
16 774 F.3d 1313, 1325-27 (10th Cir. 2014); Wogoman v. I.R.S.
17 (In re Wogoman), 475 B.R. 239, 250 (10th Cir. BAP 2012); see also
18 IRS Chief Counsel Notice CC-2010-016, available at 2010 WL
19 3617597.

20 Alternately and unofficially, the IRS contends that the
21 Ninth Circuit's version of the Beard test is sufficient to
22 accomplish its litigation goal in this appeal. According to the
23 IRS, if the bankruptcy court here had applied the Ninth Circuit
24 version of the Beard test, it should have and would have
25 concluded that the Martins' 2004, 2005 and 2006 tax returns do
26 not qualify as returns for nondischargeability purposes.

27 The Martins similarly contend that the Beard test applies,
28 but they insist that the bankruptcy court correctly determined

1 under the Beard test that their 2004, 2005 and 2006 tax returns
2 qualify as returns for nondischargeability purposes.

3 Notably, neither side here advocates in favor of the literal
4 construction of the "return" definition that Congress added to
5 the nondischargeability statute as part of the 2005 Bankruptcy
6 Code amendments. Indeed, in this case and in other cases, the
7 IRS expressly has rejected the literal construction and has
8 stated that the literal construction leads to "overly harsh"
9 results. In re Wogoman, 475 B.R. at 250. Instead, the IRS has
10 advocated for its less draconian approach focusing on whether the
11 taxpayer filing occurred before or after an IRS tax assessment.
12 Id.

13 Even though neither side here supports the literal
14 construction of the "return" definition, in light of the
15 increasing number of courts that have adopted that construction,
16 our analysis necessarily focuses on that approach first. Before
17 undertaking that analysis, however, we first describe the legal
18 state of affairs in the Ninth Circuit before Congress added the
19 "return" definition to the nondischargeability statute.

20 **B. The Ninth Circuit Legal Landscape Before BAPCPA⁴**

21 Section 523(a)(1)(B)(i) excepts from discharge tax debt when
22 the debtor taxpayer was required to file a tax return but did not
23 do so. Cal. Franchise Tax Bd. v. Jackson (In re Jackson),
24 184 F.3d 1046, 1050 (9th Cir. 1999). "The policy behind this
25 subsection is that a debtor should not be permitted to discharge
26

27
28 ⁴The Bankruptcy Abuse Prevention and Consumer Protection
Act, Pub.L. No. 109-8, 119 Stat. 23 (2005) ("BAPCPA").

1 a tax liability based upon **a required tax return that was never**
2 **filed.**" Id. at 1052 (citing 3 NORTON BANKRUPTCY LAW AND PRACTICE 2d
3 § 47:6, 47-15 (1997)). Meanwhile, § 523(a)(1)(B)(ii) excepts
4 from discharge tax debt associated with untimely filed tax
5 returns filed within two years of the debtor's bankruptcy filing,
6 and § 523(a)(1)(C) excepts from discharge tax debt associated
7 with tax returns that are fraudulent or evasive. See
8 In re Hindenlang, 164 F.3d at 1032; see also 4 COLLIER ON BANKRUPTCY
9 ¶ 523.07[3],[4] (Alan N. Resnick & Henry J. Sommer, eds., 16th
10 ed. rev. 2015).

11 In United States v. Hatton (In re Hatton) ("Hatton I"),
12 216 B.R. 278, 282 (9th Cir. BAP 1997), this Panel adopted for
13 purposes of § 523(a)(1)(B)(i) the meaning of "return" set forth
14 in Beard. Beard held that a document qualifies as a return if:

15 (1) it must purport to be a return; (2) it must be
16 executed under penalty of perjury; (3) it must contain
17 sufficient data to allow calculation of tax; and (4) it
must represent an honest and reasonable attempt to
satisfy the requirements of the tax law.

18 In re Hindenlang, 164 F.3d at 1033. Hatton I applied the Beard
19 test in upholding the bankruptcy court's finding that the debtor
20 had filed a return within the meaning of § 523(a)(1)(B)(i).

