UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MURRAY BEER, et al.	:	
Plaintiffs	:	**Civil Action No. 11-4218(FSH)**
v.	:	
	:	**ORDER ON INFORMAL**
UNITED STATES OF AMERICA	:	**APPLICATION & SECOND AMENDED**
	:	**PRETRIAL SCHEDULING ORDER**
Defendant	:	

This matter having come before the court for a settlement conference on March 16, 2012; and the parties being unable to resolve the dispute at this time; and the parties having discussed the exchange of discrete information to enable the defendant to evaluate this case and a possible resolution; and for the reasons discussed during the settlement conference;

IT IS ON THIS 16th day of March, 2012

ORDERED that the request to extend the unexpired pretrial deadlines is granted as set forth herein;

IT IS FURTHER ORDERED THAT:

I. COURT DATES

1. There shall be a telephone status conference before the Undersigned on **March 21, 2012 at 9:30 a.m.** in lieu of the March 19, 2012 telephone conference. Plaintiff shall initiate the telephone call.

2. a. There will be a settlement conference before the Undersigned on **TO BE SET.**

b. Trial counsel and clients with full settlement authority are required to appear at the conference and they shall confirm their availability to appear on the date of the conference by filing a letter no later than **TO BE SET**. Absent exceptional, unforeseen personal circumstances, the confirmed settlement conference will not be adjourned.

c. If the trial counsel **and** client with full settlement authority do not appear, the settlement conference may be cancelled or rescheduled and the noncompliant party and/or attorney may be sanctioned, which may include an assessment of the costs and expenses incurred by those parties who appeared as directed.

3. The final pretrial conference shall be conducted pursuant to Fed. R. Civ. P. 16(d) on **August 14, 2012 at 1:00 p.m.** The Final Pretrial Conference will occur even if there are dispositive motions pending. The Court will adjourn the Final Pretrial conference only if the requesting party makes a compelling showing that manifest injustice would otherwise result absent adjournment.

II. DISCOVERY AND MOTION PRACTICE

4. a. Fed. R. Civ. P. 26 disclosures are to be exchanged on or before **deadline passed on November 14, 2011.**

b. Authorizations/releases from health care and professional service providers shall be produced no later than **deadline passed on November 21, 2011** to obtain records for the period January 1, 2005 through the present.

5. Discovery necessary to engage in meaningful settlement discussions: medical records and professional service providers records (i.e., cpa).

6. The parties may serve interrogatories limited to **25** single questions including subparts and requests for production of documents on or before **deadline passed on November 28, 2011,** which shall be responded to no later than **deadline passed on January 10, 2012.**

7. The number of depositions to be taken by each side shall not exceed **10.** No objections to questions posed at depositions shall be made other than as to lack of foundation, form or privilege. See Fed. R. Civ. P. 32(d) (3) (A). No instruction not to answer shall be given unless a privilege is implicated. The depositions are to be completed no later than **May 17, 2012.**

8. Fact discovery is to remain open through **May 17, 2012.** No discovery is to be issued or engaged in beyond that date, except upon application and for good cause shown.

9. Counsel shall confer in a good faith attempt to informally resolve any and all discovery disputes before seeking the Court's intervention. Should such informal effort fail to resolve the dispute, the matter shall be brought to the Court's attention via a joint letter that sets forth: (a) the request, (b) the response; (c) efforts to resolve the dispute; (d) why the complaining party believes the information is relevant and why the responding party's response continues to be deficient; and (e) why the responding party believes the response is sufficient. No further submissions regarding the dispute may be submitted without leave of Court. If necessary, the Court will thereafter schedule a telephone conference to resolve the dispute.

No discovery motion or motion for sanctions for failure to provide discovery shall be filed before utilizing the procedures set forth in these paragraphs without prior leave of Court.

Any unresolved discovery disputes (other than those that arise during depositions) must be brought before the Court no later than deadline passed on February 21, 2012 at 2:00 p.m. except as permitted by the February 21, 2012 Order which allowed the parties to resubmit the unresolved disputes embodied on their February 21, 2012 letters, which shall bd presented no later

than **deadline passed on March 1, 2012 at 2:00 p.m.** The Court will not entertain applications concerning discovery matters, informally or otherwise, after this date. If an unresolved dispute arises at a deposition, then the parties shall contact the Chambers of the Undersigned for assistance during the deposition.

10. Any motion to amend pleadings or join parties must be filed by **January 13, 2012.**

11. All dispositive motions shall be discussed in advance of filing with the Undersigned either in person or by teleconference. Any and all summary judgment motions must be filed no later than **July 13, 2012** and must be comply with Local Rule 7.1. No pretrial dispositive motions will be entertained after that date. Any responses shall be submitted no later than **July 23, 2012** and any replies shall be submitted no later than **July 30, 2012**. If there are simultaneous cross-motions, then they shall be filed no later than **July 13, 2012** and any responses shall be submitted no later than **July 30, 2012** and no replies will be permitted. The return date shall be **August 6, 2012** before the Hon. Faith S. Hochberg. Her Honor's chambers will advise the parties if oral argument will be required.

III. EXPERTS

12. All affirmative expert reports shall be delivered by **May 17, 2012.**

13. All responding expert reports shall be delivered by **June 18, 2012.**

14. a. All expert reports are to be in the form and content as required by Fed. R. Civ. P. 26(a) (2)(B). No expert shall testify at trial as to any opinions or base those opinions on facts not substantially disclosed in the experts report.

b. All expert depositions shall be completed by **June 29, 2012.**

c. Daubert motions shall be filed no later than **July 13, 2012.**

IV. FINAL PRETRIAL CONFERENCE

15. The final pretrial conference shall be conducted pursuant to Fed. R. Civ. P. 16(d) on **August 14, 2012 at 1:00 p.m.** The final pretrial conference will occur even if dispositive motions are pending. The Court will adjourn the Final Pretrial conference only if the requesting party makes a compelling showing that manifest injustice would otherwise result absent adjournment.

16. Not later than **20 working days** before the pretrial conference, the parties shall exchange copies of all proposed trial exhibits. Each exhibit shall be pre-marked with an exhibit number conforming to the party's exhibit list.

17. All counsel are directed to assemble at the office of Plaintiff's counsel not later than **ten (10) days** before the pretrial conference to prepare the proposed Joint Final Pretrial Order in the form and content required by the Court. Plaintiff's counsel shall prepare the Joint Pretrial Order and shall submit it to all other counsel for approval and execution.

18. With respect to non-jury trials, each party shall submit to the District Judge and to opposing counsel proposed Findings of Fact and Conclusions of Law, trial briefs and any hypothetical questions to be put to an expert witness on direct examination.

19. The original of the Final Pretrial Order shall be delivered to the CHAMBERS of the Undersigned no later than **August 7, 2012 at noon**. All counsel are responsible for the timely submission of the Pretrial Order.

20. The Court expects to engage in meaningful settlement discussions at the final pretrial conference. Therefore, trial counsel who actually has full settlement authority must attend the conference and clients or other persons with full settlement authority must be available by telephone.

V. MISCELLANEOUS

21. The Court may from time to time schedule conferences as may be required, either sua sponte or at the request of a party.

22. Since all dates set forth herein are established with the assistance and knowledge of counsel, there will be no extensions except for good cause shown and by leave of Court, even with consent of all counsel. Any request to extend any deadline or to adjourn a court event shall be made no later than three days before the scheduled date and shall reflect: (1) the good cause the requesting party believes supports the extension or adjournment and (2) whether or not all parties consent to the request. Absent unforeseen emergent circumstances, the Court will not entertain requests to extend deadlines that have passed as of the date of the request.

23. A copy of every pleading, document or written communication with the Court shall be served on all other parties to the action. Any such communication which does not recite or contain a certification of such service may be disregarded by the Court.

24. Absent permission from Chambers, communications to the Court by facsimile will not be accepted. All communications to the Court shall be in writing or by telephone conference.

25. **FAILURE TO COMPLY WITH THE TERMS OF THIS ORDER MAY RESULT IN SANCTIONS.**

s/Patty Shwartz
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

DAVID DELGADO RESTO,	)	
	)	
Plaintiff	)	
	)	
v.	)	No. 3:11-cv-01350-PG
	)	
INTERNAL REVENUE SERVICE,	)	
	)	
Defendant.	)	

ORDER

Having considered the United States' motion for leave to file a reply brief in response to the Plaintiff's opposition to the pending motion to dismiss, the proposed reply brief submitted in support of such motion, any response(s) thereto, the applicable law, and the entire record of this case, IT IS HEREBY

ORDERED that the United States is granted leave under Local Civil Rule 7(c) to file a reply brief in support of its motion to dismiss.

Date: March 20, 2012.

JUAN M. PEREZ-GIMENEZ
United States District Judge

E-FILED
Tuesday, 20 March, 2012 02:22:27 PM
Clerk, U.S. District Court, ILCD

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

CAROLYN FINFROCK, as Executor of the Estate of Doris E. Finfrock-Ware,	)	
Plaintiff,	)	
v.	)	No. 11-3052
UNITED STATES OF AMERICA,	)	
Defendant.	)	

OPINION

SUE E. MYERSCOUGH, U.S. District Judge.

