

Case No. 3:15-cv-01448-VC
(Related Case No. 3:15-cv-02028-VC)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

6	In re	)	Bankruptcy Case No. 12-11995
7	KIRK LINDSAY WILSON,	)	Chapter 7
8	Debtor.)	
9	<hr/>		
10	KIRK LINDSAY WILSON,	)	Adversary No. 14-01106-AJ
11	Plaintiff,)	
12	v.)	
13	UNITED STATES OF AMERICA, and its)	
14	agency, INTERNAL REVENUE SERVICE,)	
15	Defendant.)	
	<hr/>		

This is an appeal from a Final Order of the United States Bankruptcy Court for the Northern District of California, the Honorable Alan Jaroslovsky presiding, entered on March 12, 2015, granting, in part, Appellee Kirk Lindsay Wilson’s Motion for Summary Judgment in adversary proceeding case number 14-01106-AJ.

APPENDIX TO APPELLANT UNITED STATES OF AMERICA’S OPENING BRIEF

MELINDA HAAG (CABN 132612)
United States Attorney
THOMAS MOORE (ASBN 4305-078T)
Chief, Tax Division
JOSE A. OLIVERA (CABN 279741)
Assistant United States Attorney
450 Golden Gate Avenue, Box 36055
San Francisco, California 94102-3495
Telephone: (415) 436-6888
Facsimile: (415) 436-7009
E-mail: jose.olivera@usdoj.gov
Attorneys for the United States of America

TABLE OF APPENDICIES

Appendice Attachment Number	Docket Number/ Record on Appeal	Description
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10	5-35	Discharge Order

Dated: July 15, 2015.

Respectfully submitted,

MELINDA HAAG
United States Attorney

s/ Jose A. Olivera
JOSE A. OLIVERA
Assistant United States Attorney

1 CRAIG K. WELCH # 078546
2 LAW OFFICE OF CRAIG K. WELCH
3 809 Petaluma Boulevard North
4 Petaluma, Ca. 94952
5 Telephone (707) 782-1790
6 Facsimile (707) 782-1795
7 Email: cwelch@craigwelchlegal.com

8 Attorneys for Debtor,
9 Kirk Lindsay Wilson

10 UNITED STATES BANKRUPTCY COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 In re

Case No. 12-11995
Chapter 7

13 KIRK LINDSAY WILSON

A.P. No.

14 Debtor

15 KIRK LINDSAY WILSON,

16 Plaintiff,

17 v.

18 UNITED STATES OF AMERICA, and its
19 agency, INTERNAL REVENUE SERVICE.

20
21 **COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT,
22 DECLARATORY RELIEF, DAMAGES AND SANCTIONS**

23 Plaintiff, Kirk Lindsay Wilson, the debtor in the above-captioned Chapter 7 bankruptcy
24 case (hereinafter the “Debtor”), alleges as follows:

25 **JURISDICTION**

26
27 1. This Court has jurisdiction as to the claims for relief asserted herein under 28 U.S.C.
28 §§157 and 1334, and 26 USCS §7433(e). Venue is proper pursuant to 28 U.S.C. §1409.

1 2. The Debtor consent to entry of a final order or judgment by the Bankruptcy Court. This
2 adversary proceeding is a core proceeding under 28 U.S.C. §157(b)(2)(I & O), and is brought
3 pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure.
4

5 **GENERAL ALLEGATIONS**

6 3. On March 21, 2011, the Debtor filed his personal federal tax return for the tax period
7 ending on December 31, 2008.

8 4. On July 24, 2012, this bankruptcy case was commenced by the Debtor by the filing of a
9 voluntary petition under Chapter 7 of Title 11 of the United States Code.
10

11 5. On November 11, 2012, the Court entered its order entitled “Discharge of Debtor”
12 (hereinafter the “Discharge Order”) and the Debtor was discharged from all dischargeable
13 debts under sections 524 and 727 of Title 11, United States Code.

