

When is a Return Not a Return?

The Bankruptcy Code provides individuals with the opportunity to discharge a variety of liabilities and obtain a “fresh start.” Among the liabilities that can be discharged are tax liabilities; under Section 727(b) of the Bankruptcy Code, the debtor in a Chapter 7 case can obtain a discharge of tax liabilities unless they fall within one of the exceptions to discharge that are set forth in Section 523 of the Bankruptcy Code. One of these exceptions involves the failure to file a tax return; if a tax liability is one “with respect to which a return . . . , if required – (i) was not filed or given” then the liability is not dischargeable. 11 U.S.C. § 523(a)(1)(B)(i).

What’s a return? Well for many years the Bankruptcy Code contained no definition. In 2005, Congress added language to Section 523(a) that defined a return: “the term ‘return’ means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements).” What happens if a return is filed late? The Fifth Circuit recently held that a return that is filed after the deadline under applicable state law is not a “return” within the meaning of Section 523(a) of the Bankruptcy Code, which means that taxes for the period covered by a late-filed return are not dischargeable. *In re McCoy*, 2012 U.S. App. LEXIS 62, *8-*21 (5th Cir. Jan. 4, 2012).

This result is hard to reconcile with the plain language of the Bankruptcy Code; after all there is another clause in Section 523(a)(1)(B), which precludes a discharge where a return “was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition.” 11 U.S.C. § 523(a)(1)(B)(ii). In other words, a late-filed return should bar a discharge only if the late return was filed within two years of the bankruptcy filing. The Fifth Circuit’s holding in *McCoy* seems to read this provision right out of the Bankruptcy Code.

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