21 Hatton I reasoned that the debtor taxpayer came close enough to
22 filing a return by meeting with the IRS, by acquiescing to the
23 substitute return the IRS filed on the debtor taxpayer's behalf,
24 by acknowledging his liability for 1983 taxes in the amount set
25 forth in the substitute return, and by entering into an
26 installment payment agreement, pursuant to which debtor agreed to
27 pay his delinquent taxes at a rate of \$200 per month.

28 The Ninth Circuit Court of Appeals reversed. Hatton II,

1 220 F.3d at 1060-61. Hatton II rejected Hatton I's attempted
2 expansion of the Beard test to include a debtor taxpayer who had
3 not signed any document under penalty of perjury and who "made
4 every attempt to avoid paying his taxes" until the IRS sent the
5 debtor taxpayer a letter threatening to levy on his wages and
6 bank accounts and to seize his property. Id. at 1061. But
7 Hatton II did not throw out the baby with the bath water. For
8 purposes of § 523(a)(1)(B)(i), Hatton II explicitly adopted
9 Beard's definition of return, as articulated in
10 In re Hindenlang.⁵

11 By adopting In re Hindenlang's version of the Beard test,
12 Hatton II sub silentio overruled, at least in part, another Panel
13 decision - United States v. Nunez (In re Nunez), 232 B.R. 778,
14 783 (9th Cir. BAP 1999). In re Nunez adopted a slightly

16
17 ⁵There is nothing in Hatton II suggesting that it adopted
18 other aspects of In re Hindenlang, particularly
19 In re Hindenlang's holding that post-assessment tax returns filed
20 by the taxpayer never qualify as returns for purposes of
21 § 523(a)(1)(B). To the contrary, Hatton II's analysis -
22 especially its reliance on the Beard test to determine whether
23 the taxpayer filed a return - is inconsistent with
24 In re Hindenlang's pre- or post-assessment test. As stated in
25 one persuasive bankruptcy court decision:

26 Had the Hatton court adopted the Hindenlang [pre- or
27 post-assessment] Rule, it would not have needed to
28 consider whether the Debtor had executed the
29 submissions under penalty of perjury or the Debtor's
30 subjective intent post assessment. The court would
31 have simply determined that the debtor's post
32 assessment submissions, could not as a matter of law,
33 constitute returns under § 523(a)(1)(B).

34 Rushing v. United States (In re Rushing), 273 B.R. 223, 227
35 (Bankr. D. Ariz. 2001).

1 different version of the Beard test. Following Savage v. I.R.S.
2 (In re Savage), 218 B.R. 126, 132 (10th Cir. BAP 1998),
3 In re Nunez narrowed the honesty-and-reasonableness prong of the
4 Beard test to examine only what appeared on the face of the
5 taxpayer's filing in order to ascertain whether that filing
6 constituted "an honest and genuine endeavor to satisfy the law."
7 In re Nunez, 232 B.R. at 783 (quoting In re Savage, 218 B.R. at
8 132). In re Nunez, therefore, excluded from its honesty-and-
9 reasonableness analysis the length of the delay in the taxpayer's
10 filing, the reason for the delay and the number of tax years for
11 which timely filings were missed. Id. It is impossible to
12 reconcile this aspect of In re Nunez with Hatton II's honesty-
13 and-reasonableness analysis, which largely hinged on the delay in
14 taxpayer compliance. See Hatton II, 220 F.3d at 1061.

15 In short, in the Ninth Circuit, the Hatton II/
16 In re Hindenlang version of the Beard test indisputably governed
17 the definition of the term "return" for purposes of determining
18 the nondischargeability of tax debts, at least until the
19 enactment of BAPCPA. In the next section, we attempt to discern
20 how (if at all) BAPCPA changed the legal landscape.

21 **C. The Impact of BAPCPA on the Nondischargeability of Tax Debts**

22 Recall that, when Congress first enacted the Bankruptcy
23 Code in 1978, it specifically noted that § 523(a)(1)(B)
24 represented a careful balancing of the competing interests of the
25 debtor, the taxing authority, and the debtor's other creditors.
26 See Maryland v. Ciotti (In re Ciotti), 638 F.3d 276, 279 (4th
27 Cir. 2011) (citing S.Rep. No. 95-989, at 14 (1978), reprinted in
28 1978 U.S.C.C.A.N. 5787, 5800)). Congress further stated that

1 § 523(a)(1)(B) reflected its intent that "**tax claims which are**
2 **nondischargeable**, despite a lack of priority, **are those to whose**
3 **staleness the debtor contributed by some wrong-doing or serious**
4 **fault.**" S.Rep. No. 95-989, at 14 (1978), reprinted in 1978
5 U.S.C.C.A.N. 5787, 5800 (emphasis added).

