No. 98-1700

In the Supreme Court of the United States

WILLIAM C. HINDENLANG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LORETTA C. ARGRETT
Assistant Attorney General
KENNETH L. GREENE
ROBERT W. METZLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202)514-2217

QUESTION PRESENTED

Whether an untimely tax return form filed after the Internal Revenue Service makes an assessment of tax, and which mirrors the Service's independent determination of liability, provides a basis for discharging the underlying tax liability in bankruptcy proceedings under Section 523(a)(1)(B) of the Bankruptcy Code, 11 U.S.C. 523(a)(1)(B).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 164 F.3d 1029. The opinion and order of the district court (Pet. App. 13a-18a) is reported at 214 B.R. 847. The opinion of the bankruptcy court (Pet. App. 21a-32a) is reported at 205 B.R. 874.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1999. The petition for a writ of certiorari was filed on April 22, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner did not file federal income tax returns for 1985 through 1988 (Pet. App. 3a, 14a, 23a). When petitioner failed to respond to the request that he file returns for those years, the Internal Revenue Service sent notices of proposed deficiencies to petitioner based on information about his income obtained from employers, banks, and other parties (*ibid.*). The debtor did not consent to the tax liabilities determined in the notices of deficiency (*ibid.*).

Pursuant to 26 U.S.C. 6213(a), the Internal Revenue Service was prohibited from assessing the tax deficiencies for 90 days after the notices of deficiency were sent to petitioner. In 1991, after the 90-day period expired, the Service assessed the taxes owed by petitioner for the years 1985 through 1988 (Pet. App. 3a).

2. A debtor who files a petition in bankruptcy under Chapter 7 is generally discharged from personal liability for all debts incurred before the filing of the petition. 11 U.S.C. 727(b). Under Section 523 of the Bankruptcy Code, however, certain debts are not dischargeable. In particular, Section 523(a)(1)(B)(i) provides that a discharge under Section 727 "does not discharge an individual debtor from any debt * * * for a tax * * * with respect to which a return, if required * * * was not filed." 11 U.S.C. 523(a)(1)(B)(i).

In December 1993, two years after the Internal Revenue Service assessed the tax liabilities involved in this case, petitioner sent the Service completed income tax return Forms 1040 for the years 1985 through 1988, which calculated the taxes owed for those years in substantial agreement with the notices of deficiency the Service had previously issued (Pet. App. 3a). When petitioner thereafter filed a Chapter 7 bankruptcy peti-

tion, he sought a determination that his tax liabilities for 1985 through 1988 were dischargeable pursuant to 11 U.S.C. 727 (Pet. App. 3a-4a). The government opposed petitioner's request, contending that the tax liabilities were excepted from discharge under 11 U.S.C. 523(a)(1)(B)(i) because petitioner had not, in compliance with the statute, filed a "return" for the years in question (Pet. App. 22a-23a). The bankruptcy court concluded, however, that the untimely Forms 1040 that petitioner submitted after the deficiency assessments were made by the Service constituted tax "returns" within the scope of Section 523(a)(1)(B)(i). The court therefore granted summary judgment to petitioner (*id.* at 21a-32a), and the district court affirmed (*id.* at 13a-18a).

3. Explaining that the issue presented in this case is "what constitutes a return under § 523(a)(1)(B) of the Bankruptcy Code" (Pet. App. 6a), the court of appeals reversed (*id.* at 1a-12a). The court concluded that it is appropriate to look to tax law to determine what constitutes a valid "return" for purposes of Section 523, because the Bankruptcy Code does not define the term and there is "no reason to presume the Bankruptcy Code sought to encompass as a return [a] document * * * that would not qualify as a return under the applicable tax law" (*id.* at 6a). Looking to the tax law, the court noted that "[t]he purpose [of the return] is not alone to get tax information in some form but also to get it with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished" (*id.* at 7a (quoting *Commissioner* v. *Lane-Wells Co.*, 321 U.S. 219 (1944))). The court of appeals therefore applied the "four part test" that courts have routinely applied in determining whether a document submitted by a

taxpayer constitutes a "return" for purposes of the tax law (*id.* at 7a-8a):

> (1) [the document] must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain 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.

The court of appeals focused on the fourth part of this test: whether the Forms 1040 filed by petitioner after the Service had already made deficiency assessments, and which merely mirrored the Service's prior determinations, represented an honest and reasonable attempt to satisfy the requirements of the tax law. The court concluded that (Pet. App. 10a):

> when the debtor has failed to respond * * * to the * * * deficiency letters sent by the IRS, and the government has assessed the deficiency, then the Forms 1040 serve no tax purpose, and the government thereby has met its burden of showing that the debtor's actions were not an honest and reasonable effort to satisfy the tax law.

Because, on the particular facts of this case, there was no "tax purpose" for filing the belated Forms 1040, those filings did not constitute "returns" within the meaning of the discharge provisions of Section 523 of the Bankruptcy Code (*id.* at 11a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. In creating categories of debts that are excepted from the general discharge granted under the Bankruptcy Code, "Congress * * * concluded that the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start." *Grogan* v. *Garner*, 498 U.S. 279, 287 (1991). Recognizing that "[o]ur system of taxation is based on voluntary assessment" (*Flora* v. *United States*, 362 U.S. 145, 176 (1944)) and "works to the extent that the majority of taxpayers think [it is] fair" (S. Rep. No. 989, 95th Cong., 2d Sess. 14 (1978)),[1] Congress enacted Section 523(a)(1)(B)(i) to deny a discharge in bankruptcy for taxes for which the debtor failed to file a required "return." Nothing in the Bankruptcy Code provides a definition of what constitutes a valid "return" for the purpose of this discharge provision. Because this exception to discharge is manifestly designed to protect the integrity of the tax system (S. Rep. No. 989, *supra*, at 13-15) and because, as the court of appeals stated, "there is no reason to presume the Bankruptcy Code sought to encompass as a return any document, form, paper, or the like that would not qualify as a return under the applicable tax law" (Pet. App. 6a), the court correctly concluded that it should