This cause is before the Court on the parties' cross-motions for summary judgment. See Plaintiff's Motion for Summary Judgment (d/e 10); Defendant's Motion for Summary Judgment (d/e 11). The sole issue is whether Treasury Regulation 20.2032A-8 (a)(2) (26 C.F.R. § 20.2032A-8 (a)(2)) is a valid regulation. For the reasons that follow, this Court finds that the regulation is invalid. Because additional issues remain to be determined, however, the Motions for Summary Judgment are taken under advisement.

I. FACTUAL BACKGROUND

The parties have stipulated to the following facts

Plaintiff is the executor of the estate of her deceased mother-in-law, Doris Finfrock-Ware (the decedent), who previously resided in this District. The decedent died on January 3, 2008.

At the time of her death, the decedent owned 61.05% of the issued and outstanding stock in the farm corporation Finfrock Farms, Inc. (Finfrock Farms). Finfrock Farms was a closely-held business pursuant to the Treasury Department regulations.

At the time of decedent's death, and for at least 8 years prior to her death, Finfrock Farms owned the following items of real property: Item 1 (40 acres of real property); Item 2 (122.5 acres of real property); Item 3 (377.21 acres of real property); and Item 4 (165 acres of real property). There was no formal agreement describing who would operate the farm on behalf of the corporation. However, for the entire 8 years preceding the decedent's death, her son James Finfrock actively farmed Items 1 through 4.

On the decedent's death, Items 1 through 4 passed indirectly to qualified heirs as defined in 26 U.S.C. § 2032A(e) through a change in ownership of Finfrock Farms. The decedent estate's Internal Revenue Service (IRS) Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return ("Form 706"), was filed on October 2, 2008.

In Schedule A of the estate's Form 706, the estate listed decedent's share of Finfrock Farm's interest in Items 1 through 4, which Plaintiff alleges constituted "qualified real property" as that term is used in § 2032A. The estate's "adjusted value of the gross estate," as that term is used in 26 U.S.C. § 2032A(b)(1)(A) and (B), was $2,608,848.00. The estate's "adjusted value of real property," as that term is used in 26 U.S.C. § 2032A(b)(1)(B), which consists of the estate's interest in Items 1 through 4 listed in Schedule A of the Form 706, was $1,775,000.00, representing approximately 68% of the adjusted value of the gross estate.

The estate made a regular election to specially value its share of Finfrock Farm's interest in Item 4. The estate valued Items 1 through 3 using the usual valuation method. The special use valuation of Item 4

was $227,233.00. The adjusted value of Item 4, $402,930.00, represents approximately 15% of the adjusted value of the gross estate. The estate elected to value only the farmland referenced above as Item 4 pursuant to 26 U.S.C. § 2032A because Plaintiff wished to continue operating Item 4 as a farm, whereas other members of her family opted not to continue farming Items 1through 3 and sold them to unrelated third parties shortly after the decedent's death.

The IRS examined the Form 706 and determined that the estate's election to value only part of the qualifying real property did not meet the requirements of applicable federal regulation 26 C.F.R. § 20.2032A-8 ("Treasury Regulation § 20.2032A-8"). Under Treasury Regulation § 20.2032A-8, not only must the adjusted value of all of the estate's qualifying real property exceed the 25% threshold as provided in 26 U.S.C. § 2032A(b)(1)(B), but the value of the real property for which the executor makes the election also must exceed such threshold. As indicated above, because the estate's election only included its interest in Item 4, the adjusted value of which was only 15% of the adjusted value

of the gross estate, the estate did not meet this threshold. Accordingly, Defendant "increased the returned value of Item 4 on Schedule A of the 706 return from $227,233.00" (its special use value) to $402,930.00 (its agreed market value) and assessed an additional tax on account of this increase. Statement of Undisputed Fact No. 13.

On behalf of the estate, Plaintiff timely filed a claim for refund and paid the additionally assessed tax. By letter dated February 7, 2011, Defendant denied the estate's claim.

On February 23, 2011, Plaintiff filed this lawsuit on behalf of the estate. Plaintiff contends that the estate should be entitled to elect a special use valuation for its interest in Item 4 notwithstanding Treasury Regulation § 20.2032A-8 because the regulation is invalid.

II. JURISDICTION AND VENUE

This Court has jurisdiction pursuant to 28 U.S.C. § 1346(a)(1) (providing that "[t]he district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of[] . . . any civil action against the United States for the recovery of any internal

revenue tax alleged to have been erroneously or illegally assessed or collected"). Venue is proper in this District because Plaintiff resides in Waynesville, Illinois, which is located in DeWitt County. See 28 U.S.C. § 1402(a)(1) (providing that a civil action against the United States under § 1346(a) may, with certain exceptions not applicable here, be prosecuted only "in the judicial district where the plaintiff resides"); Complaint for Tax Refund, ¶ 4 (asserting Plaintiff is an individual residing in Waynesville, Illinois).

III. LEGAL STANDARD

The parties have filed cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. A court may grant summary judgment only if the "pleadings, the discovery, and discovery materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also, Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Here, the parties agree that the material facts are not in dispute and that the case turns on a question

of law. Therefore, the case may be properly resolved on a motion for summary judgment. See, e.g., Gallenberg Equipment, Inc. v. Agromac Intern., Inc., 10 F. Supp. 2d 1050, 1052 (E.D. Wis. 1998).

IV. ANALYSIS

The purpose of § 2032A, which was enacted as part of the Tax Reform Act of 1976, was "to encourage the continued operation of family farms and other small family businesses by permitting real property used for the farm or business to be valued upon its present use, rather than upon its highest and best use." Schuneman v. United States, 783 F.2d 694, 697 (7th Cir. 1986). Specifically, "§ 2032A relieves taxpayers from having to sell an eligible family farm or business when the income from its present use is insufficient to pay the tax calculated upon its highest and best use." Id.

To qualify for the special use valuation, several conditions must be met. One of those conditions is that "25 percent or more of the adjusted value of the gross estate consists of the adjusted value of real property which meets the requirements of subparagraphs (A)(ii) and (C)." 26

U.S.C. § 2032A(b)(1)(B). The parties agree that Items 1 through 4 represented approximately 68% of the adjusted value of the gross estate.

The Treasury Regulations, however, provide that while an estate need not elect special use valuation with respect to all of the qualifying property, the property actually elected for the special use valuation must constitute at least 25% of the adjusted value of the gross estate. See 26 C.F.R. § 20.2032A-8(a)(2) ("An election under section 2032A need not include all real property included in an estate which is eligible for special use valuation, but sufficient property to satisfy the threshold requirements of section 2032A(b)(1)(B) must be specially valued under the election"); see also Miller v. United States, 680 F. Supp. 1269, 1270 n. 1 (C.D. Ill. 1988) (noting the interpretation of the regulation is that the election must be made on property valued at 25% or more of the adjusted value of the gross estate). Defendant argues that this regulation is valid and, because the property elected for special use valuation (Item 4) constituted only 15% of the adjusted value of the gross estate, Plaintiff is not entitled to the refund. Plaintiff argues that the regulation is invalid

and in conflict with the statute.

This is not the first time the issue has come before a judge in this district. In Miller v. United States, 680 F.Supp. 1269, the district court found Treasury Regulation § 20.2032A-8(a)(2) invalid by using the test that preceded the test articulated by the United States Supreme Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The Miller court found that the Treasury Regulation was an interpretive regulation, promulgated under the general rule-making power of the Code, and represented an invalid exercise of that power. Miller, 680 F. Supp. at 1273-74. The court concluded that Treasury Regulation § 20.2032A-8(a)(2) added a requirement not found in the underlying statute that was inconsistent with the statute. Id.

While the parties dispute the persuasive authority of Miller, the parties agree that the test articulated by the United States Supreme Court in Chevron is the appropriate test to apply when reviewing the challenged Treasury Regulation. See Mayo Found. for Med. Educ. & Research, 131 S. Ct. 704, 713 (2011) (applying the Chevron test to

review of a Treasury Department regulation, noting "[t]he principles underlying our decision in Chevron apply with full force in the tax context"). Under the Chevron test, a court, when reviewing an agency's interpretation of a statute it administers, first determines "whether Congress has directly spoken to the precise question at issue." Chevron, 467 U.S. at 842; see also Emergency Servs. Billing Corp. v. Allstate Ins. Co., 668 F.3d 459, 465 (7th Cir. 2012) (identifying the two-step Chevron test). If the intent of Congress is clear, both the court and the agency "must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 843. That is, "[i]f the plain meaning of the text either supports or opposes the regulation, then we stop our analysis and either strike or validate the regulation." Bankers Life & Casualty Co. v. United States, 142 F.3d 973, 982 (7th Cir. 1998).

If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron, 467 U.S. at 843 (noting that Congress may explicitly or implicitly leave a gap for

the agency to fill); see also Mayo, 131 S. Ct. at 714 (identifying step two of the Chevron test as a determination of whether the rule is a "reasonable interpretation" of the statute). In the Seventh Circuit, the legislative history and other appropriate factors are generally considered during step two of the Chevron test. Emergency Servs. Billing Corp., 668 F.3d at 466.