14 6. The Department of Treasury, Internal Revenue Service, an agency of the United States
15 Government (hereinafter the “IRS”) received notice of the bankruptcy and filed a proof of
16 claim on February 5, 2012, setting forth a secured claim as of the petition date in the amount of
17 \$91,723.15 for the tax period ending December 31, 2008. The collateral is described as “all of
18 the debtor’s right, title and interest to property.”
19

20 7. The IRS proof of claim states that the tax due is for the tax period ending December 31,
21 2008 and that the past due tax is \$55,718.50, penalty to the petition date is \$27,057.36, and
22 interest to the petition date is \$8,947.29. A true and correct copy of the proof of claim is
23 attached hereto and incorporated by this reference.
24

25 8. On February 11, 2014, the Chapter 7 Trustee, Timothy W. Hoffman, filed his “Notice
26 of Trustee’s Final Report and Applications for Compensation and Deadline to Object”
27 (hereinafter “Final Report”). The notice states that objections to the report must be filed within
28

1 20 days after the mailing of the notice. The IRS was duly served with a copy of this notice.

2 9. The Final Report shows a balance available for payment of pre-petition priority claims,
3 including all priority tax claims, of \$222,689.08. The only pre-petition priority claim for which
4 payment is proposed is the priority claim of the IRS in the amount of \$63,484.12.
5

6 10. The Final Report does not propose to pay the secured claim of the IRS in full.

7 11. No objections were filed to the Final Report.

8 12. The IRS received notice of the hearing and did not object to the Final Report.

9 13. The Trustee disbursed the funds as set forth in the Final Report and the pre-petition
10 priority claim of the IRS was paid in full.
11

12 14. The remainder of the IRS claim, \$27,057.36, (hereinafter the "Penalty Claim")
13 consisted of pre-petition penalties for the late filing of the 2008 tax return and were not in
14 compensation for actual pecuniary loss, and as a result the Penalty Claim was subordinated to
15 the claim of general unsecured creditors and was not paid by the Trustee.
16

17 15. If the Penalty Claim had not been subordinated, it would have been paid in full because
18 there were sufficient funds on hand to pay all pre-petition priority claims in full, including all
19 tax claims entitled to priority pursuant to 11 U.S.C. §507(a)(8).
20

21 **FIRST CLAIM FOR RELIEF**
(Dischargeability of Tax Penalty Claim)

22 16. All of the prior allegations of this Complaint are incorporated into this Claim for Relief.

23 17. The Penalty Claim is not in compensation for an actual pecuniary loss and stems from
24 transactions that occurred more than three years prior to the time the Debtor filed his
25 bankruptcy petition and is dischargeable pursuant to 11 U.S.C. §523(a)(7)(B).
26

27 18. The Penalty Claim was discharged as provided in 11 U.S.C. §524 by the entry of the
28 Debtor's Discharge.

1 19. All non-dischargeable penalties, taxes, and interest due to the IRS arising from the 2008
2 tax year were paid by the Chapter 7 Trustee.

3 20. An actual and subsisting controversy exists by and between the IRS and the Debtor in
4 that the Debtor contends that the Penalty Claim has been discharged, whereas the IRS contends
5 that the Penalty Claim has not been discharged. The Debtor seeks a declaration of the
6 respective rights and liabilities of the parties, and a declaration by the Court that the Penalty
7 Claim has been discharged and that there are no pre-petition taxes, penalties, or interest arising
8 from the Debtor’s 2008 tax year that remain unpaid and have not been discharged.
9
10

11 **SECOND CLAIM FOR RELIEF**
12 **(Violation of Discharge - Recovery of Damages and Sanctions)**

13 21. All of the prior allegations of this Complaint are incorporated into this Claim for Relief.

14 22. On April 21, 2014, the Franchise Tax Board of the State of California notified the
15 Debtor that it had “intercepted” the Debtor’s state income tax refund in the amount of
16 \$1,513.00 at the request of the IRS in partial payment of the Penalty Claim.

17 23. On June 25, 2014, counsel for the Debtor spoke by telephone to Gerald Angeles,
18 Bankruptcy Specialist for the IRS, and the person who signed the IRS proof of claim, to
19 request the return of the \$1,513.00 taken by the IRS in violation of the provisions of 11 U.S.C.
20 §524.
21

22 24. Despite this request, the IRS refused to return the seized funds.

23 25. On June 27, 2014, after speaking with Mr. Angeles’ supervisor, Debtor’s counsel sent a
24 letter to Mr. Angeles explaining that the Penalty Claim had been discharged and demanding a
25 return of the \$1,513.00 seized by the IRS in violation of the discharge injunction.