6 In contrast, when Congress enacted BAPCPA, it did not offer
7 any similarly specific statement of its legislative rationale for
8 adding a definition of "return" into the Code's
9 nondischargeability statute. In re Mallo, 774 F.3d at 1327.⁶
10 But BAPCPA was accompanied by a general statement of legislative
11 intent indicating that the 2005 amendments as a whole were
12 motivated by four general factors:

13 the "recent escalation of consumer bankruptcy filings,"
14 the "significant losses . . . associated with
15 bankruptcy filings," the fact that the "bankruptcy
system has loopholes and incentives that allow

16 ⁶Congress did explain the second sentence of the hanging
17 paragraph, as follows:

18 Income Tax Returns Prepared by Tax Authorities.
19 Section 714 of the Act amends section 523(a) of the
20 Bankruptcy Code to provide that a return prepared
21 pursuant to section 6020(a) of the Internal Revenue
22 Code, or similar State or local law, constitutes filing
23 a return (and the debt can be discharged), but that a
24 return filed on behalf of a taxpayer pursuant to
section 6020(b) of the Internal Revenue Code, or
similar State or local law, does not constitute filing
a return (and the debt cannot be discharged).

25 H.R. REP. 109-31(I), at 103 (2005), reprinted in 2005
26 U.S.C.C.A.N. 88, 167. It seems odd that Congress would bother to
27 explain the relatively minuscule effect of the second sentence of
28 the hanging paragraph but not offer any legislative comment on
the first sentence, which literal construction adherents claim
dramatically altered the nondischargeability of tax debt
associated with untimely filed tax returns.

1 and-sometimes-even encourage opportunistic personal
2 filings and abuse," and "the fact that some bankruptcy
3 debtors are able to repay a significant portion of
4 their debts."

4 In re Ciotti, 638 F.3d at 279 (citing H.R.Rep. No. 109-31, at 3-5
5 (2005), reprinted in 2005 U.S.C.C.A.N. 88, at 90-92).

6 In any event, BAPCPA added the "return" definition into the
7 nondischargeability statute in a hanging paragraph tacked onto
8 the end of § 523(a) and often cited as § 523(a)(*). The hanging
9 paragraph consists of two sentences, the first of which defines
10 the term "return" and the second of which further refines that
11 definition by explicitly including a certain type of return
12 prepared by the taxing authority on behalf of the taxpayer and by
13 expressly excluding another. The full text of the hanging
14 paragraph provides as follows:

15 For purposes of this subsection, the term "return"
16 means a return that satisfies the requirements of
17 applicable nonbankruptcy law (including applicable
18 filing requirements). Such term includes a return
19 prepared pursuant to section 6020(a) of the Internal
20 Revenue Code of 1986, or similar State or local law, or
21 a written stipulation to a judgment or a final order
22 entered by a nonbankruptcy tribunal, but does not
23 include a return made pursuant to section 6020(b) of
24 the Internal Revenue Code of 1986, or a similar State
25 or local law.

26 11 U.S.C. § 523(a)(*).

27 A number of courts, including several Courts of Appeal, have
28 addressed the issue of what the "return" definition means, and
29 many of them have held that the term "applicable filing
30 requirements" is unambiguous and that the plain and ordinary
31 meaning of the term necessarily includes time deadlines for
32 filing returns as stated in the Internal Revenue Code, 26 U.S.C.
33 § 6072(a), and/or in equivalent state statutes. Therefore, these

1 literal construction courts have concluded that untimely returns
2 are not returns at all for purposes of the nondischargeability
3 statute. See, e.g., Fahey v. Massachusetts Dep't of Revenue
4 (In re Fahey), 779 F.3d 1, 4-5 (1st Cir. 2015); In re Mallo,
5 774 F.3d at 1321; McCoy v. Miss. State Tax Comm'n (In re McCoy),
6 666 F.3d 924, 928, 932 (5th Cir. 2012).

