**NOT FOR PUBLICATION**

# UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

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**BAP NO. MW 13-027**

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**Bankruptcy Case No. 08-43819-MSH**
**Adversary Proceeding No. 11-04150-MSH**

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**JOHN T. BROWN,**
**Debtor.**

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**JOHN T. BROWN,**
**Plaintiff-Appellee,**

**v.**

**MASSACHUSETTS DEPARTMENT OF REVENUE,**
**Defendant-Appellant.**

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**Appeal from the United States Bankruptcy Court**
**for the District of Massachusetts**
**(Hon. Melvin S. Hoffman, U.S. Bankruptcy Judge)**

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**Before**
**Deasy, Cabán, and Finkle,**
**United States Bankruptcy Appellate Panel Judges.**

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**Daniel J. Hammond, Esq., Celine E. Jackson, Esq., and Jeffrey S. Ogilvie, Esq., on brief for Defendant-Appellant.**

**Marques C. Lipton, Esq. and Timothy M. Mauser, Esq., on brief for Plaintiff-Appellee.**

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**April 3, 2014**

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**Per curiam.**

Massachusetts Department of Revenue (the "MDOR") appeals from a bankruptcy court judgment (the "Judgment") determining that certain state income tax liabilities of the debtor, John T. Brown (the "Debtor"), were dischargeable, even though his corresponding tax returns were filed late. For the reasons set forth in Gonzalez v. Mass. Dep't of Revenue (In re Gonzalez), BAP No. MW 13-026, 2014 WL 888460 (B.A.P. 1st Cir. Mar. 6, 2014), we **AFFIRM** the Judgment.

## BACKGROUND

The material facts are not in dispute. On July 7, 2005, the Debtor filed his Massachusetts resident income tax returns for the tax years 1998, 1999, and 2001 through 2004. On March 16, 2006, he filed his tax return for the 2000 tax year. All of the returns were overdue, although filed prior to any assessment[1] by the Commissioner of Revenue.

[1] Massachusetts law defines an "assessment" as:

> [T]he process of the Department of Revenue's determination or verification of the amount of tax, as provided under M.G.L. c. 62C, §§ 24, 25, and 26, imposed and due from a taxpayer under M.G.L. chs. 60A; 62 through 64J; 65B and 65C; M.G.L. c. 121A, § 10; M.G.L. c. 138, § 21; and the entry of the amount of the tax due in the Commissioner's assessment records; or the taxpayer's calculation and declaration of the tax due, as provided under M.G.L. c. 62C, § 26(a), completed in full on a return, including any amendment, correction, or supplement thereto, by the taxpayer or the taxpayer's representative and duly filed with the Commissioner.

830 Mass. Code Regs. 62C.26.1(2).

In November 2008, the Debtor filed a voluntary petition for chapter 7 relief. On his Schedule E, the Debtor listed outstanding tax indebtedness to the MDOR, for the years 1998 through 2004, totaling $105,000.00. On March 23, 2009, he received a discharge of his debts pursuant to § 727.[2]

In November 2011, the Debtor commenced an adversary proceeding against the MDOR with a single-count complaint, seeking a determination that his prepetition state income tax liabilities had been discharged pursuant to the discharge order entered in his chapter 7 case. After filing an answer, the MDOR moved for summary judgment, arguing that the subject income tax liabilities were not discharged as a matter of law. The MDOR's theory was that the Debtor's late-filed income tax returns did not qualify as "returns" for purposes of § 523(a), and that § 523(a)(1)(B)(i) renders nondischargeable tax liabilities for which a return was not filed. At the crux of the MDOR's argument was the language of BAPCPA's "hanging paragraph," which states:

> 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,[3] or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but

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[2] Unless otherwise indicated, the terms "Bankruptcy Code," "section" and "§" refer to Title 11 of the United States Code, 11 U.S.C. §§ 101, et seq., as amended by, inter alia, the Bankruptcy Abuse and Consumer Protection Act of 2005 ("BAPCPA").

[3] Section 6020(a) of the Internal Revenue Code provides:

> (a) Preparation of return by Secretary. If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent 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.

26 U.S.C. § 6020(a).

> does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986,[4] or a similar State or local law.