26 26. The IRS again refused to return the seized funds, and then on July 21, 2014, without
27 first obtaining a declaration from the Court as to whether the claim was or was not discharged,
28

1 the IRS sent a notice of its intent to levy on the Debtor's future social security benefits to pay
2 the discharged Penalty Claim.

3
4 27. The Debtor is informed and believes that the IRS intends to levy on his future social
5 security benefits to collect the discharged tax penalties with interest on those penalties and as a
6 result, the Debtor is uncertain how he will be able to pay his future living expenses and the
7 Debtor has been subjected to a great deal of emotional stress.

8
9 28. The IRS has intentionally violated the Discharge Order by seizing of the \$1,513.00 tax
10 refund, threatening to levy on the Debtor's future social security benefits, and otherwise
11 attempting to collect pre-petition taxes, penalties and interest from the Debtor which have been
12 paid or discharged.

13
14 29. As a direct result of the IRS violation of the Discharge Order, the Debtor has been
15 damaged in the amount of \$1,513.00, plus interest thereon at the legal rate, and the Debtor will
16 continue to be damaged by any future levies.

17
18 30. In doing the things heretofore alleged, the IRS acted intentionally and knowingly and
19 with intentional disregard for the Discharge Order entered by the Court.

20
21 31. As a result of the actions of the IRS as heretofore alleged, the Debtor has incurred and
22 will continue to incur attorneys fees and costs and seeks recovery of reasonable costs of
23 litigation pursuant to 26 U.S.C. §7430.

24 PRAYER

25 WHEREFORE, Debtor seeks judgment as follows:

- 26 1. For a declaration that the Penalty Claim has been discharged and that there are
27 no pre-petition taxes, penalties, or interest that have not been paid or
28 discharged.

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2. For actual damages in the amount of \$1,513.00, plus such other sums as may be seized by the IRS prior to entry of judgment in this matter, together with interest thereon at the legal rate.
3. For reasonable costs and attorneys fees incurred in connection with this adversary proceeding.
4. For monetary sanctions for intentional violation of the Discharge injunction in an amount to be determined by the Court

Dated: July 30, 2014

Law Office of Craig K. Welch

By/s/Craig K. Welch
Craig K. Welch, SBN 078546
Attorney for Debtor.

UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF CALIFORNIA		PROOF OF CLAIM
Name of Debtor: KIRK LINDSAY WILSON		Case Number: 12-11995
NOTE: Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.		
Name of Creditor (the person or other entity to whom the debtor owes money or property): Department of the Treasury - Internal Revenue Service		COURT USE ONLY
Name and address where notices should be sent: Internal Revenue Service P.O. Box 7346 Philadelphia, PA 19101-7346		<input type="checkbox"/> Check this box if this claim amends a previously filed claim. Court Claim Number: (If known) Filed on: _____
Telephone number: 1-800-973-0424 email: Creditor Number: 12776131		
Name and address where payment should be sent (if different from above): Internal Revenue Service P.O. Box 7317 Philadelphia, PA 19101-7317		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.
Telephone Number: 1-800-973-0424 email:		
1. Amount of Claim as of Date Case Filed: \$ 91,723.15 If all or part of the claim is secured, complete item 4. If all or part of the claim is entitled to priority, complete item 5. <input checked="" type="checkbox"/> Check this box if the claim includes interest or other charges in addition to the principal amount of claim. Attach a statement that itemizes interest or charges.		
2. Basis for Claim: Taxes (See instruction #2)		
3. Last four digits of any number by which creditor identifies debtor: See Attachment	3a. Debtor may have scheduled account as: (See instruction #3a)	3b. Uniform Claim Identifier (optional): (See instruction #3b)
4. Secured Claim (See instruction #4) Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.		Amount of arrearage and other charges, as of the time case filed, included in secured claim, if any: \$ 91,723.15
Nature of property or right of setoff: <input checked="" type="checkbox"/> Real Estate <input checked="" type="checkbox"/> Motor Vehicle <input checked="" type="checkbox"/> Other Describe: *All of debtor(s) right, title and interest to property - 26 U.S.C. §6321		Basis for perfection: See Attachment
Value of Property: \$ _____ Annual Interest Rate 3 % <input type="checkbox"/> fixed or <input checked="" type="checkbox"/> variable (when case was filed)		Amount of Secured Claim: \$ 91,723.15 Amount Unsecured: \$ _____
5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.		
<input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).	<input type="checkbox"/> Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier - 11U.S.C. §507 (a)(4).	<input type="checkbox"/> Contributions to an employee benefit plan -11 U.S.C. §507 (a)(5). Amount entitled to priority: \$ _____
<input type="checkbox"/> Up to \$2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. §507 (a)(7).	<input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. §507 (a)(8).	<input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. §507 (a)(____).
*Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.		
6. Credits. The claims of 4-2011065-Deb#15911 Filed 06/06/15 Entered 06/07/15 10:35:55 Page 13 of 3		