7 The literal construction adherents have not been deterred by
8 the perceived harshness resulting from their reading of the
9 statute. They rely heavily (if not exclusively) on the plain
10 language of the phrase "applicable filing requirements" to
11 conclude that Congress intended by way of the "return" definition
12 in the hanging paragraph to except from discharge the tax debts
13 of all taxpayers whose tax returns do not strictly comply with
14 all filing requirements - including time deadlines. See, e.g.,
15 In re Fahey, 779 F.3d at 4-5; In re Mallo, 774 F.3d at 1321;
16 In re McCoy, 666 F.3d at 932. In doing so, they gloss over one
17 of the most important rules of plain meaning statutory
18 construction: that the meaning of a statutory term only is
19 considered plain and unambiguous if the term is clearly
20 understood in the context of the words surrounding it and in the
21 context of the larger statutory scheme.

22 The Supreme court reiterated the vital importance of
23 contextual reading in Yates v. United States, 135 S. Ct. 1074,
24 1081-82 (2015). Yates emphasized that the clarity of statutory
25 language only can be measured in "the specific context in which
26 that language is used, and the broader context of the statute as
27 a whole." Id. at 1081 (quoting Robinson v. Shell Oil Co.,
28 519 U.S. 337, 341 (1997)). While the Court's ruling in Yates was

1 a plurality decision, there was no controversy amongst the
2 Justices about the critical importance of contextual reading. In
3 fact, the Yates dissent, in which four Justices joined, was even
4 more compelling on this point:

5 I agree with the plurality (really, who does not?) that
6 context matters in interpreting statutes. We do not
7 "construe the meaning of statutory terms in a vacuum."
8 Rather, we interpret particular words "in their context
9 and with a view to their place in the overall statutory
10 scheme." And sometimes that means, as the plurality
11 says, that the dictionary definition of a disputed term
12 cannot control.

13 Id. at 1092 (Justice Kagan dissenting) (citations omitted).

14 The more one considers the phrase "applicable filing
15 requirements" in context, the more doubtful the literal
16 construction becomes. First, within the hanging paragraph
17 itself, the second sentence does not square with the so-called
18 ordinary meaning of the term "applicable filing requirements"
19 found in the first sentence. The literal construction of
20 "applicable filing requirements" effectively excepts from
21 discharge all taxes associated with untimely-filed returns, but
22 the second sentence adds right back into the definition returns
23 prepared by taxing authorities under 26 U.S.C. § 6020(a) or under
24 equivalent state statutes. That subsection provides:

25 **(a) Preparation of return by Secretary.**--If any person
26 shall fail to make a return required by this title or
27 by regulations prescribed thereunder, but shall consent
28 to disclose all information necessary for the
preparation thereof, then, and in that case, the
Secretary may prepare such return, which, being signed
by such person, may be received by the Secretary as the
return of such person.

29 26 U.S.C. § 6020(a). Thus, under the literal construction of the
30 hanging paragraph, a debtor taxpayer who is one month or one day

1 or even one hour late in filing his or her return will have his
2 associated tax debt excepted from discharge, whereas a debtor
3 taxpayer who never bothers to file his or her own return can
4 discharge his or her associated tax debt if the IRS fortuitously
5 prepares a return on that person's behalf.

6 Why would Congress want to treat debtor taxpayers who do
7 nothing on their own to comply with their return filing
8 obligations so much better than debtor taxpayers who - perhaps
9 for reasons beyond their control - miss the filing deadline by as
10 little as a day but then conscientiously complete and file their
11 return? The literal construction adherents have an answer to
12 this question, but that answer is hardly persuasive. The literal
13 construction adherents speculate that Congress wanted to make
14 available to the taxing authorities a "carrot" they could offer
15 to formerly uncooperative taxpayers to encourage their
16 cooperation going forward. In re Fahey, 779 F.3d at 7;
17 In re Mallo, 774 F.3d at 1324; In re McCoy, 666 F.3d at 931.