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

The MDOR relied on certain cases which have held that the definition of "return" in amended § 523 means that a late-filed federal income tax return, unless filed pursuant to 26 U.S.C. § 6020(a) of the Internal Revenue Code, can never qualify as a return for dischargeability purposes because it does not comply with the applicable filing requirements. See, e.g., Shinn v. Internal Revenue Serv. (In re Shinn), Adv. No. 10-8139, 2012 WL 986752 (Bankr. C.D. Ill. Mar. 22, 2012); Hernandez v. United States (In re Hernandez), Adv. No. 11-5126-C, 2012 WL 78668 (Bankr. W.D. Tex. Jan. 11, 2012); Cannon v. United States (In re Cannon), 451 B.R. 204 (Bankr. N.D. Ga. 2011); Links v. United States (In re Links), No. 08-3178, 2009 WL 2966162 (Bankr. N.D. Ohio Aug. 21, 2009); Creekmore v. Internal Revenue Serv. (In re Creekmore), 401 B.R. 748 (Bankr. N.D. Miss. 2008). The MDOR also cited McCoy v. Miss. State Tax Comm'n, 666 F.3d 924 (5th Cir. 2012), for the same principle, in the context of state income tax returns. The MDOR argued that BAPCPA's definition of "return" abrogated the common law test for determining whether a document filed with the Internal Revenue Service ("IRS") qualified as a

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[4] Section 6020(b)(1) of the Internal Revenue Code provides:

> (b) Execution of return by Secretary.
> (1) Authority of Secretary to execute return. If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or 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.

26 U.S.C. § 6020(b)(1).

[5] Courts use an asterisk to denote this unnumbered, "hanging paragraph" which is inserted immediately after § 523(a)(19), a practice which we adopt.

"return" for tax purposes set forth in Beard v. Comm'r, 82 T.C. 766, 774-79 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986). See Creekmore, *supra*. According to the MDOR, to be considered a return for discharge purposes post-BAPCPA, the return must comply with applicable requirements of nonbankruptcy law, namely, Mass. Gen. Laws ch. 62C, § 6(c), requiring that state tax returns be made on or before the fifteenth day of the fourth month following the close of each taxable year. In other words, the MDOR contends that if the return is filed late it is tantamount to noncompliance which results in a nondischargeable tax debt unless filed under 26 U.S.C. § 6020(a) or its state law equivalent. Hence, the Debtor did not file a "return" for the applicable years because he failed to file the returns on time.

The Debtor countered that a late return is nonetheless a return under the plain language of the definition of a return in the Bankruptcy Code and reiterated that his income tax debts for the applicable years were discharged under § 727. He contended that even the § 523(a)(1)(B)(ii) exception, which explicitly excludes from discharge returns filed late and within two years of the filing of the bankruptcy case, was inapplicable here because he filed all of his required returns more than two years prior to his chapter 7 petition. The Debtor urged the bankruptcy court to reject McCoy and cases similarly decided, arguing that a conclusion that a late return is not a return for dischargeability purposes would render § 523(a)(1)(B)(ii) "superfluous." Instead, the Debtor advanced the approach advocated by the IRS in analogous cases involving federal income taxes, namely that a late filed return will not render a tax nondischargeable under § 523 unless the taxing authority assesses a tax against the taxpayer prior to the filing of the return. See, e.g., Wogoman v. Internal Revenue Serv. (In re Wogoman), 475 B.R. 239 (B.A.P. 10th Cir. 2012); Casano v. Internal Revenue Serv. (In re Casano), 473 B.R. 504 (Bankr. E.D.N.Y. 2012); Smythe

v. United States (In re Smythe), Adv. No. 11-04077, 2012 WL 843435 (Bankr. W.D. Wash. Mar. 12, 2012). The Debtor maintained that this approach was less harsh, would preserve the meaning of § 523(a)(1)(B)(ii), and would further the Bankruptcy Code's fresh start objective.

After conducting a hearing on the summary judgment motion in August 2012, the bankruptcy court took the matter under advisement. In December 2012, the bankruptcy court ordered the parties to file supplemental memoranda regarding the effect of a late-filed Massachusetts income tax return under state law.[6] In its supplemental memorandum filed January 31, 2013, the MDOR stated that a late-filed Form-1 Massachusetts resident income tax return has the following effects under Massachusetts law: (1) the imposition of a penalty pursuant to Mass. Gen. Laws ch. 62C, § 33(a) and/or § 28; (2) the imposition of interest pursuant to Mass. Gen. Laws ch. 62C, § 32(a); and (3) the creation of an assessment, either through the filing of a tax return, or through a deficiency assessment made by the MDOR. According to the MDOR, once it has made a deficiency assessment and established the amount of tax to be paid, a late-filed return is treated as an application for an abatement.[7] The MDOR stressed, however, that the effect of a late return under Massachusetts law was irrelevant to the definition of return under § 523, arguing that:

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[6] See In re Colón Martinez, 472 B.R. 137, 139 n.4 (B.A.P. 1st Cir. 2012) (citation omitted) (stating we may take judicial notice of the bankruptcy court's docket).

[7] Massachusetts law defines an "abatement" as:

> [T]he determination by the Commissioner that an assessment exceeds the amount properly due and the adjustment by the Commissioner of the amount in the Commissioner's assessment records.

