

# Effect of Late Returns on the Dischargeability of Ohio Individual Income Tax Assessments

By: Cory D. Steinmetz, Attorney, Ohio Department of Taxation

---

## Department's Interpretation of Current Case Law

The basis of the Department's interpretation of the applicability of 11 U.S.C. 523(a)(1)(B) mainly stems from Beard v. Commissioner, 82T.C. No. 60 (Tax Ct. 1984) and In re Hinderlang, 164 F.3d 1029, (6<sup>th</sup> Cir. 1999). These cases provide us with the four part test below:

To be considered a "return" the document must:

1. Contain sufficient data to allow calculation of tax,
2. Purport to be a return,
3. Executed under penalty of perjury, and
4. Represents an honest and reasonable attempt to satisfy the law.

The fourth prong of the test is most often at issue. In most, if not all, of the cases on point, a return filed once an assessment has been created does not meet the fourth prong of the test. If the "return" is filed so late that it has no effect or tax purpose cannot represent an honest and reasonable attempt.

The Department's procedure is similar to that undertaken by the Internal Revenue Service (IRS). When a taxpayer fails to file an income tax return, the Department will create a delinquency assessment. In creating this assessment, the Department reviews all available information, including that obtained from the IRS. The assessed amount is derived from the income, filing status, and number of dependent information that can be obtained. The taxpayer is given credit for exemption amounts for at least themselves. Credit for Ohio withholding is not given unless and until employer-issued income statements (W-2s) are provided.

Once an assessment is created and is final, the amount due is based upon available information. By the time an assessment has become final, a taxpayer has received at least three notices, one being by certified mail. Any further information provided after this point is likely only being provided to reduce the assessment, not solely in the interest of complying with the filing requirement. The timeframe between when the assessment becomes final and then the return is filed is important and will be considered in the Department's review.

As such, a tax return filed late, after the Department has assessed a taxpayer for a delinquency and the assessment is final, *may* not qualify as a "return" for bankruptcy discharge determination purposes. This does not apply to those debts not discharged per 11 U.S.C. 523(a)(1)(B)(ii), where a late return was filed within two years of the bankruptcy petition. The Department will still process and review late filed returns for possible adjustments as normal. Any additional tax found due per a late-filed return would be dischargeable (unless section 523(a)(1)(B)(ii) applies), only the originally assessed amount will remain nondischargeable. This affects both debtors in both Chapter 13 and Individual Chapter 7 cases.

## Bankruptcy Code

11 U.S.C. 523(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

(1) for a tax or a customs duty-

(B) with respect to which a return, or equivalent report or notice, if required-

(i) was not filed or given; or

(ii) 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

The “hanging paragraph in 523:

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

11 U.S.C. 1328(a) provides that amounts due where no return was filed or where a return was filed late within 2 years of the petition will be nondischargeable.

## Ohio Revised Code

The Revised Code (ORC) defines “return” for Ohio income tax purposes and the requirements for filing. The Department often follows the IRS interpretation of certain issues and is considered analogous in the bankruptcy context. There are several statutes that provide insight into how returns are treated by the ORC.

5747.01(L) Return Defined: “return Means the notifications and reports required to be filed pursuant to this chapter for the purposes of reporting the tax due and includes declarations or estimated tax when so required.”

5747.08

(E) Joint and several liability for jointly filed returns.

(F) Requirement that return be signed, includes the taxpayers Social Security Number.

(G) Requirement that returns are filed by April 15<sup>th</sup> (ODT always follows the IRS filing deadline).

5747.10 Amended Returns: “If any of the facts, figures, computations, or attachments required in a taxpayer's annual return to determine the tax charged by this chapter or Chapter 5748. of the Revised Code must be altered as the result of an adjustment to the taxpayer's federal income tax return, whether initiated by the taxpayer or the internal revenue service, and such alteration affects the taxpayer's tax liability under this chapter or Chapter 5748. of the Revised Code, the taxpayer shall file an amended return with the tax commissioner in such form as the commissioner requires. The amended return shall be filed not later than sixty days after the adjustment has been agreed to or finally

determined for federal income tax purposes or any federal income tax deficiency or refund, or the abatement or credit resulting therefrom, has been assessed or paid, whichever occurs first.”

5747.13 Liability for failure to file returns: (A) “the tax commissioner may make an assessment against any person liable for any deficiency for the period for which the return is or taxes are due, based upon any information in the commissioner’s possession.

“No assessment shall be made or issued against an employer, taxpayer... more than four years after the final date the return subject to assessment was required to be filed or the date the return was filed, whichever is later.”

5747.19 “No person shall knowingly fail to file any return or report required to be filed by this chapter...”

5747.99(A) “Whoever violates section 5747.19 of the Revised Code... is guilty of a felony of the fifth degree.”

#### Summary of Case Law Citations, Further Reading

*In re Hinderlang*, 164 F.3d 1029 (6<sup>th</sup> Circ. 1999)

*Beard v. Commissioner*, 82 T.C. 766 (Tax Ct. 1984)

*In re Earls*, Adv. Pro. 14-1043, (Bankr. S.D. Ohio 2016)

*In re Justice*, 817 F.3d 738, (11<sup>th</sup> circ. 2016)

*In re McBride*, 534 B.R. 326 (Bankr. S.D. Ohio 2015)

*In re Moroney*, 352 F.3d 902 (4<sup>th</sup> Circ. 2003)