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**SURVEY OF DISCHARGEABILITY - RECENT CASES - 2013**  
**(176 cases reviewed)**

**I. “Returns” in bankruptcy**

**A. “Returns” or not.**

1. *Pendergast v. Mass. Dept. Of Revenue*, 494 B.R. 8 (Bankr. D. Mass. 2013)

The Debtor late-filed 6 years returns in 2009. Mass. had already assessed 3 of the years. Based on the *McCoy* case, 666 F. 3d 924 (5<sup>th</sup> Cir. 2012), the Court held that late returns are not returns for purposes of dischargeability, even if there was no prior assessment. See also, *Fahey v. Mass. Dept of Revenue*, 2013 Bankr. LEXIS 2375 (Bankr D. Mass. 2013); and *Segnetz v. Mass. Dept. Of Revenue*, 2013 Bankr. LEXIS 2376 (Bankr. D. Mass. 2013).

2. *Wendt v. US*, 2013-2 USTC 50,607 (Bankr. S.D. FL 2013)

On debtor’s motion for sanctions for violation of the discharge injunction, because the IRS tried to collect \$400 post discharge, the Court determined the tax to be non-dischargeable. The debtor claimed the return was late because the hurricanes of 2005 destroyed tax papers, she had an ill friend and health problems. She did not explain why she did not contact the IRS. The Court applied the *McCoy* analyses (even though this was an after-filed return), refused to apply the *Beard* test and found that a late return is not a return for purposes of discharge, notwithstanding the valid reasons for lateness. (Pro se).

3. *Perry v. US*, 500 B.R. 796 (M.D. Ala. 2013)

The Court analyzed the *McCoy* approach, the IRS (“debt” not return) approach, and the *Beard* criteria. Under each method, the debtor lost. The court found that returns filed late, after an IRS assessment, are not an honest attempt to file a return and are non-dischargeable under *Hindenlang*. The “I didn’t think I owed tax” defense did not work.

4. *Mallo v. US*, 498 B.R. 268 (D. Colo. 2013)

The court affirmed the bankruptcy court, finding that the late returns filed after the IRS has made an assessment were not “returns” for purposes of dischargeability, relying on *Beard* and the fact that there were no special circumstances. The Court did not adopt *McCoy*, nor did it buy the IRS “debt” argument because the statute does not differentiate between late returns and late returns filed after the IRS assessment. See also, *Martin v. US*, 500 B.R. 1 (D. Colo. 2013).

5. *Moffitt v. US*, 2013 Bankr. LEXIS 2628 (Bankr. W.D. Ky. 2013)

The court granted the IRS motion for Summary Judgment, finding returns filed late in the same amount as the IRS assessment, were not a reasonable attempt to satisfy the tax obligation, based on *Hindenlang*.

6. *Moffitt v. Mass. Dept of Revenue*, 2013 Bankr. LEXIS 4046 (Bankr. W.D. Ky. 2013)

Mr. Moffitt lost again for the same reasons for failing to file state tax returns, and failing to file an amended state tax return after an IRS audit. The court declined to follow *McCoy*, but found under *Hinderlang* that the late returns were not a reasonable attempt to satisfy the tax obligation.

7. *In re Moore*, 112 AFTR2d 5629 (Bankr. M.D. Ga. 2013)

Tax returns filed within 2 years of the bankruptcy are not discharged by the Plan because they are not priority taxes.

### **B. Duty to file returns/ keep records and discharge**

none in 2013

## **II. Taxes Are Not Discharged.**

### **(A) Tax Court**

none in 2013

### **(B) Circuit Court**

8. *US v. Monahan*, 497 B.R. 642 (BAP First Cir. 2013)

The First Circuit BAP reversed the Bankruptcy Court and found that the post bankruptcy interest was not discharged because the Chapter 13 plan did not specify that the tax was discharged. (Practice Point).