7. Documents: Attach are redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, security agreements, or, in the case of a claim based on an open-end or revolving consumer credit agreement, a statement providing the information required by FRBP 3001(c)(3)(A). If the claim is secured, box 4 has been completed, and redacted copies of documents providing evidence of perfection of a security interest are attached. If the claim is secured by the debtor's principal residence, the Mortgage Proof of Claim Attachment is being filed with this claim. (See instruction #7, and the definition of "redacted".)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

- I am the creditor.
- I am the creditor's authorized agent.
- I am the trustee, or the debtor, or their authorized agent. (See Bankruptcy Rule 3004.)
- I am a guarantor, surety, indorsor, or other codebtor. (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print name: GERALD ANGELES
Title: BANKRUPTCY SPECIALIST
Company: Internal Revenue Service

/s/ GERALD ANGELES 12/04/2012
(Signature) (Date)

Address and telephone number (if different from notice address above):

Internal Revenue Service
Insolvency Group 2
1301 Clay St, M/S 1400S
Oakland, CA 94612

Telephone number: (510) 637-2520

Email:

Proof of Claim for Internal Revenue Taxes



Form 10
Attachment

Department of the Treasury/Internal Revenue Service

In the Matter of: KIRK LINDSAY WILSON
266 WASHINGTON COURT
SEBASTOPOL, CA 95472

Case Number
12-11995

Type of Bankruptcy Case
CHAPTER 7A

Date of Petition
07/24/2012

The United States has not identified a right of setoff or counterclaim. However, this determination is based on available data and is not intended to waive any right to setoff against this claim debts owed to this debtor by this or any other federal agency. All rights of setoff are preserved and will be asserted to the extent lawful.

Secured Claims (Notices of Federal tax lien filed under internal revenue laws before petition date)

<i>Taxpayer ID Number</i>	<i>Kind of Tax</i>	<i>Tax Period</i>	<i>Date Tax Assessed</i>	<i>Tax Due</i>	<i>Penalty to Petition Date</i>	<i>Interest to Petition Date</i>	<i>Notice of Tax Lien Filed: Date Office Location</i>	
XXX-XX-7872	INCOME	12/31/2008	03/21/2011	\$55,718.50	\$27,057.36	\$8,947.29	01/18/2012	SONOMA COUNTY

Total Amount of Secured Claims:

\$91,723.15

MELINDA HAAG (CABN 132612)
United States Attorney
THOMAS MOORE (ALBN 4305-078T)
Chief, Tax Division
MICHAEL G. PITMAN (DCBN 484164)
Assistant United States Attorney, Tax Division
450 Golden Gate Ave., Box 36055
San Francisco, CA 94102
Telephone: (415) 436-6475
Facsimile: (415) 436-7009
E-Mail: michael.pitman@usdoj.gov

Attorneys for the United States of America

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SANTA ROSA DIVISION

In re:

KIRK LINDSAY WILSON,
Debtor.

Case No.: 12-11995

Chapter 7

KIRK LINDSAY WILSON,
Plaintiff,

Adversary No.: 14-01106

Honorable Alan Jaroslovsky

v.

UNITED STATES' ANSWER

UNITED STATES OF AMERICA, and its
agency, INTERNAL REVENUE SERVICE,
Defendant.