18 This makes no sense. The literal construction adherents
19 admit (at least some of them do) that it is extremely rare for
20 taxing authorities to engage in the expensive and time-consuming
21 process of preparing tax returns on behalf of taxpayers. See,
22 e.g., In re Fahey, 779 F.3d at 6-7. More importantly, the
23 literal construction of the "return" definition in reality
24 creates an incentive for impoverished taxpayers who already are
25 late in filing one or more tax returns to further delay, with the
26 hope that they would be some of the lucky few for whom the taxing
27 authorities decide to prepare returns on the taxpayers' behalf
28 (which then would enable them under the literal construction to

1 obtain a discharge of an otherwise nondischargeable tax debt).

2 When read with a literal construction, the disconnect
3 between the first and second sentences of the hanging paragraph
4 does not end there. In the last part of the second sentence, the
5 hanging paragraph excludes from the definition of "return"
6 returns prepared by taxing authorities under 26 U.S.C. § 6020(b)
7 or under equivalent state statutes. That subsection provides in
8 relevant part:

9 **(b) Execution of return by Secretary.--**

10 **(1) Authority of Secretary to execute return.--**If
11 any person fails to make any return required by
12 any internal revenue law or regulation made
13 thereunder at the time prescribed therefor, or
14 makes, willfully or otherwise, a false or
fraudulent return, the Secretary shall make such
return from his own knowledge and from such
information as he can obtain through testimony or
otherwise.

15 26 U.S.C. § 6020(b). Thus, according to the literal construction
16 adherents, even though the first sentence of the hanging
17 paragraph already excludes **all** late-filed returns from the
18 definition of "return," Congress felt it necessary (supposedly
19 for the sake of clarity) to repeat one tiny aspect of this
20 exclusion one sentence later - the exclusion with respect to §
21 6020(b) returns, which by definition are untimely. See, e.g., In
22 re Fahey, 779 F.3d at 7; In re Mallo, 774 F.3d at 1324. Many
23 literal construction adherents acknowledge that a statute should,
24 if possible, be construed in a manner that avoids rendering any
25 part of it redundant. See, e.g., In re Fahey, 779 F.3d at 6;
26 In re Mallo, 774 F.3d at 1317. Indeed, In re Fahey cites to
27 TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001), which stated: "[i]t
28 is a **cardinal principle** of statutory construction that a statute

1 ought, upon the whole, to be so construed that, if it can be
2 prevented, no clause, sentence, or word shall be superfluous,
3 void, or insignificant." Id. (citations and internal quotation
4 marks omitted and emphasis added).

5 The literal construction adherents offer little to explain
6 their acceptance of the redundancy created by their
7 interpretation of the hanging paragraph. According to them,
8 Congress likely was redundant for the sake of clarity. But this
9 explanation is wholly at odds with the cardinal principle of
10 statutory construction referenced immediately above.

11 Alternately, the literal construction adherents dismiss the
12 redundancy as insignificant, especially in light of the plain
13 meaning of the term "applicable filing requirements." See, e.g.,
14 In re Fahey, 779 F.3d at 7. This reasoning not only is circular
15 but also undermines a contextual reading of the statute.

16 Assuming the literal construction of the term "applicable
17 filing requirements" already has not collapsed under the weight
18 of the contextual difficulties found within the hanging paragraph
19 itself, another more-extreme level of difficulties awaits within
20 § 523(a)(1)(B)(ii). In that subparagraph, as originally enacted
21 in 1978, Congress clearly excepted from discharge any and all tax
22 debts associated with untimely filed returns that were filed
23 within two years of the debtor's bankruptcy petition filing.
24 In re Ciotti, 638 F.3d at 279. Before BAPCPA, there was no
25 genuine dispute regarding the broad coverage of this
26 subparagraph. See id. After BAPCPA, at least under the literal
27 construction, the once-expansive coverage of this subparagraph
28 has been dramatically reduced to an infinitesimal scope - a scope

1 bordering on and approaching zero. As the literal construction
2 adherents would have it, this subparagraph post-BAPCPA only would
3 apply to § 6020(a) returns, since § 6020(a) returns are the only
4 type of untimely returns that fall within the definition of
5 "return" under the literal construction. See, e.g., In re Fahey,
6 779 F.3d at 6; In re Mallo, 774 F.3d at 1323-24.