### **( C ) District Court**

9. *US v. Dr. Stanley*, 2013 US Dist. LEXIS 121016 (S.D. Miss. 2013)

In a suit to reduce a tax lien to judgement, the taxpayer claimed the taxes had been discharged in bankruptcy. The court found the 1998 through 2004 taxes to be non-dischargeable because the debtor filed late returns, didn't pay, put assets in others names, had expensive toys - jaguar, motorcycle, vacations. The bipolar defense did not work because he could function as a doctor. Post bankruptcy taxes were not discharged, and taxes due within 3 years of the bankruptcy were not discharged. Judgement was entered for the IRS.

10. *US v. Dr. Stanley*, 2013 USTC 50,612 (S.D. Miss. 2013) (round two)

The IRS won in a suit to reduce a tax lien to judgment, for thirteen years of tax liabilities, ten of which were non-dischargeable in a Chapter 7 for evasion. The debtor requested that the judgement be stayed and the bond waived. Without any evidence provided by the debtor to satisfy the factors with respect to the bond and the stay, the request was denied.

11. *Vaughn v. US*, 111 AFTR2d 1482 (D. Colo. 2013)

The District Court affirmed the bankruptcy court's determination that the taxpayer's use of KPMG tax shelter "Blips", and transfer of assets prior to assessment was sufficient to conclude the taxes were non-dischargeable for evasion to pay.

**(D) Bankruptcy Court**

12. *In re Whitson*, 112 AFTR2d 6838 (Bankr. E.D. TN. 2013)

Tax assessed within 240 days of bankruptcy for disallowed EIC, child care credit are priority taxes and not discharged. See also, *Baylor v. US*, 112 AFTR2d 5257 (Bankr. N.D. TX 2013).

13. *In re Ryan*, 2013 Bankr. LEXIS 5412 (Bankr. D. Mass. 2013)

After the bankruptcy, the IRS claimed the debtor had not filed returns for 2 years, which they had not listed on their proof of claim as "no return". There had been discussions with the IRS attorney during the bankruptcy which did not include the claim of unfiled returns. The debtor claimed the returns were filed with multiple years. The IRS records were conflicting, **the Plan did not say "the tax is discharged."** The IRS did not provide the court with requested documents and the debtor did not file any affidavits with respect to the filing of the returns. The court found the tax to be excepted from discharge, but noted that had **the debtor provided more evidence/affidavits**, the IRS would not have met its burden of proof. (Two practice points.)

14. *In re Clemente*, 111 AFTR2d 598 (Bankr. D. NJ 2013)

The debtor objected to the IRS proof of claim because he made payments to the Revenue Officer under the impression they would be applied against tax and not penalties. The debtor did not subpoena the Revenue Officer or produce the IRS letter which might have supported his claim. The tax due was found to be priority.

15. *Meyer v. US*, 111 AFTR2d 1162 (Bankr. E.D. NY 2013)

The debtor was an attorney who had not filed returns for the years 1992 through 2001, and had filed late returns for 2002 through 2007. He put assets in family members name, had no personal bank account, boat, 2 mercedes, horse, etc. The court found the tax to be excepted from discharge because of willful evasion to pay.

16. *ETRG Investments LLC v. Hardee*, 2013 Bankr. LEXIS 949 (Bankr. E.D. TX 2013)

The debtor is the managing member of the LLC, who embezzled monies and failed to pay payroll taxes. The court found that the debt owed to the LLC is non-dischargeable because the debt owed by the LLC to the IRS is nondischargeable, but the debt to the other members is discharged. There is no fiduciary duty to the other members.

17. *In re Newton*, 490 B.R. 126 (Bankr. D.C. 2013)

The debtor moved to vacate his Chapter 7 discharge because a tax relief company had interacted with the IRS by filing documents that extended the time periods in Sections 523 and 507, thus making the 2004 and 2005 taxes nondischargeable. The court granted the motion to reopen the case and denied the request to vacate the discharge because the debtor has no standing to make that request and any such request has to be made prior to the discharge. (Malpractice???)

18. *Pitts v. US*, 2013 Bankr. LEXIS 3315 (Bankr. C.D. CA 2013)

The debtor is a general partner and is liable for the employment taxes of the partnership even though there is no separate assessment.