Defendant United States of America, on behalf of its agency, the Internal Revenue Service (“IRS”), by and through its undersigned attorneys, in answer to Kirk Lindsay Wilson’s (“Debtor” or “Plaintiff”) Complaint to Determine Dischargeability of Debt, Declaratory Relief, Damages and Sanctions, filed on July 30, 2014 (Doc. # 1), admits, denies, and alleges as follows:

//

JURISDICTION AND VENUE

- 1. Admits.
- 2. In so much as an answer is necessary, admits.

GENERAL ALLEGATIONS

3. Denies. Debtor filed his personal federal tax return for the tax period ending on December 31, 2008, on February 8, 2011.

4. Admits. Debtor filed a Chapter 7 No Asset bankruptcy on July 24, 2012, which was converted to a Chapter 7 Asset bankruptcy on December 3, 2012, after the Bankruptcy Trustee discovered dividends in the estate.

5. The docket for Bankruptcy Case No. 12-11995 indicates that the court entered Debtor's Chapter 7 discharge on November 6, 2012.

6. Admits. A secured tax claim of \$91,723.15 for the 2008 tax year was filed based on a Notice of Federal Tax Lien recorded on January 18, 2012.

7. Admits.

8. Admits.

9. Admits.

10. Admits.

11. Admits.

12. Admits.

13. Denies. The Chapter 7 Trustee paid the IRS Proof of Claim a partial amount of \$63,484.12 on March 24, 2014. A balance due was left on the IRS Proof of Claim \$28,289.03. The penalty portion on the IRS proof of claim was \$27,057.36.

14. Denies. Non-Pecuniary Loss Penalties are non-dischargeable within the three year rule. Pursuant to 11 U.S.C. § 523(a)(7), Exceptions to Discharge, a non-pecuniary lose penalty (a punitive penalty) relating to a tax is non-dischargeable if it relates to a tax that is non-dischargeable under 11 U.S.C. § 523(a)(1), and if the transaction or event that gave rise to the penalty occurred within the three years before the bankruptcy was filed.

15. Denies for lack of knowledge or information.

FIRST CLAIM FOR RELIEF
(Dischargeability of Tax Penalty Claim)

16. Defendant incorporates each and every response of the General Allegations into this First Claim for Relief.

17. Denies. The Penalty Claim occurred within the three years prior to the Debtor filing his bankruptcy petition and is not dischargeable. The Debtor filed an extension to file his 2008 tax return until October 15, 2009. The three year criteria for categorizing a tax year as priority was met because the Debtor filed bankruptcy on July 24, 2012, which falls between the three years when the 2008 tax return with extension was due, October 15, 2009, through October 15, 2012. Furthermore, the Debtor's 2008 tax return was actually not filed until February 8, 2011.

18. Denies. The Penalty Claim was not discharged with the Debtor's discharge because it was incurred within the three years prior to the Debtor filing his bankruptcy petition and is not dischargeable.

19. Denies. The Chapter 7 Trustee only partially paid the IRS Proof of Claim. The total IRS Proof of Claim was \$91,723.15; the Chapter Trustee paid a partial amount of \$63,484.12, leaving a balance due on the Proof of Claim of \$28,239.03.

20. In so much as an answer is necessary, denies.

SECOND CLAIM FOR RELIEF
(Violation of Discharge – Recovery of Damages and Sanctions)

21. Defendant incorporates each and every prior response of this Complaint.

22. Denies for lack of knowledge or information.

23. Denies for lack of knowledge or information.

24. Denies for lack of knowledge or information.

25. Denies for lack of knowledge or information.

26. Denies for lack of knowledge or information.

27. Denies for lack of knowledge or information.

28. Denies.

1 29. Denies for lack of knowledge or information.

2 30. Denies.

3 31. Denies.

4 PRAYER

5 WHEREFORE, the United States prays:

6 1. That the relief requested by the Debtor against Defendant be denied, except as admitted
7 herein; and

8 2. That the Court grant such other relief as it deems just and proper.