A. Treasury Regulation § 20.2032A-8(a)(2) Is Invalid Under the Chevron Analysis

In this case, Plaintiff only challenges step one of the Chevron analysis. That is, Plaintiff argues the statute is clear and unambiguous that the 25% or more requirement only applies to qualify an estate for the special election but does not require that the executor elect to apply the special use valuation to property that constitutes 25% or more of the adjusted gross estate. Plaintiff admits that the Treasury Regulation § 20.2032A-8(a)(2) would meet step two of the Chevron test but asserts that this Court need not reach step two. See Plaintiff's Combined Response to Defendant's Motion for Summary Judgment and Reply in Support of her Own Motion for Summary Judgment (d/e 12), p. 9

(stating that "we are not going to waste this Court's time arguing that . . . [the regulation] would fail under Chevron Step 2" because the "regulation is not outrageous, or arbitrary and capricious").

In contrast, Defendant argues the statute is "silent as to how much of the qualified real property included in the decedent's gross estate must be subject to the special use valuation election." Defendant's Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment (d/e 11), p. 3. Defendant asserts the Secretary of the Treasury clarified this ambiguity created by silence by promulgating Treasury Regulation § 20.2032A-8(a)(2). This Court agrees with Plaintiff.

Under step one of the Chevron test, this Court first looks to the language of the statute. Khan v. United States, 548 F.3d 549, 554 (7th Cir. 2008). The statute provides that if a decedent was a resident or citizen of the United States, the executor elects § 2032A, and the executor "files the agreement referred to in subsection (d)(2),"[1] then

[1] Subsection (d)(2) provides that "[t]he agreement referred to in this paragraph is a written agreement signed by each person in being who has an interest

"qualified real property" may be valued at its current use as opposed to its best use. See 26 U.S.C. § 2032A(a)(1); see also LeFever v. Comm'r of Internal Revenue, 100 F.3d 778, 782 (10th Cir. 1996) (noting that each person having an interest in the property must sign and file a personal liability agreement under § 2032A(d)(2)). The statute defines "qualified real property" as follows:

> (b) Qualified real property.--
>
> (1) In general.--For purposes of this section, the term "qualified real property" means real property located in the United States which was acquired from or passed from the decedent to a qualified heir of the decedent and which, on the date of the decedent's death, was being used for a qualified use by the decedent or a member of the decedent's family, but only if–
>
> (A) 50 percent or more of the adjusted

(whether or not in possession) in any property designated in such agreement consenting to the application of subsection (c) with respect to such property." 26 U.S.C. § 2032A(d)(2). Subsection (c) provides that if the qualified real property ceases to be used for the qualified purpose within 10 years after the decedent's death, an additional estate tax will be imposed. 26 U.S.C. § 2032A(c). See also Estate of Gavin v. United States, 113 F.3d 802, 806 (8th Cir. 1997) (noting that "Congress included § 2032A(c) 'to foreclose abuse of the privilege by taxpayers who would engage in family farming only long enough to reap the estate tax benefits and then convert the property to a more lucrative commercial use'" (quoting Williamson v. Comm'r, 974 F.2d 1525, 1527 (9th Cir. 1992))).

value of the gross estate consists of the adjusted value of real or personal property which--

(i) on the date of the decedent's death, was being used for a qualified use by the decedent or a member of the decedent's family, and

(ii) was acquired from or passed from the decedent to a qualified heir of the decedent.

(B) 25 percent or more of the adjusted value of the gross estate consists of the adjusted value of real property which meets the requirements of subparagraphs (A)(ii) and (C),

(C) during the 8-year period ending on the date of the decedent's death there have been periods aggregating 5 years or more during which–

(i) such real property was owned by the decedent or a member of the decedent's family and used for a qualified use by the decedent or a member of the decedent's family, and

> **(ii)** there was material participation by the decedent or a member of the decedent's family in the operation of the farm or other business, and
>
> **(D)** such real property is designated in the agreement referred to in subsection (d)(2).

26 U.S.C.A. § 2032A (emphasis added).

Therefore, under the plain language of the statute, to meet the definition of "qualified real property," 25% or more of the adjusted value of the gross estate must consist of real property that (1) "was acquired from or passed from the decedent to a qualified heir of the decedent" (26 U.S.C. § 2032A(b)(1)(A)(ii)); and (2) has been used for a qualified use for 5 of the 8 years preceding the decedent's death and for which there was material participation by the decedent or a member of the decedent's family in the operation of the farm (26 U.S.C. § 2032A(b)(1)(C)). Subparagraph (D) further defines "qualified real property" as "such real property" that is designated in the agreement required by subsection (d)(2). 26 U.S.C. § 2032A(b)(1)(D).

Notably, the statute does not require that real property constituting 25% or more of the adjusted value of the gross estate be "designated in an agreement referred to in subsection (d)(2)." 26 U.S.C. § 2032A(b)(1)(D). The 25% or more requirement is a means to limit the benefit of the special use valuation to family farms and family businesses. Nonetheless, under the plain language of the statute, once the estate meets the thresholds identified in subsections (1)(A), (1)(B), and (1)(C), the only other requirement to qualify as "qualified real property" is to designate the property in the required agreement. Congress did not require that the designation be of all or a certain percentage of the real property in the estate that meets the requirements of 1(A), 1(B), and 1(C). See, e.g., Miller, 680 F. Supp. at 1273 (finding "[t]he language of Code § 2032A(b)(1)(B) . . . cannot be said to be ambiguous with respect to the 25% requirement which the regulation imposes").

This Court finds that § 2032A(b) is neither silent nor ambiguous on the precise issue – whether an executor can elect for special valuation property that constitutes less than 25% of the gross value of the adjusted

value of the gross estate. The statute unambiguously provides that an executor can do so.

Having found the statute unambiguous, the Court next determines if the plain meaning of the statute supports or opposes Treasury Regulation § 20.2032A-8(a)(2). See Bankers Life & Casualty Co., 142 F.3d at 982 (explaining step one of the Chevron test). Here, the regulation imposes an additional requirement that the property designated by the agreement referenced in § 2032A(b)(1)(D) and (d)(2) for special use valuation must constitute at least 25% of the adjusted value of the gross estate. This additional requirement is contrary to the plain language of the statute. See, e.g., Miller, 680 F. Supp. at 1273 (finding that "the regulation clearly imposes an additional, substantive requirement not authorized by the statute"). The regulation neither clarifies an ambiguity in the statute, because the statute contains no ambiguity, nor fills any gap, as there is no gap to fill. Therefore, Treasury Regulation § 20.2032A-8(a)(2) is invalid.

Because this Court finds that the statute is unambiguous and that

Treasury Regulation § 20.2032A-8(a)(2) conflicts with the statute, this Court need not proceed to step two of the Chevron test or address Defendant's arguments with regard to step two of the Chevron test.

B. The Case Is Not Resolved, However, Because the Parties Have Raised Two Additional Matters

Two additional matters must be addressed. First, Defendant, in its Motion for Summary Judgment, argued for the first time that Plaintiff's special use valuation election was invalid because there was no formal arrangement calling for material participation by the decedent owner or a family member. See 26 C.F.R. § 20.2032A-3(f) (for indirectly owned property, "there must be an arrangement calling for material participation in the business by the decedent owner or a family member . . . [E]ven full-time involvement must be pursuant to an arrangement between the entity and the decedent or family member specifying the services to be performed"). In this case, the parties stipulated that although "[t]here was no formal agreement describing who would operate the farm on behalf of the corporation," the decedent's son, James Finfrock, actively farmed Items 1 through 4 for the entire 8 years preceding the decedent's

death. See Statement of Undisputed Fact No. 5.

In response, Plaintiff, while not contesting Defendant's ability to raise this argument for the first time, argues she agreed to the Stipulation as written because there was no written contract between Finfrock Farms and James Finfrock. Plaintiff asserts, however, that there was an "arrangement" as that term is used in 26 C.F.R. § 20.2032A-3(f) (requiring "an arrangement calling for material participation"). In support thereof, Plaintiff submitted James' Declaration indicating that he served as chief operating officer for the corporation during all eight years at issue and engaged in no employment other than managing and operating the farms.

In its Reply, Defendant concedes that an oral agreement might satisfy the material participation requirement of the regulation but asserts that the United States was not previously informed of such oral agreement. Defendant asserts that it has requested additional documentation from Plaintiff that might allow Defendant to abandon this argument. Defendant also notes that the Court need not reach the

issue if the Court rules in favor of Defendant. Because this Court has ruled in favor of Plaintiff, this remaining issue needs to be resolved. Therefore, Defendant shall advise the Court, by March 29, 2012, whether it is abandoning this argument and, if not, whether additional briefing is necessary. If additional briefing is necessary, this Court will set a briefing schedule.

Second, the parties stipulated that, in the event the Court found in favor of Plaintiff, the parties would attempt to collaborate in the submission of a proposed final judgment which would include a calculation of the proper amount that should be refunded. If the parties could not reach an agreement, they agreed to file supplemental briefs on that issue. Obviously, this issue cannot be addressed until Defendant has informed the Court whether it is abandoning its argument regarding the existence of an arrangement calling for material participation.

Therefore, this issue will be addressed after Defendant advises the Court on March 29, 2012.

V. CONCLUSION

For the reasons stated, Plaintiff's Motion for Summary Judgment (d/e 10) and Defendant's Motion for Summary Judgment (d/e 11) are both TAKEN UNDER ADVISEMENT. Defendant shall, by March 29, 2012, advise the Court whether it is abandoning its alternative argument in support of summary judgment and, if not, whether additional briefing is necessary. The final pretrial conference scheduled for April 30, 2012 at 3:00 p.m. and the bench trial scheduled for May 1, 2012 are VACATED.