### **III. Taxes Are Discharged**

19. *In re Mazzarella*, 2013 Bankr. LEXIS 4855 (Bankr. N.D. Oh. 2013)

An installment agreement to pay city income tax does not toll any of the bankruptcy periods because collection was not prohibited as the result of a hearing request. Fines are also discharged.

20. *Winters v. Commr.*, 2013 Bankr. LEXIS 5197 (BAP 6<sup>th</sup> Cir. 2013)

The bankruptcy court decision that the taxes were not dischargeable is reverse and remanded for the bankruptcy court to determine if the 3 year statute of limitations for assessment of 2004 has expired.

21. *In re Weiss*, 2013 Bankr. LEXIS 5320 (Bankr. D. Kx. 2013)

The Trust Fund taxes were discharged through the Chapter 13 Plan, even though they were not paid because the IRS filed an untimely claim, which was disallowed and the Plan provided that the Priority tax would be discharged.

22. *In re Molina/Gomez*, 487 B.R. 73 (Bankr. D. P.R. 2013)

Puerto Rico taxing authority claimed that the taxes were priority because the taxpayer had a payment plan which they deemed to be an “offer in compromise”. The court did not determine whether a payment plan is an OIC, but rather decided that since the payment plan ended more than 240 days before the bankruptcy, the tax was discharged. (What about the extra 30 days?)

23. *Buchanan v. Buchanan*, 2013 Bankr. LEXIS 2586 (Bankr. S.D. Ind. 2013)

The ex-wife wanted the court to determine that her ½ of the tax refund that had not been paid was support and non-dischargeable. It was determined to be discharged because it was not in the support section of the divorce order.

24. *In re Berry*, 2013 Bankr. LEXIS 3248 (Bankr. N.D. Ind. 2013)

The county was unsuccessful at having \$273 court fee determined to be excise tax. Therefore it was discharged.

25. *US v. Steinman*, 111 AFTR2d 1313 (E.D. Wisc. 2013)

The IRS filed suit, unsuccessfully, to have the debtors discharge denied and tax deemed non dischargeable because of evasion to pay. The debtor was credible and convinced the court that he tried to force the sale of marital property to pay the tax.

26. *Erikson v. US*, 2013 Bankr. LEXIS 2049 (Bankr. E.D. Mich. 2013)

The debtors adversary to determine dischargeability was dismissed on motion of the IRS because they intended to abate the tax. The court found there was no case or controversy.

#### **IV. Procedural Issues:**

##### **A. Summary Judgment**

27. *Brown/Gonzales v. Mass. Dept. Of Revenue*, 489 B.R. 1 (D. Mass. 2013)

Massachusetts motion for summary judgment was denied for dischargeability of a late filed return. The court found that *Beard* only applies if Massachusetts assesses the tax before the return is filed by the taxpayer.

28. *US v. Fletcher*, 489 BR 224 (Bankr. N.D. Ok. 2013)

The court denied the IRS motion for summary judgment for a determination under either Section 727 or 523 because willfulness and intent on summary judgment.

##### **B. Bankruptcy Stay**

29. *In re Killmer*, 501 B.R. 208 (Bankr. S.D. NY 2013)

The mortgage company filed a motion to reopen a bankruptcy case because a tax sale of the debtor's property occurred before the case was closed. The sale was in violation of the injunction, and was void.

30. *Sanchez/Gonzales v. Treas. Puerto Rico*, 2013-1 USTC 50,149 (Bankr. D. P.R. 2013)

The notices requesting payment sent to taxpayers do not violate the automatic stay unless they threaten seizure.

31. *In re Hollis*, 2013 Bankr. LEXIS 3052 (Bankr. E.D. Wisc. 2013)

The Dept. Of Agriculture was not listed as a creditor. It was not a willful violation of the stay when the IRS setoff the tax refund in favor of the DOA. The court granted stay relief. See also, *Newberry v. US*, 111 AFTR2d 924 (Bankr. S.D. Il. 2013).