830 Mass. Code Regs. 62C.26.1(2).

> Regardless of how state law treats a late filed return, the timeliness requirement of nonbankruptcy law is a part of the definition of "return" for discharge purpose. Therefore a late return can never qualify as a return, for purposes of [ ] § 523 (even if the return is accepted by the revenue agency) unless it is filed under the [26 U.S.C.] § 6020(a) safe harbor or similar state law exception.

The Debtor asserted in his supplemental memorandum also filed on January 31, 2013, that "[n]owhere, in either the Massachusetts General Laws or the Code of Massachusetts Regulations, is it stated that a document, which satisfies the definition of a return in all other respects, is nevertheless not a return when it is filed after the due date." He further argued that the very language of Mass. Gen. Laws ch. 62C, § 28 permits a taxpayer, once notified by the commissioner of its failure to file a return, to still file a *proper return* within 30 days before a tax will be assessed. Additionally, the Debtor maintained that he "satisfied each element of the definition of a 'return'" articulated in 830 Mass. Code Regs. 62C.26.1, insofar as he filed with the Commissioner of Revenue a "signed declaration of the tax due . . . properly completed . . . on a form prescribed by the Commissioner."

After consideration of the supplemental memoranda, the bankruptcy court entered an order denying the MDOR's summary judgment motion on March 11, 2013. In its accompanying memorandum of decision,[8] the court explained:

> I believe the MDOR's interpretation of § 523(a) is ill-conceived and unjustified. Interpreting the definitional paragraph of § 523(a) to mean that all late-filed Massachusetts tax returns are not returns renders virtually meaningless § 523(a)(1)(B)(ii), arguably the most frequently resorted-to subsection of § 523(a)(1). The interpretation of the definitional paragraph advanced by the MDOR and the decisions upon which it relies, rewrites § 523(a)(1)(B)(ii) so that it no longer covers late-filed returns filed more than two years prior to bankruptcy

[8] The memorandum of decision also addressed the MDOR's motion for summary judgment filed in Gonzalez v. Mass. Dep't of Revenue (In re Gonzalez), Adv. Proceeding No. 11-04149-MSH (Bankr. D. Mass. November 21, 2011), which motion the bankruptcy court similarly denied. The Gonzalez order was the subject of our opinion set forth in In re Gonzalez, *supra*.

but merely covers late filed returns prepared pursuant to § 6020(a) of the Internal Revenue Code or similar statutes. The *IRS Chief Counsel Notice* CC-2010-016, 2010 WL 3617597 (Sept. 10, 2010), refers to the number of § 6020(a) returns as "minute" and observes that taxpayers do not even have the right to demand that the IRS prepare such returns on their behalf. For all practical purposes, therefore, the interpretation advocated by the MDOR renders § 523(a)(1)(B)(ii) a nullity. In United States of America v. Martin (In re Martin), 428 B.R. 635, 639 (Bankr. D. Colo. 2012), Judge Campbell refused to adopt an interpretation of the definitional paragraph of § 523(a) similar to the one advocated by the MDOR here because it would make § 523(a)(1)(B)(ii) superfluous.

The interpretation of the definitional paragraph being advanced by the MDOR also renders superfluous the reference at the end of the definitional paragraph itself to late-filed returns under § 6020(b) of the Internal Revenue Code. If all late-filed returns except § 6020(a) returns are not returns there is no need to state that § 6020(b) returns are not returns.

There is no legislative history available to shed light on Congressional intent in enacting the BAPCPA amendment to § 523(a). In the absence of any legislative history I will not adopt the MDOR's interpretation. It simply does too much violence to the statute. As the Supreme Court declared in Dewsnup v. Timm, 502 U.S. 410, 419, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992), "[t]his Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history."

A far more sensible reading of the definitional paragraph added to § 523(a) by BAPCPA is that the phrase "the term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements)" refers to a return that *qualifies* as a return under applicable nonbankruptcy law including the filing requirements of such law. This essentially was the approach taken pre-BAPCPA by the courts adopting the Beard test when determining whether a return was a return under federal law and it seems quite logical to read the BAPCPA addition of the definitional paragraph as extending that analytical approach with respect to all tax returns, federal, state or local.

The more nuanced Beard-influenced approach to understanding the § 523(a) definitional paragraph does not mean tardiness in filing a tax return may never be relevant to application of the definition. On the contrary, if a late-filed return is not considered a return under applicable law then the relevant tax will be non-dischargeable under § 523(a)(1)(B)(i) since no return will have been filed.

Applying this approach to the cases here means answering the question, did the late-filed state income tax returns of Messrs. Brown and Gonzalez qualify as returns under Massachusetts law or put another way, did the late-filed returns serve any tax purpose under Massachusetts law? The answer is an emphatic "yes." A late-filed return serves as the formal assessment of the tax in the amount set forth therein. Mass. Gen. Laws ch. 62C, § 26(a) provides:

> Taxes shall be deemed to be assessed at the amount shown as the tax due upon any return filed under the provisions of this chapter and on any amendment, correction or supplement thereof, or at the amount properly due, whichever is less, and *at the time when the return is filed or required to be filed, whichever occurs later.* (emphasis supplied).