ENTER: March 20, 2012

FOR THE COURT:

s/ Sue E. Myerscough
SUE E. MYERSCOUGH
UNITED STATE DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ERNEST FRANKLIN COBLE, JR. Plaintiff, v. WILLIAM J. WILKINS, INTERNAL REVENUE SERVICE, EXAMINER #0469241048, and UNITED STATES OF AMERICA, Defendants.	)	1:11CV211

ORDER

This matter is before the Court on a Recommendation of the United States Magistrate Judge recommending that Defendants' Motion to Dismiss be granted. The Recommendation was filed on February 29, 2012, and notice was served on the parties pursuant to 28 U.S.C. § 636(b). On March 13, 2012, Plaintiff filed timely Objections to the Recommendation. The Court has now reviewed de novo the Objections and the portions of the Recommendation to which objection was made, and finds that the Objections do not change the substance of the United States Magistrate Judge's ruling. The Magistrate Judge's Recommendation [Doc. #22] is therefore affirmed and adopted.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss [Doc. #8] is hereby GRANTED, that this action is DISMISSED WITHOUT PREJUDICE, and that the remaining Motions [Doc. #9, #13, & #16] are hereby DENIED AS MOOT. A Judgment will be entered contemporaneously herewith.

This, the 20th day of March, 2012.

United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

Plaintiff,

vs. Case No. 3:08-cv-966-J-34MCR

JUDITH BARNES and NATHAN GENRICH,

Defendants.

ORDER

This case is before the Court on Defendant's Motion for Temporary Stay of Proceeding. (Doc. 56). Upon due consideration, it is hereby

ORDERED:

1. Defendant's Motion for Temporary Stay of Proceeding (Doc. 56) is **DENIED**.

2. Defendant Judith Barnes may file any objections to the form only of the Proposed Judgment and Proposed Order of Sale, (see Doc. 51), on or before **April 4, 2012**.

DONE AND ORDERED in Jacksonville, Florida, this 19th day of March, 2012.

Marcia Morales Howard

MARCIA MORALES HOWARD
United States District Judge

lc12
Copies to:
Counsel of Record

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff,

v.

Paul G. Hayes,

Defendant.
_____/

Case No. 10-14938

Honorable Sean F. Cox
United States District Judge

ORDER DENYING WITHOUT PREJUDICE THE GOVERNMENT'S MOTION FOR DEFAULT JUDGMENT AS TO PAUL G. HAYES

The Government filed this action pursuant to 26 U.S.C. § 7401 in order to reduce to judgment the unpaid tax liabilities of Paul G. Hayes ("Hayes").

On March 9, 2011, the Government obtained a Clerk's Entry of Default and on April 22, 2011, the Government filed a motion for default judgment against Hayes (D.E. No. 17).

This Court issued an Opinion & Order (D.E. No. 20) on June 22, 2011, ordering the Government to file an amended complaint, if necessary, after the bankruptcy court determined the extent of Paul G. Hayes's tax liability. To date, the bankruptcy court has not determined the amount of taxes owed by Hayes.

IT IS HEREBY ORDERED that the Government's motion for default judgment against Paul G. Hayes (D.E. No. 17) is **DENIED WITHOUT PREJUDICE**. The Government may re-file its motion for default judgment after the bankruptcy court determines the amount owed by Hayes, and after the Government files an amended complaint, if an amended complaint is necessary.

IT IS SO ORDERED.

S/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: March 20, 2012

I hereby certify that a copy of the foregoing document was served upon counsel of record on March 20, 2012, by electronic and/or ordinary mail.

S/Jennifer Hernandez
Case Manager

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOSEPH IANTOSCA, *et al.*,

Plaintiffs,

v.

BENISTAR ADMIN SERVICES, INC., *et al.*,

Defendants,

and

TRAVELERS INDEMNITY COMPANY, TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, and CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,

Reach and Apply Defendants,

and

UNITED STATES OF AMERICA,

Plaintiff by Intervention.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, and All Participating Insurers and Syndicates,

Third-Party Plaintiff,

v.

WAYNE H. BURSEY,

Third-Party Defendant.

Civil Action No. 08-11785-NMG

Judge Nathaniel M. Gorton

UNITED STATES' EMERGENCY MOTION TO EXCUSE ACTING ASSOCIATE ATTORNEY GENERAL, TONY WEST, FROM ATTENDANCE AT THE PRE-TRIAL CONFERENCE

Emergency motion allowed.
/s/ NMGorton, USDJ 3/20/12

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. DARRELL G. JACOBSON et al., Defendants.	**ORDER** Case No. 2:10-cv-1259 CW Judge Clark Waddoups

On March 12, 2012, the court ordered the United States to show cause why this case should not be dismissed for failure to prosecute. On March 19, 2012, the United States filed a response that shows the parties have been actively seeking to resolve this matter through settlement negotiations. The United States has requested that it be allowed to continue these efforts and has proposed to file a status report with the court on or before September 28, 2012. For good cause showing, the court hereby adopts the proposal. The United States shall have until September 28, 2012 to file a status report.

SO ORDERED this 20th day of March, 2012.

BY THE COURT:

Clark Waddoups
United States District Judge Since that

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF PUERTO RICO

IN RE:	
	CASE NO. 11-07717 EAG
NC AUTO & TRUCK RENTALS INC	**Chapter 11**
XXX-XX	
	FILED & ENTERED ON 03/20/2012
Debtor(s)	

ORDER GRANTING WITHDRAWAL OF MOTION

UNITED STATES (IRS)'s motion withdrawing (docket entry #66):

[X] the motion to dismiss

[ ] the objection to claim # filed by

[ ] the motion to lift stay

[ ] the legal representation of

is hereby granted.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 20 day of March, 2012.

Edward A. Godoy
U. S. Bankruptcy Judge

C: DEBTOR(S)
MODESTO BIGAS MENDEZ
UNITED STATES (IRS)

ORDERED ACCORDINGLY.

Dated: March 20, 2012

George B. Nielsen, Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re	Chapter 11 Proceedings
N'GENUITY ENTERPRISES, INC.	Case No. 2:11-bk-28705-GBN
Debtor.	**ORDER GRANTING JACKSON'S MOTION FOR EXPEDITED CONSIDERATION OF MOTION TO EQUITABLY SUBORDINATE VALERIE LITTLECHIEF'S EQUITY INTEREST –and- MOTION TO DISALLOW VALERIE LITTLECHIEF'S EQUITY INTEREST**

This matter having come before the Court pursuant to Vincent Jackson's ("Jackson") Motion for Expedited Consideration of Jackson's Motion to Equitably Subordinate Valerie Littlechief's Equity Interest - and - Motion to Disallow Valerie Littlechief's Equity Interest, and good cause appearing therefor:

IT IS HEREBY ORDERED setting the matters for hearing on April 2, 2012 at 11:00 a.m. before the United States Bankruptcy Court, District of Arizona, Courtroom 702, Seventh Floor, 230 First Avenue, Phoenix, Arizona 85003.

IT IS FURTHER ORDERED that Debtor's counsel shall immediately communicate this order to all interested parties by e-mail and/or facsimile.

DATED AND SIGNED AS SHOWN ABOVE.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

DAVID OGLE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 10-CV-00650-GAF**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
RICHARD BARRETT and DENISE BELCHER,	)	
	)	
Third-Party Defendants.	)	
	)	
	)	
RICHARD BARRETT,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
DENISE BELCHER, et al,	)	
	)	
Third-Party Defendants.	)	
	)	
RICHARD BARRETT,	)	
	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
AUTOTRIBE, LLC,	)	
	)	

Third Party Defendant.)

ORDER FOR DISMISSAL WITH PREJUDICE BY RICHARD BARRETT

Now on this 15th day of March, 2012, this matter comes before the Court Pursuant to the Third-Party Plaintiff, Richard Barrett's, Motion for Dismissal with Prejudice.

The Court having considered this Motion, hereby finds that,

IT IS ORDERED, ADJUDGED AND DECREED that Third-Party Plaintiff Richard Barrett's claims against Third-Party Defendant Auto Tribe, LLC, are hereby dismissed with prejudice with each party to bear their own costs.

IT IS SO ORDERED.

s/ Gary A. Fenner
Gary A. Fenner, Judge
United States District Court

DATED: March 20, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	NO. 09-4742
v.	:	
	:	
PIL HYUN YU and YONG HYUN YU, Administrators of the Estate of Si Tae Yu; JUNG HEE YU; JOONG HYUN YU; COMMERCE BANK, National Association; and T.D. BANKNORTH, National Association	:	

MEMORANDUM AND ORDER

On February 14, 2012, I issued an Order granting a motion for summary judgment filed by plaintiff United States of America. Now before me is a motion for reconsideration of my February 14 Order filed by defendant TD Bank, N.A.[1] For the reasons that follow, I will grant in part and deny in part TD Bank's motion.