##### **C. Certain tax claims and their treatment**

32. *In re Cook*, 112 AFTR2d 6569 (Bankr. N>D. Ala. 2013)

The Chapter 13 debtor has to include a tax refund for EIC in disposable income even though it is exempt. See also, *In re Jackson*, 2013 Bankr. LEXIS 2509 (Bankr. S.D. IN. 2013) (EIC tax credit is exempt but ACTC credit is not.)

33. *Adams v. IRS*, 2013 Bankr. LEXIS 5286 (Bankr. N.D. GA. 2013)

The IRS late claim was allowed in a Chapter 13 because they were not noticed of the bankruptcy.

34. *Prisco v. IRS*, 112 AFTR2d 6918 (N.D. NY 2013)

The debtor had to pay the post bankruptcy interest and penalties (\$370), even though the tax was full paid in the Chapter 13 before it was converted. (Pro se). (Query? Is this cost effective for the IRS?)

35. *In re Ferguson*, 2013 Bankr. LEXIS 6 (Bankr. C.D. Ill. 2013)

The Chapter 12 debtor can't sell estate assets to pay post bankruptcy tax.

36. *In re Cantelli*, 111 AFTR2d 483 (Bankr. N.D. Oh. 2013)

The court dismissed the Chapter 7 because it was not filed in good faith. The debtor failed to fully disclose assets, sales and loans, the bankruptcy was aimed at only the IRS, the taxpayer was a serial business owner to avoid tax and lived a luxurious lifestyle. He paid the trust fund tax, but not the income tax.

37. *In re Turner*, 2013 Bankr. LEXIS 313 (Bankr. E.D. Ky 2013)

The debtor could not reopen his Chapter 7 to add a tax assessed after bankruptcy

38. *In re Hemann*, 2013 Bankr. LEXIS 1385 (Bankr. N.D. Ia. 2013)

The Chapter 12 debtor dissolved the family farm partnership prior to bankruptcy and transferred the assets. He never stopped farming, just changed the operation and the entity. The income resulting from the transfer was excluded from taxable income because it was the sale of farm assets used in farming under Section 1222(a)(2)(A).

39. *In re Walls*, 112 AFTR2d 5063 (Bankr. N.D. Miss. 2013)

The Bankruptcy court held that the Debtor had to file an adversary pleading in the Chapter 13 (not reopen the 7) to determine if the taxes had been discharged in the prior Chapter 7 because he was over the debt limit otherwise.

40. *US v. Wanland*, 2013 U.S. Dist. LEXIS 64598 (E.D. Ca. 2013)

The court held that there is no claim preclusion because a criminal case is not within the bankruptcy court's jurisdiction. The debtors defense that the tax was discharged in bankruptcy did not work to get rid of the 35 criminal counts of tax evasion.

#### **D. Jurisdiction, etc.**

None in 2013 or included elsewhere

#### **E. Liens after Bankruptcy**

41. *US v. Kolb*, 112 AFTR2d 6436 (W.D. Ark. 2013)

In a suit to reduce the tax lien to judgment and foreclose, the court granted summary judgment to the IRS in the total amount for the foreclosure because the tax liens survive bankruptcy. The judgment only included the non discharged trust fund tax.

42. *Brinsen v. US*, 485 B.R. 890 (Bankr. N.D. Ill. 2013)

The court allowed the Chapter 13 debtor to value the tax lien, which would remain until the Chapter 13 discharge.

43. *Williams v. IRS*, 488 B.R. 492 (Bankr. M.D. Ga. 2013)

The Chapter 7 debtor cannot strip a tax lien if any part of it is secured.

44. *US v. Short*, 2013 U.S. Dist. LEXIS 68340 (N.D. Oh. 2013)

The IRS wanted to reopen and amend a lawsuit to collect a personal judgment that had been

closed for 8 years because a bankruptcy was filed. The court denied the request because the IRS could have gotten stay relief.

45. *US v. Latos*, 111 AFTR2d 2333 (D.RI 2013)

Summary judgment was granted to the IRS to enforce liens on property for discharged tax. The court did not allow the taxpayer to dispute the tax and the debtor failed to argue statute of limitations. (Pro se).