7 Structurally, interpreting the definitional hanging
8 paragraph in a way that dramatically alters the coverage of
9 § 523(a)(1)(B)(ii) is an excellent example of "the tail wagging
10 the dog." This structural concern is the least of our concerns.
11 The literal construction also renders § 523(a)(1)(B)(ii) all but
12 meaningless. The literal construction adherents explain away
13 this concern by suggesting that, while "meaningless" is not okay
14 under the cardinal rule disfavoring interpretations that render
15 part of a statute superfluous, "all but meaningless" is fine.
16 See, e.g., In re Fahey, 779 F.3d at 6; In re Mallo, 774 F.3d at
17 1323-24.

18 And yet we have an even more significant concern. The
19 Supreme Court disfavors interpretations of ambiguous Bankruptcy
20 Code provisions (and amendments) that impose major changes in
21 pre-existing practice in the absence of at least some discussion
22 in the legislative history. See Dewsnup v. Timm, 502 U.S. 410,
23 419 (1992). The literal construction adherents reason that this
24 concern is unjustified because the "return" definition is
25 unambiguous. But our contextual reading of the statutory text
26 convinces us otherwise.

27 At the outermost circle of contextual reading, we must
28 consider how the literal construction of the term "applicable

1 filing requirements" fits within Congress' statutory scheme for
2 excepting debts from discharge. Recall that Congress' original
3 Bankruptcy Code enactment of § 523(a)(1)(B) embodied a careful
4 balancing of the competing interests of the debtor, taxing
5 authorities and the debtor's other creditors. See In re Ciotti,
6 638 F.3d at 279 (citing S.Rep. No. 95-989, at 14 (1978),
7 reprinted in 1978 U.S.C.C.A.N. 5787, 5800)). Nothing in the term
8 "applicable filing requirements" or in the four general factors
9 that served as the impetus for BAPCPA manifests an intent to
10 effect a sea-change in how Congress chose to balance the
11 dischargeability of tax debts associated with untimely filed
12 returns.

13 The Supreme Court before BAPCPA recognized that "exceptions
14 to discharge should be confined to those plainly expressed,"
15 Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998) (quoting Gleason v.
16 Thaw, 236 U.S. 558, 562 (1915)), and the Supreme Court after
17 BAPCPA continues to adhere to this same principle. Bullock v.
18 BankChampaign, N.A., 133 S. Ct. 1754, 1760 (2013). Here, in
19 light of our contextual reading of the term "applicable filing
20 requirements," we are not persuaded that the statutory text, as
21 amended by BAPCPA, manifests a plainly expressed intent to re-
22 balance the nondischargeability of tax debts associated with
23 untimely filed tax returns.

24 **D. Application of the Correct Definition of "Return" to this**
25 **Appeal**

26 Our rejection of the literal construction of the "return"
27 definition leaves us with the task of articulating what the
28 definition of "return" in the hanging paragraph is supposed to

1 mean. The generic terms “applicable bankruptcy law” and
2 “applicable filing requirements” necessarily reflect that the
3 answer will depend on which nonbankruptcy laws are applicable
4 (federal or state or local) and what the applicable filing
5 requirements say. “[N]early all courts” pre-BAPCPA utilized some
6 version of the Beard test. In re Mallo, 774 F.3d at 1318. In
7 other words, for purposes of determining the dischargeability of
8 federal income tax debt, the “return” definition added by
9 Congress in 2005 effectively codified the Beard test, except that
10 Congress in the second sentence of the hanging paragraph carved
11 out some specific rules for tax returns prepared by taxing
12 authorities.⁷

13 In this appeal, in the context of late-filed federal income
14 tax returns prepared and filed by the taxpayers, there is no
15 convincing or persuasive indication that BAPCPA or the hanging
16 paragraph abrogated Hatton II’s holding that we should use
17 In re Hindenlang’s version of the Beard test – a test derived
18 from nonbankruptcy law – to determine whether the Martins’
19 untimely tax returns qualify as tax returns for
20 nondischargeability purposes. That version of the Beard test
21 provides:

22 (1) it must purport to be a return; (2) it must be
23 executed under penalty of perjury; (3) it must contain
24 sufficient data to allow calculation of tax; and (4) it
must represent an honest and reasonable attempt to
satisfy the requirements of the tax law.