In my prior opinion, I found that defendants Jung Hee Yu and the estate of Si Tae Yu are jointly indebted to the United States for certain federal income taxes, statutory additions to tax and interest. I also held that federal tax liens with respect to the assessments described in paragraph 17 of the United States' Complaint remain attached to the undivided one-half interest in the real property at 1925 Cheltenham Avenue, Elkins Park, Pennsylvania that was formerly owned by Si Tae Yu. The United States filed notices of federal tax liens against Si Tae Yu and Jung Hee Yu with the Prothonotary of Montgomery County, Pennsylvania on August 15, 2005

[1] TD Bank N.A., as successor to Commerce Bank/Pennsylvania, N.A., contends that the bank defendants were improperly identified in the Complaint as Commerce Bank, N.A. and T.D. Banknorth, N.A.

and December 15, 2005.[2]

I ordered that following a sale of the property at 1925 Cheltenham Avenue, the proceeds of the sale shall be distributed first to reimbursement for the costs of the sale, then to any holders of liens against the property superior to the federal tax liens, and then one half to Joong Hyun Yu and the other half distributed to the United States in satisfaction of the tax debts of Si Tae Yu and Jung Hee Yu described in paragraphs 17 through 22 of the Complaint, up to the full amount of such tax debts, including accrued interest and penalties, with any remainder distributed to Joong Hyun Yu.

TD Bank is the holder of a mortgage on the property at 1925 Cheltenham Avenue in the amount of $1,150,000. On August 31, 2011, TD Bank filed a mortgage foreclosure action with respect to its mortgage against the property at 1925 Cheltenham Avenue in the Court of Common Pleas, Montgomery County, Pennsylvania. That action is still pending. On January 27, 2012 in this action, TD Bank asserted a counterclaim and crossclaims in mortgage foreclosure against the United States and against defendants Jung Hee Yu, Joong Hyun Yu and Pil Hyun Yu and Yong Hyun Yu, Administrators of the Estate of Si Tae Yu.

Although my February 14 Order recognized the prior right of any liens superior to the federal tax liens, it did not establish the priority of TD Bank's mortgage. Nor did it render a decision with respect to TD Bank's counterclaim and crossclaims. At the time of my decision, TD Bank had not filed a response to the motion for summary judgment. In its motion for reconsideration, TD Bank now asks that I enter an order amending my February 14 Order to

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[2] On July 1, 2011, the United States filed with the Prothonotary of Montgomery County a certificate of release of the federal tax lien reflected in the notice previously filed on December 15, 2005.

reflect that TD Bank's mortgage lien with regard to the real property at 1925 Cheltenham Avenue is superior in priority to the federal tax liens.

I will vacate my February 14th order to the extent that it entered judgment against TD Bank and foreclosed consideration of its counterclaim and crossclaims. I will not, however, grant TD Bank's requested amendment. Instead, I will stay these proceedings pending the resolution of the Montgomery County mortgage foreclosure action as its resolution may well dispose of the remaining claims in this action.

"In the exercise of its sound discretion, a court may hold one lawsuit in abeyance to abide the outcome of another which may substantially affect it or be dispositive of the issues." Chartener v. Provident Mutual Life Ins. Co., No. 02-8045, 2003 U.S. Dist. LEXIS 19500, at *3 (E.D. Pa. Oct. 22, 2003), quoting Bechtel Corp. v. Local 215, Laborers' Int'l Union, 544 F.2d 1207, 1214 (3d Cir. 1976).

> The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

Landis, 299 U.S. at 254. Weighing "whether a stay will simplify issues and promote judicial economy," "the balance of harm to the parties" and "the length of the requested stay," I conclude the balance here tips in favor of granting the requested stay pending the outcome of the mortgage foreclosure action. Smithkline Beecham Corp. v. Andrx Pharm. Corp., No. 99-4304, 2004 WL 1615307, at *23-24 (E.D. Pa. Jul. 16, 2004).

AND NOW, this 20th day of March, 2012, upon consideration of defendant TD Bank's

motion for reconsideration and the United States's response in opposition thereto, it is ORDERED that TD Bank's motion is GRANTED and this Court's Order of February 14, 2012 is VACATED to the extent that it enters judgment with respect to the counterclaim and crossclaims asserted by TD Bank. In all other respects, TD Bank's motion is DENIED.

It is FURTHER ORDERED that TD Bank's counterclaim and crossclaims are STAYED pending resolution of the Complaint in Mortgage Foreclosure filed by TD Bank in the Court of Common Pleas, Montgomery County, Pennsylvania, Docket No. 11-24794. The parties shall update the Court on the status of the Montgomery County action every six months.

s/Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - DETROIT

In Re:	)	
	)	Case no. 11-71412
LEIGH J. ROSE,	)	Chapter 7
	)	Hon. Steven W. Rhodes
Debtor.	)	

ORDER EXTENDING UNITED STATES' DEADLINE TO OBJECT TO DEBTOR'S DISCHARGE, UNTIL MAY 25, 2012

Pursuant to the Stipulation To Extend United States' Time To Object To Debtor's Discharge, entered between the creditor United States of America (Internal Revenue Service) and the debtor Leigh J. Rose on March 19, 2012, the deadline for the United States of America to object to the debtor's discharge is hereby EXTENDED until May 25, 2012.

IT IS SO ORDERED.

Signed on March 20, 2012

/s/ Steven Rhodes
Steven Rhodes
United States Bankruptcy Judge

SO ORDERED.
SIGNED this 20th day of March, 2012

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

Shelley D. Rucker
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
Winchester

IN RE:	)	
	)	
THOMAS E. SETTLES, SR.,	)	Chapter 11
	)	Bk. No. 09-16159
Debtor.	)	Judge Shelley D. Rucker
	)	

ORDER GRANTING THE UNITED STATES' MOTION TO DISMISS

Having considered the United States' motion to dismiss and any opposition thereto, the Court hereby GRANTS the motion and ORDERS that the above-captioned bankruptcy proceeding is DISMISSED. The Court also ORDERS the debtor to immediately pay all funds contained in the escrow account, established pursuant to this Court's prior order at Docket # 39, to the Internal Revenue Service.

# # #

Requested by:

/s/ Andrew C. Strelka
ANDREW C. STRELKA
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JOHN STAHL,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. CV-08-170-FVS

ORDER DENYING AND GRANTING SUMMARY JUDGMENT

THIS MATTER comes before the court based upon cross motions for summary judgment. The plaintiff is represented by Gary Randall, James J. Workland, and Eric J. Sachtjen. The defendant is represented by Jennifer D. Auchterlonie.

RELIEF REQUESTED

John Stahl and his family are members of the Stahl Hutterian Brethren ("SHB"). The SHB is part of the Hutterite movement. Hutterites live in colonies; emphasizing communal life. The SHB provides food and medical care to its members. Mr. Stahl sought to persuade the Internal Revenue Service ("IRS") that the SHB may deduct, as an ordinary and necessary business expense, the sums it expended on food and medical care for him and his family during 1997, 1998, and 1999. The IRS rejected Mr. Stahl's interpretation of the Internal Revenue Code ("I.R.C."). As a result, he paid the tax demanded by the IRS and then commenced this action against the United States seeking a

refund.

BACKGROUND

The SHB is like an extended family. Its core is composed of eight siblings and their respective spouses. Each couple has produced children. Consequently, the colony now numbers about 65 men, women, and children. Each one of them is a member of the SHB. The SHB farms approximately 30,000 acres of land. Much of the SHB's energy is devoted to growing potatoes, but the SHB also maintains dairy cattle. Every member works on the farm when he or she is old enough. However, no member receives wages for the work he or she performs. Nor does any member own property. To the contrary, the SHB maintains a common treasury. From this, the SHB provides for its members' needs. Not only does the SHB provide houses on the farm for its member families to live in, but also the SHB serves meals to its members in a common dining hall. Should a member require medical care, the SHB pays for it. All of this the SHB does as a matter of religious conviction; even for those of its members who are unable to work.

The members of the SHB perform most, but not all, of the work that is necessary to operate the farm. Some needs are met by nonmembers. For example, the SHB hires a limited number of nonmember school teachers to help educate its families' children. The SHB does not provide housing or meals to its nonmember employees; although, on occasion, a teacher might be invited to have lunch in the SHB dining hall. The SHB pays wages to its nonmember employees, and it makes contributions on their behalf to government-mandated benefit programs.

The SHB is a nonprofit religious or apostolic corporation. 26

U.S.C. § 501(d). Thus, it does not pay corporate income tax or accumulated income tax. *See Kleinsasser v. United States*, 707 F.2d 1024, 1026 (9th Cir.1983). Rather, each member employee pays personal income tax on his or her pro rata share of the SHB's taxable income. *See Stahl v. United States*, 626 F.3d 520, 521 (9th Cir.2010). As a result, the calculation of the SHB's taxable income is of considerable significance to each member employee. The SHB's taxable income consists of its gross income less any corporate deductions it is eligible to take. Corporate taxable income is allocated proportionately to the SHB's member employees. *See id.* Each member employee's share is treated as a dividend for tax purposes. *See Kleinsasser*, 707 F.2d at 1026. As explained above, each member employee pays personal income tax on his or her pro rata share.

Mr. Stahl filed this action during 2008 as a result of the IRS' determination that the SHB may not deduct from its taxable income the cost of medical care and food that it provided to him and his family during 1997, 1998, and 1999.[1] The parties filed cross motions for summary judgment. Mr. Stahl made the following argument: The SHB's members are its employees. The SHB compensates its member employees by providing food and medical care. Since food and medical care are employee compensation, the SHB may deduct its expenditures for those items as a corporate-level business expense under I.R.C. § 162(a)(1).