46. *US v. Burrell*, 2013 U.S. D. LEXIS 124741 (E.D. CA. 2013)

In a suit to reduce the tax lien to judgment, the IRS was granted summary judgment. The court found that a stipulation in the bankruptcy was not res judicata because it was not a judgment on the merits. The 10 year statute of limitations on collection was suspended during the Chapter 11 converted to a Chapter 7 plus 6 months from the discharge date.

#### **F. Fees and Follies**

47. *In re Lin*, 499 B.R. 430 (Bankr. S.D. NY 2013)

The bankruptcy was dismissed for bad faith on motion of the IRS. The debtor paid all creditors but the IRS, caused unreasonable delay, and the court did not believe that she was the victim of extortion and gave \$1.7 mil cash to two women in a cab, but never reported it to the police

48. *Jou v. Adalian*, 500 B.R. 402 (Bankr. M.D. PA 2013)

Discharge was denied at the request of a creditor because the debtor failed to file tax returns for ten years, had no records, and could not explain loss of assets.

49. *Lopez v. Dept. of Treas. Puerto Rico*, 492 B.R. 595 (Bankr. D. P.R. 2013)

The notice sent by the taxing authority threatening to seize property was a willful violation of the stay because the Dept. had notice of the bankruptcy. The debtor would be granted actual damages, but not punitive.

50. *Murphy v. US*, 2013 Bankr. LEXIS 5340 (Bankr. D. Maine 2013)

The court found that the IRS had willfully violated the bankruptcy injunction. Upon reopening the bankruptcy, the court ordered the debtor to prove that a discharge was entered, and the IRS to prove that the taxes were excepted from discharge. The IRS refused to identify why the taxes were not discharged. The court granted summary judgment to the debtor. The IRS claimed that the debtor is required to file and adversary to determine dischargeability. The court found that to be “wrongheaded”. The court found the IRS claim of investigating and finding willful evasion as definitive to be a unilateral decision not encompassed in the bankruptcy code. The court determined that the IRS gets no such special status. A trial was scheduled for damages. (Contrast this with the cases where the IRS claims no case or controversy and dismisses the debtor’s adversary!!!)

51. *McDonald v. US*, 112 AFTR2d 6306 (D. Nev. 2013)

The court ordered the IRS to return \$998 that was seized by the IRS In violation of the

injunction. The debtor had to then exhaust his administrative remedies for fees before damages would be considered.

52. *Steinke v. US*, 112 AFTR2d 5360 (Bankr. Colo 2013)

The IRS levied post bankruptcy on a 401K. The court enjoined the levy but did not consider damages because the debtor had not exhausted the administrative remedies. See also, *In re Parham*, 112 AFTR2d 5585 (Bankr. E.D. Tn. 2013).

53. *US v. Equipment Acquisition Resources, Inc. v. US*, 485 B.R. 586 (N.D. Ill. 2013)

The company could not recover transfers from the IRS for payments of shareholder taxes because there was no waiver of sovereign immunity. The Court affirmed the bankruptcy court's dismissal.

54. *In re Reed*, 492 B.R. 261 (Bankr. E.D. TN 2013)

The Bank's claim in the bankruptcy was reduced by the amount of the 1099C that was issued to the debtor. The court found that amount to be discharged when the 1099C was issued. The bank could claim any attorneys fees up to the time of the 1099C.

55. *Neely v. Trippon*, 2013 US Dist. LEXIS 87254 (S.D. TX. 2013)

Attorney who filed malpractice suit against the accountant who miscalculated the dischargeability of the tax was sanctioned because the suit was beyond the statute of limitations, was an asset of the bankruptcy estate, and he had a reputation for "vexatious behavior."

56. *Winters v. IRS*, 485 B.R. 375 (Bankr. M.D. Tn. 2013)

The court found that the tax at issue in the pending Tax Court cases was "assessable" and not dischargeable. The erroneous refund issued to the debtor by the IRS did not belong to the debtor and therefore, does not belong to the bankruptcy estate. (Malpractice?)