27 ⁷We express no opinion on what “return” means under
28 applicable nonbankruptcy law when state tax returns are in play,
as that issue is not properly before us.

1 In re Hindenlang, 164 F.3d at 1033.⁸

2 Similar to what this Panel held in In re Nunez, the
3 bankruptcy court here concluded that it should utilize a
4 different version of the Beard test. In this alternate version,
5 the prong of the test focusing on the honesty and reasonableness
6 of the debtor's efforts to file the return is narrow in scope and
7 considers only the form and substance of the purported return
8 while ignoring the length of delay, the reason for the delay, and
9 the number of tax years missed. As we stated at the outset of
10 this discussion, this alternate version of the Beard test is
11 inconsistent with the holding and reasoning set forth in
12 Hatton II, so we cannot uphold the bankruptcy court's usage of
13 this alternate test.

14 Hatton II offered two distinct reasons why the taxpayer
15 there did not satisfy the Beard test. Hatton II, 220 F.3d at
16 1061. First, Hatton II explained the the taxpayer had not signed
17 any document under penalty of perjury, so the second Beard test
18 factor was not met. Id. In addition, Hatton II explained that

19 _____
20 ⁸The IRS follows the Beard test in defining the term
21 "return" under many circumstances. As the bankruptcy court noted
22 in its Memorandum Decision:

23 The IRS has referenced the Beard Test in its revenue
24 rulings and other materials. See Rev. Rul. 2005-59,
25 2005-2 C.B. 505 (2005) (clarifying when documents
26 constitute valid returns under Beard Test in context of
27 joint filers); I.R.S. Chief Couns. Notice CC-2004-032,
2004 WL 3210764 (Sept. 9, 2004) ("The four part test
set forth in [Beard] is widely accepted as the analysis
for determining what constitutes a return for purposes
of the Internal Revenue Code.").

28 Mem. Dec. (March 31, 2014) at 20:23-26.

1 the taxpayer indisputably took no steps to cure his delinquency
2 in filing his 1983 federal income tax return, and did not begin
3 to cooperate with the IRS's efforts, until the IRS threatened to
4 levy on his wages and his bank account. Id. According to
5 Hatton II, these undisputed facts established that the taxpayer
6 had not engaged in "an honest and reasonable attempt to comply
7 with the requirements of the tax law" as required by the fourth
8 Beard test factor. Id. The bankruptcy court posited that,
9 because Hatton II offered two separate and independent reasons
10 why the Beard test was not met, the second reason given -
11 regarding the honesty and reasonableness of the taxpayer's
12 efforts - perhaps was non-binding dicta. We disagree. When
13 alternate grounds are given for a holding, neither ground
14 constitutes non-binding dicta. Exp. Grp. v. Reef Indus., Inc.,
15 54 F.3d 1466, 1471 (9th Cir. 1995).

16 The bankruptcy court attempted to offer some other reasons
17 why it might not be bound by Hatton II, but none of these other
18 reasons, even if valid, justify a departure from Hatton II's
19 version of the Beard test, which included a broader honesty-and-
20 reasonableness prong than the bankruptcy court utilized. Because
21 the bankruptcy court did not apply the correct legal standard for
22 assessing the honesty and reasonableness of the Martins' efforts
23 to comply with applicable tax laws, we must VACATE AND REMAND so
24 that the bankruptcy court can apply the proper legal standard to
25 the relevant facts of this case, which are not limited to the
26 form and content of the Martins' filings, but also include the
27 number of missing returns, the length of the delay, the reasons
28 for the delay, and any other circumstances reasonably pertaining

1 to the honesty and reasonableness of the Martins' efforts.

2 In sum, we need to ensure that the bankruptcy court views
3 all of the relevant facts through the lens of the appropriate
4 legal standard set forth in Hatton II, and we furthermore believe
5 that the determination of whether all of the relevant facts and
6 circumstances constitute an honest and reasonable effort to
7 comply with the applicable tax laws is best made, in the first
8 instance, by the bankruptcy court.

9
10 **E. IRS Argument That Tax Debts Associated With Post-Assessment
Tax Returns Are Always Nondischargeable**

11 There is only one other issue that we need to address. We
12 must address the IRS's argument that a tax debt associated with
13 an IRS tax assessment made without the benefit of a taxpayer-
14 prepared tax return always should be treated as nondischargeable.