The threshold issue was whether the members of the SHB are its

[1]Mr. Stahl is the only member of the SHB who is a party to this action. Nevertheless, the United States has agreed the judgment will apply equally to all of the members.

employees. This Court ruled against Mr. Stahl. The Ninth Circuit reversed:

> On balance, the individual Hutterites, who work for the SHB business, should be seen as common law employees of SHB insofar as they perform the work of that business. They are permanent workers on SHB's grounds and SHB can both insist that they perform their assigned tasks at the proper times and can direct the detail of that performance. Despite the fact that SHB and those members who work for it have a myriad of interconnected relationships, one of those relationships is operation of and working in a business. That connection is most like the relationship between an employer and employee, and should be so treated for tax purposes.
>
> That said, just how any particular claimed deduction should be treated at the corporate level remains to be seen. For example, whether, and to what extent, meal expenses can be deducted is a complex issue of its own; it is one that the district court should resolve in the first instance. It can do so upon remand.

Stahl, 626 F.3d at 527.

The case is now back before this Court. Once again, the parties have filed cross motions for summary judgment. The standard is well established. A district court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Neither party claims any material fact is the subject of a genuine dispute.

PARTIES' POSITIONS

The disagreement between Mr. Stahl and the United States involves

corporate-level deductions. He argues the SHB may deduct the cost of the meals and medical care that it provided to him and his family during 1997, 1998, and 1999 as "ordinary and necessary" business expenses. I.R.C. § 162(a)(1).[2] He bears the burden of establishing deductibility. "'[A]n income tax deduction is a matter of legislative grace[.]'" *Stahl*, 626 F.3d at 522 (quoting *Interstate Transit Lines v. Comm'r*, 319 U.S. 590, 593, 63 S.Ct. 1279, 87 L.Ed. 1607 (1943)). "'[T]he burden of clearly showing the right to the claimed deduction is on the taxpayer.'" *Id.*

The United States argues Mr. Stahl has failed to establish the SHB is entitled to a deduction for its expenditures for food and medical care. Mr. Stahl and his family would have needed food and medical care whether or not they were members of the SHB. This demonstrates, says the United States, that their food and medical care are personal expenses. *See, e.g., Moss v. Comm'r*, 758 F.2d 211, 212 (7th Cir.1985) ("most people would eat lunch even if they didn't work"). The United States observes that § 262(a) of the I.R.C. prohibits a taxpayer from deducting personal expenses. *Id.* ("Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.").

Mr. Stahl denies § 262(a) applies to corporate expenditures. Even if it does, § 262's broad prohibition is subject to exceptions. A corporation may deduct "all the ordinary and necessary expenses paid

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[2]Mr. Stahl is not asking the Court to rule the meals in question are deductible at the "employee" level under I.R.C. § 119.

or incurred during the taxable year in carrying on any trade or business, including . . . a reasonable allowance for salaries or other compensation for personal services actually rendered[.]" I.R.C. § 162(a)(1). Mr. Stahl cites instances in which the Tax Court has authorized a corporation to deduct the medical care and food it provided to its employees. *See, e.g., Waterfall Farms, Inc. v. Comm'r*, T.C. Memo. 2003-327, 2003 WL 22838540 at *7 (U.S. Tax Ct. 2003) (insurance premiums and medical expenses); *Harrison v. Comm'r*, T.C. Memo. 1981-211, 1981 WL 10522 (U.S. Tax Ct. 1981) (groceries).

The United States concedes § 162(a) represents an exception to § 262's broad prohibition against deductions for personal expenses. However, as the United States points out, courts frequently have rejected proposed deductions under § 162. *See, e.g., Moss*, 758 F.2d at 214 (a partner of a law firm was not allowed to deduct the cost of his business lunches); *Dobbe v. Comm'r*, T.C. Memo. 2003-330, 2000 WL 1586383 at *9, *16 (U.S. Tax Ct.2000) (a closely held corporation was not allowed to deduct the grocery expenses of its shareholder-officers), *aff'd* 61 Fed. Appx. 348 (9th Cir.2003); *Hankenson v. Comm'r*, T.C. Memo. 1984-2000, 1984 WL 144455 (U.S. Tax Ct.1984) (a professional corporation was not allowed to deduct the business lunches of its sole shareholder). The United States urges this Court to do likewise. The United States places great weight upon Treasury Regulation 1.162-7(a):

> There may be included among the ordinary and necessary expenses paid or incurred in carrying on any trade or business a reasonable allowance for salaries or other compensation for personal services actually rendered. The

> test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services.

In *Elliotts, Inc. v. Commissioner*, 716 F.2d 1241, 1243 (9th Cir.1983), the Ninth Circuit recognized that the second sentence of § 1.162-7(a) establishes a two-part test for assessing the deductibility of a corporation's compensation payments to a person who is both an employee and a principal shareholder. "First, the amount of compensation must be reasonable; second, the payment must be purely for services, or have a purely compensatory purpose." *O.S.C. & Assocs., Inc. v. Commissioner*, 187 F.3d 1116, 1120 (9th Cir.1999). The Ninth Circuit uses the *Elliotts-O.S.C.* test in order determine whether a putative compensation payment includes a disguised dividend. *LabelGraphics, Inc. v. Commissioner*, 221 F.3d 1091, 1095 (9th Cir.2000) ("This case presents the classic tension between characterization of payments as employee compensation, which is deductible, and characterization of payments as a dividend, which is not deductible."). Although the United States does not allege Mr. Stahl received a disguised dividend from the SHB, the United States argues the *Elliotts-O.S.C.* test applies here.

The second prong of the *Elliotts-O.S.C.* test requires a showing of "compensatory purpose." The United States acknowledges Mr. Stahl is an employee of the SHB, and an employee ordinarily is compensated by his employer for the services he performs. Nevertheless, in the United States' opinion, Mr. Stahl's status as an employee is not enough to demonstrate the SHB's decision to provide food and medical care was motivated by a compensatory purpose. More is required.

According to the United States, Mr. Stahl must show the SHB provided him with food and medical care in order to secure his services on the farm. This he cannot do, says the United States. For one thing, he did not bargain with the SHB to work on its farm in exchange for food and medical care. For another thing, the SHB provides for the needs of each of its members irrespective of his or her ability to work. In the United States' opinion, the preceding circumstances indicate the SHB lacked a compensatory purpose. As the United States views the record, the SHB provided food and medical care in order to fulfill the tenets of Hutterite doctrine.

ANALYSIS

A. Food

There are at least three paths the SHB could follow in order to arrive at a deduction for food expenses under I.R.C. § 162(a). To begin with, the SHB could prove the meals in question are "different from or in excess of that which would have been made for the taxpayer's personal purposes." *Moss*, 758 F.2d at 213 (internal punctuation and citation omitted). In the alternative, the SHB could prove its decision to serve meals to members on the farm was necessary within the meaning of § 162(a). *Harrison*, 1981 WL 10522. Finally, the SHB could prove it provided the meals to Mr. Stahl as "other compensation." I.R.C. § 162(a)(1). These paths will be examined in order.

The first path is closed to the SHB because there is nothing unusual about the meals it provided to its member employees. Mr. Stahl does not deny he and his fellow member employees would have

eaten essentially the same meals whether or not they worked for the SHB. The second path, by contrast, is open to the SHB. As Mr. Stahl points out, the SHB farms approximately 30,000 acres of land. Among other things, the SHB grows potatoes and maintains dairy cattle. While the SHB may not need to retain employees on the farm around the clock in order to grow potatoes, maintaining dairy cattle is another matter. The demands of maintaining dairy cattle are such that it is appropriate and helpful to have employees on the farm around the clock. Employees must be fed. In that sense, providing meals to Mr. Stahl and his family was necessary. *See Welch v. Helvering*, 290 U.S. 111, 113, 54 S.Ct. 8, 8, 78 L.Ed. 212 (1933) (an expense is necessary if it is appropriate and helpful for the development of the business). That leaves the third path. It, too, is open. For years, Mr. Stahl has rendered personal services to the SHB. The only issue is whether the SHB has provided him with food and medical care as compensation for the personal services he has rendered. The United States thinks not; largely because of the nature of the SHB's relationship with its members. It is true the SHB has never offered its members food and medical care in exchange for the work on the farm. It is also true the SHB provides for its members needs whether or not they are able to work. Nevertheless, in this situation, food and medical care serve as compensation. The SHB has created a community that functions largely without wages. In a wage-less community, employee compensation takes different forms than in a wage-based community. Instead of salaries, employees receive housing, food, and medical care. The fact that the SHB has chosen a wage-less

community for religious reasons is irrelevant as long as the items it is claiming as compensation -- *i.e.*, food and medical care -- truly function as compensation in the SHB's community. They do. Mr. Stahl is an employee of the SHB. He works long and hard on its behalf. He does not receive wages for his work. Instead, the SHB provides food and medical care, among other things. He would not be able to perform the services he performs absent these benefits. Under the circumstances, it is reasonable to treat them as a form of "other compensation" within the meaning of § 162(a)(1). Consequently, the SHB is entitled to a business deduction.

