



U.S. Department of Justice

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March 26, 2015

Molly C. Dwyer, Esquire
Clerk, U.S. Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Martin Smith v. United States Internal Revenue Service*
(9th Cir. – No. 14-15857)

Dear Ms. Dwyer:

I write to advise the Court of the recent decision in *Fahey v. Mass. Dep't of Revenue (In re Fahey)*, Nos.14–1328, 14–1350, 14–9002, 14–9003, ___ F.3d ___, 2015 WL 677033 (1st Cir. Feb. 18, 2015), which, like this case, involved the dischargeability of tax debts for which the debtors filed untimely tax forms after the taxing authority had independently assessed their liabilities.

In *Fahey*, a case involving Massachusetts tax debts, the First Circuit held that, under Bankruptcy Code § 523(a), a statutory due date for a tax return is an “applicable filing requirement.” Under this reasoning, a late-filed tax form can never be a “return” for purposes of obtaining a discharge under § 523(a)(1)(B)(i). The First Circuit’s holding is consistent with the reasoning of *In re McCoy*, 666 F.3d 924 (5th Cir. 2012), discussed at pages 59-65 of our brief, and of *In re Mallo*, 774 F.3d 1313 (10th Cir. 2014), *cert. petition pending* (S. Ct. – No. 14-1072), of which we advised the Court on January 7, 2015.

Judge Thompson filed a dissenting opinion in *Fahey*, in which she observed, *inter alia*, that the majority’s reading is inconsistent with other aspects of the statute, as we also explain in our brief (pp. 61-63). Judge Thompson, however, concluded that the taxing authority’s treatment of a

filing should be dispositive of its status as a “return,” a position we have not advanced.

As explained in our brief, we suggest the better analysis is that the tax debt at issue here is not “a debt” “for which a return” “was filed” within the meaning of 11 U.S.C. § 523(a)(1)(B)(i), or that the belated tax forms filed by the debtor are not “returns” for the reasons articulated by this Court in *United States v. Hatton*, 220 F.3d 1057, 1061 (9th Cir. 2000). Under either of the approaches we suggest or the reasoning of *Fahey*, however, the District Court’s order in this case should be affirmed.

Please circulate this letter and the attached opinion to the panel.

Sincerely yours,

/s/ JULIE C. AVETTA

JULIE CIAMPORCERO AVETTA

Attorney

Appellate Section

Attachment

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2015, I electronically filed the foregoing letter with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ JULIE C. AVETTA
JULIE CIAMPORCERO AVETTA
Attorney