The only way a late-filed return does not serve as the tax assessment under Massachusetts law is when the commissioner of revenue assesses the tax first. Mass. Gen. Laws ch. 62C, § 26(d) states:

> In the case of a false or fraudulent return filed with intent to evade a tax or of a failure to file a return, the commissioner may make an assessment at any time, without giving notice of his intention to assess, determining the tax due according to his best information and belief.

In connection with the taxes at issue in these cases there was no assessment by the commissioner of revenue prior to Messrs. Brown and Gonzalez filing their returns. Their late-filed returns are thus "returns" under applicable Massachusetts law and there is no basis in Bankruptcy Code § 523(a) for excepting from discharge the taxes assessed by such returns.

As the returns in these cases were filed prior to tax assessment by the commissioner I need not address the question whether a late-filed return after assessment qualifies as a return under Massachusetts law. As indicated previously, with respect to federal taxes courts are in disagreement as to whether a post-assessment late-filed return constitutes a return for purposes of federal law, with a sizable majority of courts holding it does not. What the result would be for Massachusetts tax returns will have to await a future case or controversy.

For the foregoing reasons, the MDOR's motions for summary judgment will be denied. As the only disputed issue in these adversary proceedings has now been decided, it would be appropriate to enter summary judgment in favor of Messrs. Brown and Gonzalez. Before doing so, however, I will give the MDOR 30 days

> to submit in writing any reasons why summary judgment in favor of plaintiffs should not enter.

Brown v. Mass. Dep't of Revenue (In re Brown), 489 B.R. 1, 5 (Bankr. D. Mass. 2013)

Absent a response from the MDOR, on May 21, 2013, the bankruptcy court entered judgment in favor of the Debtor. This appeal followed. On appeal, the parties reiterate the arguments presented below.

## JURISDICTION

A bankruptcy appellate panel is duty-bound to determine its jurisdiction before proceeding to the merits even if not raised by the litigants. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724, 725 (B.A.P. 1st Cir. 1998). A panel may hear appeals from "final judgments, orders, and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." Fleet Data Processing Corp v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "An order granting summary judgment, where no counts remain, is a final order." DeGiacomo v. Traverse (In re Traverse), 485 B.R. 815, 817 (B.A.P. 1st Cir. 2013) (internal quotations and citation omitted). Thus, the Panel has jurisdiction.

## STANDARD OF REVIEW

A bankruptcy court's findings of fact are reviewed for clear error and its conclusions of law are reviewed *de novo*. Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 269 (1st Cir. 2010). "We apply a *de novo* standard of review to orders granting summary judgment." Traverse, 485 B.R. at 819.

## DISCUSSION

We recently considered the appeal of the bankruptcy court's ruling in In re Gonzalez, *supra*. Based upon a nearly identical fact pattern and our review of the relevant case and statutory law, in Gonzalez we declined to adopt a "per se" rule that any late-filed return is not a "return," for the following reasons:

> . . . exceptions to discharge must be strictly construed in favor of the debtor. Second, under the "two-year rule," it is an undisputed fact that debtors' late tax returns are eligible for a discharge. 11 U.S.C. § 523(a)(1)(B)(ii). In other words, Congress allowed tax debt to be discharged if it was owed more than two years before filing the bankruptcy, even if the return was filed late. Third, the definition of "return" in the "hanging paragraph," § 523(*), appears to be grounded on *what* is filed rather than *when* it is filed because it specifically includes a late-filed return under § 6020 of the Internal Revenue Code. The inclusion of 26 U.S.C. § 6020(a) versus § 6020(b) hinges on the cooperation of the taxpayer, not on any time requirement. Therefore, it seems inconsistent to conclude that the satisfaction of filing requirements allows only timely filed returns. This absolute exclusion of any late-filed return would render § 523(a)(1)(B)(ii) and the second sentence of § 523(*) superfluous, since both specifically allow for late-filed returns. Fourth, under Massachusetts state law, the definition of a "return" does not include a timeliness requirement. Furthermore, the MDOR acknowledged during oral argument that a late-filed return is treated as a return and that there are consequences for a return's lateness.

In re Gonzalez, 2014 WL 888460, at *9.

Accordingly, we held that the bankruptcy court properly determined that the debtor's obligations to the MDOR were discharged in that case, notwithstanding the late filing of his returns. For the reasons set forth in Gonzalez, we conclude that the Debtor's obligations to the MDOR for the 1998 through 2004 tax years were discharged.

## CONCLUSION

Based on the foregoing, the Judgment is hereby **AFFIRMED**.