B. Medical Expenses

Mr. Stahl alleges the SHB purchased a health plan that covered its members' medical expenses during 1997, 1998, and 1999, and the adult members of the SHB were aware of the plan. He also alleges the SHB's members obtained medical care pursuant to the plan, and the SHB paid for the charges incurred by its members. The United States does not dispute the preceding allegations. Nor does the United States deny the plan is a "health plan" within the meaning Treasury Regulation § 1.106-1. The latter states, "The gross income of an employee does not include contributions which his employer makes to an accident or health plan for compensation (through insurance or otherwise) to the employee for personal injuries or sickness incurred by him, his spouse, or his dependents, as defined in section 152." The significance of § 1.106-1 becomes apparent when one considers 1.162-10(a), which states, "Amounts paid or accrued within the taxable year for . . . a sickness, accident, hospitalization, medical

expense, . . . or similar benefit plan, are deductible under section 162(a) if they are ordinary and necessary expenses of the trade or business." (Emphasis added.) In *Waterfall Farms*, the Tax Court explained, "When payments for medical care are properly excludable from an employee's income because they are made under a 'plan for employees,' they are deductible by the employer as ordinary and necessary business expenses under section 162(a)." 2003 WL 22838540 at *7 (citing Treas. Reg. 1.162-10(a)). The United States does not deny that the preceding rule applies here. Consequently, the SHB may deduct the expense of providing medical care to its member employees.[3]

RULING

The SHB may deduct from its taxable income, pursuant to 26 U.S.C. § 162, the costs of medical care and food that it provided to Mr. Stahl and his family during 1997, 1998, and 1999. As far as food is concerned, the SHB is entitled to a § 162 deduction for either of two reasons. To begin with, the size of the SHB's operation is such that it is necessary for members to live on the farm and to be fed there. In the alternative, the SHB provided meals to Mr. Stahl as compensation for services he actually rendered. As far as medical care is concerned, it is undisputed the SHB purchased a health plan for its members' benefit and paid for any uninsured charges. These benefits are not treated as employee income. Thus, under § 1.162-

[3]Young members of the SHB are dependents of employees. A business that provides medical coverage to the dependents of employees may deduct the expense. *See Waterfall Farms, Inc. v. Comm'r*, 2003 WL 22838540 at *7.

10(a), they are deductible as ordinary and necessary business expenses. Since the disputed food and medical expenses are deductible under § 162, they fall outside the scope of § 262.[4]

IT IS HEREBY ORDERED:

1. The "United States' Motion for Summary Judgment" (**ECF No. 54**) is **denied.**

2. Mr. Stahl's "Motion for Summary Judgment" (**ECF No. 49**) is **granted** subject to the concessions his attorney made at oral argument.

IT IS SO ORDERED. The District Court Executive is hereby directed to file this order, enter judgment accordingly, furnish copies to counsel, and close the case.

DATED this 20th day of March, 2012.

s/Fred Van Sickle
Fred Van Sickle
Senior United States District Judge

[4]At oral argument, Mr. Stahl's attorney conceded a number of items that are listed in the Affidavit of Thomas M. O'Brien (ECF No. 52) are not deductible. Mr. Stahl must submit an amended affidavit that lists only those items which are deductible. In addition, Mr. Stahl must submit a proposed judgment that lists the specific relief to which he is entitled.

In the United States Court of Federal Claims

RECEIVED
CLAIMS SECTION

No. 12-63 T 2012 MAR 20 PM 4:19

(Filed: March 20, 2012)

FILED
MAR 20 2012
U.S. COURT OF FEDERAL CLAIMS

TERRI L. STEFFEN,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

ORDER

Before the court is the Motion of the United States for a More Definite Statement (defendant's Motion or Def.'s Mot.), Docket Number 4, filed March 16, 2012. Defendant moves for a more definite statement pursuant to Rule 12(e) of the Rules of the United States Court of Federal Claims (RCFC) because "[t]he complaint . . . fails to plead the special matters necessary to claim a refund of tax, pursuant to RCFC 9(m)." Def.'s Mot. 1.

RCFC 9(m) states:

> Tax Refund Claim. In pleading a claim for a tax refund, a party must include:
> (1) a copy of the claim for refund, and
> (2) a statement identifying:
> (A) the tax year(s) for which a refund is sought;
> (B) the amount, date, and place of each payment to be refunded;
> (C) the date and place the return was filed, if any;
> (D) the name, address, and identification number (under seal) of the taxpayer(s) appearing on the return;
> (E) the date and place the claim for refund was filed; and
> (F) the identification number (under seal) of each plaintiff, if different from the identification number of the taxpayer.

Christensen
P||P

RCFC 9(m).

Defendant's Motion is GRANTED. On or before Monday, April 16, 2012 plaintiff shall file an amended complaint providing the information identified in defendant's Motion. Plaintiff's amended complaint shall comply with all of the requirements of RCFC 9(m) and, in particular, shall include the following matters required to be included in a claim for a refund of tax:

(1) A copy of the claim for refund as required by RCFC 9(m)(1).

(2) The date and place the claim for refund was filed as required by RCFC 9(m)(2)(E).

(3) The tax year(s) for which plaintiff seeks a refund as required by RCFC 9(m)(2)(A).

(4) The amount, date, and place of each payment to be refunded as required by RCFC 9(m)(2)(B). Any such amount shall be specified with respect to each tax year as to which plaintiff seeks a refund.

IT IS SO ORDERED.

EMILY C. HEWITT
Chief Judge

The Honorable J. Richard Creatura

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

THE VANCOUVER CLINIC, INC., Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Case No. 3:12-cv-05016-JRC ORDER GRANTING THE UNITED STATES' UNOPPOSED MOTION FOR EXTENSION OF TIME TO ANSWER

Having read and considered the United States' unopposed motion, and, for good cause shown, the Court GRANTS the Motion and ORDERS that the United States has an extension of thirty (30) days, or until April 16, 2012, to file its answer or otherwise respond to Plaintiff the Vancouver Clinic, Inc.'s complaint.

DATED this 19th day of March, 2012.

BENJAMIN H. SETTLE
United States District Judge

Lindsay L. Clayton, 202.307.2956
U.S. Department of Justice, Tax Division
P.O. Box 683,Washington, D.C. 20044-0683

Entered on Docket March 12, 2012

Below is a Memorandum Decision of the Court.

Paul B. Snyder
U.S. Bankruptcy Court Judge
(Dated as of Entered on Docket date above)

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

In re: STEVEN R. SMYTHE and MELANIE M. SMYTHE, Debtors.	Case No. 10-49799
STEVEN R. SMYTHE and MELANIE M. SMYTHE, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Adversary No. 11-04077 **MEMORANDUM DECISION ON MOTIONS FOR SUMMARY JUDGMENT**

This matter came before the Court on February 24, 2012, on the cross-motions for summary judgment filed by the United States of America and Steven and Melanie Smythe (Debtors) on the Debtors' complaint to have their federal income tax liabilities for the years 1999 through 2004 discharged. At the conclusion of the hearing, the Court took the matter under advisement.

The Debtors filed a bankruptcy petition under Chapter 7, Title 11 on November 29, 2010. On March 1, 2011, the Debtors filed a complaint to determine whether their federal income tax liabilities for the years 1999 through 2004 are dischargeable. On May 19, 2011, the Internal Revenue Service of the United States (I.R.S.) filed an answer to the complaint conceding that the tax liabilities for 2002,

Below is a Memorandum Decision of the Court.

2003 and 2004 were dischargeable. The I.R.S. contends that the income tax liabilities assessed by the I.R.S. against the Debtors for 1999, 2000 and 2001 are not dischargeable pursuant to §523(a)(1)(B)(i).[1]

The Debtors' federal income tax returns for tax years 1999 and 2000 were due on October 15, 2000, and 2001, respectively, after two extensions from the I.R.S. The Debtors' federal income tax return for tax year 2001 was due on August 15, 2002, after one extension from the I.R.S. The Debtors failed to timely file their federal income taxes returns (Forms 1040). The I.R.S. examined the Debtors to determine their tax liabilities for tax years 1999 through 2001, and on July 2, 2004, the I.R.S. sent notices of deficiency to the Debtors. On December 6, 2004, after the Debtors did not to respond to the I.R.S. notices, the I.R.S. assessed deficiencies on the Debtors, as follows:

I.R.S. Initial 1999 tax obligations (with fees, fines and interest) = $54,896.30;

I.R.S. Initial 2000 tax obligations (with fees, fines and interest) = $55,833.08;

I.R.S. Initial 2001 tax obligations (with fees, fines and interest) = $63,135.17.

On December 21, 2004, the I.R.S. received the Debtors' completed Forms 1040 for tax years 1999, 2000, and 2001. The Debtors claim they filed the Forms 1040 without notice of the I.R.S. tax assessments sent on December 6, 2004. Thereafter, the I.R.S. abated the Debtors' tax obligation for 1999 by $25,525.33 (leaving $29,370.97 owed); for 2000 by $24,356.89 (leaving $31,476.19 owed); and for 2001 by $20,708.13 (leaving $42,427.04 due).

The Debtors allege that Mr. Smythe has been diagnosed with Major Depressive Disorder, Bipolar Disorder, Post Traumatic Stress Disorder (PTSD) and Attention Deficit Disorder (ADD), which may have led to avoidance of timely filing his Forms 1040. The Debtors also allege that Mrs. Smythe relied on Mr. Smythe to file their Forms 1040, and she also has experienced her own medical issues.

On January 13, 2012, the I.R.S. filed a motion for summary judgment, arguing that the Debtors' tax liabilities for the years 1999, 2000, and 2001 are excepted from discharge pursuant to

[1] This Court refers to sections of 11 U.S.C. § 523 throughout, but omits the Title 11 of the United States Code.