15 The IRS's argument is twofold. First, the IRS contends
16 that, when as here the taxpayer does not file his or her tax
17 return until after the IRS has assessed taxes pursuant to
18 Internal Revenue Code deficiency procedures, the debt arising
19 from the assessment is (and always will be) a debt for which no
20 return has been filed, thereby bringing the debt within the scope
21 of § 523(a)(1)(B)(i) - a tax debt for which a tax return was
22 required but never filed. According to the IRS, it makes no
23 difference whether the taxpayer, after assessment, belatedly
24 files his or her tax return because the nature of the debt (as a
25 debt arising from the assessment rather than the return) cannot
26 and does not change under applicable tax law even when a return
27 is later filed. Aplt. Opn. Br. at pp. 7-15.

28 Our initial reaction to this argument is that it tends to

1 prove too much. If we were to accept the IRS's interpretation of
2 the nature of an assessment-based tax debt, it proves not only
3 that the tax liability arose without a tax return, but also that
4 a tax return was neither necessary nor "required" to impose the
5 assessment-based tax debt. In any event, even if the belated tax
6 return associated with an assessment-based tax debt was still
7 required in some sense, we agree with the reason offered by the
8 bankruptcy court for rejecting this argument. As the bankruptcy
9 court explained, the tax debt within the meaning of the
10 Bankruptcy Code preexists both the filing of the return and the
11 issuance of the IRS assessment. Mem. Dec. (March 31, 2014) at
12 p. 12 (citing Rhodes v. United States (In re Rhodes), 498 B.R.
13 357, 362 (Bankr. N.D. Ga. 2013); see also In re Mallo, 774 F.3d
14 at 1326 (following In re Rhodes). Under the Internal Revenue
15 Code, the tax debt - or right to payment - arises at the end of
16 each tax year and not later on. In re Rhodes, 498 B.R. at 362.
17 An assessment is merely a method for fixing the amount of that
18 debt and not the source of the debt itself. Id.

19 Second, the IRS argues that a post-assessment tax return is
20 the functional equivalent of no tax return at all. As the IRS
21 puts it, once it is forced to assess taxes without the benefit of
22 a taxpayer-prepared return, a later-filed tax return fails to
23 serve its primary function as a vehicle for self-reporting tax
24 liability. We already rejected this identical argument in
25 In re Nunez, 232 B.R. 778, 781-82 (9th Cir. BAP 1999). While
26 some parts of In re Nunez were sub-silentio overruled by
27 Hatton II, Hatton II did not overrule this part of In re Nunez.
28 Nor did Hatton II overrule the following reasoning from

1 In re Nunez supporting its rejection of the IRS's post-assessment
2 tax return argument:

3 Congress could have conditioned discharge of tax debt
4 on whether a return was filed prior to an assessment.
5 As correctly noted by the [bankruptcy] court, Congress
6 used assessment as a trigger for other time periods in
7 the Code, for example, the priority qualifications
8 found in Section 507(a)(8)(A)(ii). When Congress
9 includes particular language in one section of the
10 Code, but omits it in another, it is presumed to have
11 acted intentionally and purposely. We will not read
12 into Section 523(a)(1)(B) the requirement that a debtor
13 must have filed a return prior to an assessment by the
14 IRS.

15 In re Nunez, 232 B.R. at 782 (internal citation omitted).

16 Indeed, Hatton II is consistent with Nunez's rejection of
17 the IRS's post-assessment tax return argument in the following
18 sense: if Hatton II had agreed with the IRS that a post-
19 assessment tax return is no tax return at all, Hatton II would
20 not have had any need to apply the Beard test (as it did) to
21 resolve the question of whether the debtor there had filed a
22 return within the meaning the nondischargeability statute.
23 Simply put, Hatton II's holding and reasoning cannot be
24 reconciled with the IRS's post-assessment tax return argument.

25 Accordingly, we reject both aspects of the IRS's post-
26 assessment tax return argument.

27 **CONCLUSION**

28 For the reasons set forth above, we VACATE the bankruptcy
court's judgment holding that the Martins' tax debt was
dischargeable, and we REMAND for further proceedings consistent
with this decision.