[1] The Internal Revenue Code imposes an income tax on millions of persons every year and generally relies on the voluntary reporting and assessment of the tax by those who must pay it. *Commissioner* v. *Lane-Wells Co.*, 321 U.S. 219, 223 (1944); *Flora* v. *United States*, 362 U.S. 145, 176 (1960); S. Rep. No. 989, *supra*, at 14. The tax return "implements the system of self-assessment." *Commissioner* v. *Lane-Wells Co.*, 321 U.S. at 223. As the court of appeals emphasized (Pet. App. 7a), our tax system could not function if the great majority of taxpayers did not report the correct amount of tax and instead forced the government to determine their tax liability without a return.

look to tax law to determine what constitutes a "return" for purposes of Section 523(a)(1)(B)(i).

This Court has long recognized that the purpose of a return is "to get tax information" and "to get it with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished." *Commissioner* v. *Lane-Wells Co.*, 321 U.S. at 223. Obviously, the purpose of a required tax return is not accomplished when, as here, petitioner provided no information about his tax liabilities prior to their assessment and forced the Internal Revenue Service to invoke deficiency procedures to make the tax determination and assessment. By filing an untimely document that simply mirrors the Service's determination, petitioner failed to participate in the self-assessment procedures upon which our tax system is based.

The court of appeals correctly applied the four-part test that courts have routinely employed in determining whether a document alleged to be a return is effective as a return. See Pet. App. 8a (citing *e.g.*, *Beard* v. *Commissioner*, 82 T.C. 766 (1984), aff'd, 793 F.2d 139 (6th Cir. 1986)). As the court of appeals concluded (Pet. App. 11a), petitioner did not satisfy that test because he failed to demonstrate that he was attempting to conform to any requirement of the tax laws in submitting the untimely Forms 1040.

> [W]hen the debtor has failed to respond * * * to the * * * deficiency letters sent by the IRS, and the government has assessed the deficiency, then the Forms 1040 serve no tax purpose, and the government thereby has met its burden of showing the debtor's actions were not an honest and reasonable effort to satisfy the tax law.

Id. at 10a. Indeed, it was evident that petitioner, who failed to file timely returns and refused to cooperate with the Internal Revenue Service in the making of the assessments, belatedly tendered documents that purported to be returns solely in an effort to obtain a discharge in bankruptcy. An untimely filing made in this context does not constitute a "return" because it does not "represent an honest and reasonable attempt to satisfy the requirements of the tax laws" (*id.* at 7a-8a).[2]

2. Petitioner errs in contending (Pet. 13-15) that there is a conflict of decisions that justifies review by this Court of the question presented in this case. The alleged conflict of three bankruptcy court decisions cited by petitioner does not warrant review by this Court.

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[2] Petitioner incorrectly contends that "the plain, unambiguous language" of Section 523(a)(1)(B) of the Bankruptcy Code requires that he be discharged of his unpaid tax liabilities. Pet. 4. That contention "begs the question of what constitutes a 'tax return.'" *In re Mickens*, 214 B.R. 976, 978 (N.D. Ohio 1997), aff'd, 173 F.3d 855 (6th Cir. 1999) (Table). The concession that petitioner ultimately makes that the Bankruptcy Code does not "specifically define[] the term 'return'" (Pet. 11) contradicts his contention that "the plain, unambiguous language" of the Bankruptcy Code is dispositive.

Petitioner further errs in asserting that the Bankruptcy Code requires the government to "establish that the taxpayer had acted fraudulently or in a willful manner to evade or defeat the tax to preclude the discharge" (Pet. 8). The nondischarge provision for fraudulent actions in which "the debtor * * * willfully attempted in any manner to evade or defeat" the tax (11 U.S.C. 523(a)(1)(C)) is separate and distinct from the nondischarge provision for the failure to file a "required" "return" (11 U.S.C. 523(a)(1)(B)) which is involved in this case.

In *In re Savage*, 218 B.R. 126 (B.A.P. 10th Cir. 1998), the bankruptcy appellate panel emphasized that it was not addressing the argument that the "return" involved in that case failed to satisfy the four-part test relied on in the present case, for the government "apparently did not raise this argument before the Bankruptcy Court" in that case. *Id.* at 133. The *Savage* court thus reserved, and did not decide, the specific question addressed and resolved by the court of appeals in the present case.

The bankruptcy court decision in *In re Pierchoski*, 220 B.R. 20 (Bankr. W.D. Pa. 1998), on which petitioner relies, has been vacated. *United States* v. *Pierchoski*, 99-1 U.S. Tax Cas. (CCH) ¶ 50,406 (W.D. Pa. Mar. 15, 1999). It manifestly does not establish a conflict. And, the bankruptcy court decision in *In re McGrath*, 217 B.R. 389, 392-393 (Bankr. N.D.N.Y. 1997), is not persuasive, for that court relied principally on the bankruptcy court decision in the present case which the court of appeals has now reversed. The decision in the present case appears to be one of first impression in the courts of appeals. It creates no conflict among the circuits that warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
KENNETH L. GREENE
ROBERT W. METZLER
Attorneys

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