Below is a Memorandum Decision of the Court.

§523(a)(1)(B)(i). In response to this motion, the Debtors filed a motion to shorten time to hear their cross-motion for summary judgment. The motion to shorten time contained as an exhibit the Debtors' motion for summary judgment. In the motion, the Debtors represented that they would not file any further pleadings on summary judgment beyond their responsive memorandum to the I.R.S.'s motion, which was subsequently filed on February 9, 2012. The I.R.S. opposed the shortening time. On February 10, 2012, the Court conducted a telephonic hearing, at which time the Debtors reiterated that their summary judgment motion would be based solely on their memorandum in response to the I.R.S.'s summary judgment motion. The Court determined that both summary judgment motions would be heard on February 24, 2012.

A party seeking summary judgment bears the burden of demonstrating that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The nonmoving party may not rest upon mere allegations or denials of his or her pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

The sole issue on the parties' summary judgment motions is whether the Debtors' income tax debts are excepted from discharge pursuant to § 523(a)(1)(B)(i). Section 523 provides in relevant part as follows:

> (a) A discharge under section 727 . . . 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 . . . .

Therefore, § 523 excludes from the Bankruptcy Code's discharge provisions a tax liability if "(1) the tax underlying the tax liability debt required a return; and (2) the debtor failed to file the required return." Cal. Franchise Tax Bd. v. Jackson (In re Jackson) 184 F.3d 1046, 1050 (9th Cir. 1999). Exceptions to discharge are to be narrowly construed, and the party seeking to establish an exception to the discharge of the debt bears the burden of proof. Bellco First Fed. Credit Union v. Kaspar, 125 F.3d 1358, 1059, 1361 (10th Cir.1997).

Below is a Memorandum Decision of the Court.

The narrow issue before the Court is whether the Debtors' tax debts for 1999, 2000, and 2001 are nondischargeable under § 523(a)(1)(B)(i) when the Debtors' Forms 1040 were not filed until after the I.R.S. had made assessments for these tax years.

The I.R.S. first argues that the Debtors' tax debts are nondischargeable because the debts are based on the I.R.S. assessments, and not on the Debtors' Forms 1040, so that the assessments are tax debts for which no returns were filed or given under §523(a)(1)(B)(i). Under this argument, although the Debtors filed their Forms 1040 on December 21, 2004, the debts had already arisen under the earlier I.R.S. assessments made on December 6, 2004. The I.R.S. concludes that since the tax assessments were established before the Forms 1040 were filed, they are debts for which returns were not filed or given and, consequently, are nondischargeable under §523(a)(1)(B)(i).

As support for this position, the I.R.S. cites the case of Wogoman v. I.R.S. (In re Wogoman), 2011 WL 3652281 (Bankr. D. Colo. Aug. 19, 2011). In Wogoman, the dispute was over a similar situation, where the debtors did not initially file their taxes by the deadline, the I.R.S. assessed a deficiency, and the debtors then filed their Form 1040. Wogoman, 2011 WL 3652281, at *3. The court in Wogoman recognized that the debt arose based on the I.R.S.'s examination and assessment, and not on the debtors' post-assessment Form 1040. Thus, the court held that the tax liability, which was established well before the Form 1040 was filed, was nondischargeable under § 523(a)(1)(B)(i). Based on this determination, the court further held that it did not matter whether the post-assessment Form 1040 met the definition of a "return" under §523(a)(1)(B)(i). Wogoman, 2011 WL 3652281, at * 5-6.

The Debtors did not address this particular argument, but countered that the issue here is whether the Debtors' post-assessment Forms 1040 qualify as "returns" under § 523(a)(1)(B)(i) so as not to run afoul of the failure-to-file-return rule. The Debtors allege that in order to make this determination, the Court must look to case law developed prior to enactment of the Bankruptcy Abuse

Below is a Memorandum Decision of the Court.

Prevention and Consumer Protection Act (BAPCPA) of 2005,[2] which defines when a post-assessment return can qualify as a "return" under § 523(a)(1)(B).

The Court begins with "'the language itself [and] the specific context in which that language is used.'" McNeill v. U.S., ___U.S.___, 131 S. Ct. 2218, 2221 (2011) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)). The Bankruptcy Code defines "debt" as "liability on a claim." §101(12). A "claim" means a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." §101(5)(A). A "right to payment" is an "enforceable obligation." Cohen v. De La Cruz (In re Cohen), 523 U.S. 213, 218 (1998). In tax law, a tax assessment "is the official recording of liability that triggers levy and collection efforts." Hibbs v. Winn, 542 U.S. 88, 101 (2004).

Given the plain language reading of "debt" in the Bankruptcy Code and the holding in Wogoman, the Court agrees with the I.R.S.'s argument. When the I.R.S. made tax assessments against the Debtors, the Debtors' tax obligations became enforceable and the I.R.S. could pursue its claims; therefore, the assessments created "debt[s]" as defined in the Bankruptcy Code. Although the Debtors subsequently filed Forms 1040, the tax debts had already been established by the I.R.S. assessments. The tax debts, therefore, are debts "for which no return was filed," and are nondischargeable under § 523(a)(1)(B)(i) In light of this determination, the Court agrees with Wogoman that the issue of whether the Debtors' post-assessment Forms 1040 qualify as "return[s]" under §523(a)(1)(B)(i) is irrelevant.

Alternatively, the I.R.S. argues that even if this Court assumes the debts did not arise from the assessments, but rather from the Debtors' post-assessment Forms 1040, the debts do not meet the requirements of a "return" in §523(a)(*).[3] In 2005, Congress added to this section the definition of

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[2] The Pre-BAPCPA case law allows a document to qualify as a "return" if the document: (1) purports to be a return; (2) is executed under penalty of perjury; (3) contains sufficient data to allow calculation of tax; and (4) represents an honest and reasonable attempt to satisfy the requirements of the tax law. United States v, Hatton (In re Hatton), 220 F.3d 1057, 1060 (9th Cir. 2000).

[3] The Court uses 523(a)(*) when referring to the flush language of §523 as a matter of convenience.

"return," as follows:

> 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.

§ 523(a)(*).

Thus, a "return" can be either (1) a return that satisfies the requirements of applicable nonbankruptcy law, including applicable filing requirements; or (2) a return under 26 U.S.C. §6020(a). A "return," however, cannot be a return under 26 U.S.C. 6020(b), for §523 purposes.

The Internal Revenue Code provides, "If any person shall fail to make a return required by this title or by regulations . . . 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 . . . ." 26 U.S.C. § 6020(a). Neither party contends that the Debtors' post-assessment Forms 1040 would qualify as § 6020(a) returns. The Internal Revenue Code further provides, "If any person fails to make any return required by any internal revenue law or regulation . . . at the time prescribed therefore, 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). Neither party contends that the Debtors' post-assessment Forms 1040 would qualify as substitute returns, so this section also does not apply.

The only question, then, is whether the Debtors' Forms 1040, submitted after the I.R.S. made assessments, satisfy the requirements of applicable nonbankruptcy law, including applicable filing requirements.

The Ninth Circuit Court of Appeals has not addressed this issue. The Fifth Circuit Court of Appeals (Fifth Circuit), however, recently held that a debtor's failure to file income taxes by April 15 of each year (or by date of approved extensions), makes a Form 1040 not a "return" under § 523(a)(*) because the filing does not meet the filing requirements. McCoy v. Miss. State Tax Comm'n, (In re

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McCoy), 666 F.3d 924, 932 (5th Cir. 2012). The Fifth Circuit holding appears to indicate that if a debtor files his or her return even one day late, and the filing does not fall under the "safe harbor" provision of §6020(a), the late-filed Form 1040 does not comply with the "applicable filing requirements" and is not dischargeable. See McCoy 666 F.3d at 932.

The I.R.S. proposes a more moderate position than the Fifth Circuit. Under the I.R.S.'s position, a Form 1040 filed after the filing deadline could still satisfy the "applicable filing requirements" as long as it was filed pre-assessment. The I.R.S. asserts that its position is consistent with promoting and reinforcing our self-filing requirement, which is the foundation of our taxation scheme. See Commissioner v. Lane-Wells, Co., 321 U.S. 219, 223 (1944). The Court favors the I.R.S.'s position.

The Court, however, need not resolve the differences between the Fifth Circuit's holding and the I.R.S.'s position. In this case, the Debtors clearly failed to file their Forms 1040 (1) by the applicable deadlines, and (2) before the I.R.S. made assessments. Under either the Fifth Circuit's holding, or the position advocated by the I.R.S., the Debtors' Forms 1040 do not satisfy the "applicable filing requirements," and thus are not "returns" under § 523(a)(*).

The Court has determined that the tax assessments made by the I.R.S, and not the post-assessment Forms 1040 filed by the Debtors, are the basis of the Debtors' federal income tax debts under § 523(a)(1)(B)(i). Alternatively, the Court has determined that the Forms 1040 do not qualify as "returns" under § 523(a)(*). Under both analyses, the Debtors' federal income tax debts for tax years 1999, 2000, and 2001 are nondischargeable pursuant to § 523(a)(1)(B)(i). Accordingly, the Court need not address the Debtors' argument under pre-BAPCPA law. The Court grants the I.R.S.'s motion for summary judgment and denies the Debtors' motion for summary judgment.

/ / / End of Memorandum Decision / / /