9 Respectfully submitted this 2th day of September, 2014,

10 MELINDA HAAG
11 United States Attorney

12 s/ Michael G. Pitman
13 MICHAEL G. PITMAN
14 Assistant United States Attorney, Tax Division

15 Attorneys for the United States of America
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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing UNITED STATES' ANSWER has been made this 9th day of September, 2014, by placing copies in the United States Mail addressed to the following:

Craig K. Welch, Esq
The Law Office of Craig K. Welch
809 Petaluma Boulevard North
Petaluma, CA 94952
(707) 782-1790
Email: cwelch@craighwelchlegal.com

s/ Michael G. Pitman
MICHAEL G. PITMAN
Assistant United States Attorney, Tax Division

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1 CRAIG K. WELCH # 078546
2 LAW OFFICE OF CRAIG K. WELCH
3 809 Petaluma Boulevard North
4 Petaluma, Ca. 94952
5 Telephone (707) 782-1790
6 Facsimile (707) 782-1795
7 Email: cwelch@craigwelchlegal.com

8 Attorneys for Debtor,
9 Kirk Lindsay Wilson

10 UNITED STATES BANKRUPTCY COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 In re

13 KIRK LINDSAY WILSON

14 Debtor

15 KIRK LINDSAY WILSON,

16 Plaintiff,

17 v.

18 UNITED STATES OF AMERICA, and its
19 agency, INTERNAL REVENUE SERVICE.

Case No. 12-11995 -AJ
Chapter 7

A.P. No 14-01106 -AJ

Date: February 20, 2015
Time: 9:00 a.m.
Place: 99 South E Street
Santa Rosa, Ca. 95404

20 **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

21 **Summary of the Case**

22 This adversary proceeding arose because the Internal Revenue Service, an agency of the
23 United States government (“IRS”) is collecting tax penalties from the discharged Debtor with
24 respect to transactions that occurred more than three years before this bankruptcy case was filed.
25

26 The IRS contends that these tax penalties were not discharged. The Debtor contends that the
27 penalties were discharged pursuant to the provisions of 11 U.S.C. §523(a)(7)(B).
28

Issues

1
2 1. Are the 2008 tax penalties discharged because they were imposed with respect to
3 a transaction or event that occurred more than three years before the bankruptcy was filed?
4

5 2. Is there any amount due to the IRS from the Debtor for 2008 tax year which has
6 not been paid or discharged?

7 3. Did the IRS violate the Debtor’s discharge entitling the Debtor to recovery of
8 damages, including the funds seized by the IRS in violation of the discharge and attorneys fees
9 and costs?

10
11 3. Is the Debtor entitled to recover his attorneys fees and costs pursuant to
12 26 U.S.C. §7430?

Undisputed Facts

13
14 1. On July 24, 2012, this bankruptcy case was commenced by the Debtor by the
15 filing of a voluntary petition under Chapter 7 of Title 11 of the United States Code. [“Chapter 7
16 Voluntary Petition”, filed July 24, 2012 in Case No. 12-11995-AJ as docket # 1.]
17

18 2. The Debtor’s tax return for the 2008 tax year was first due on April 15, 2009, but
19 the Debtor obtained an extension of time to file until October 15, 2009. [“United States Answer”
20 paragraph 17, filed September 9, 2014 as docket #5.]
21

22 3. On February 8, 2011, the Debtor filed his personal federal tax return for the tax
23 period ending on December 31, 2008. [“United States’ Answer”, paragraph 3, filed September 9,
24 2014 as docket #5.]

25 4. On November 11, 2012, the Court entered its order entitled “Discharge of Debtor”
26 (hereinafter the “Discharge Order”) and the Debtor was discharged from all dischargeable debts
27 under sections 524 and 727 of Title 11, United States Code. [Exhibit 1 to “Declaration of Craig
28

1 K. Welch”; “Order Discharging Debtor”, filed November 6, 2012 docket #24.]

2 5. On December 12, 2012, the IRS filed a proof of claim in this bankruptcy case,
3 setting forth a secured claim as of the petition date in the amount of \$91,723.15 for the tax period
4 ending December 31, 2008. The collateral is described in the proof of claim as “all of the
5 debtor’s right, title and interest to property.” [Exhibit 2 to Declaration of Craig K. Welch”;
6 “Proof of Claim” filed December 12, 2012 as claim no. 5-1.]

7 6. The IRS proof of claim states that the tax due is for the tax period ending
8 December 31, 2008 and that the past due tax is \$55,718.50, penalty to the petition date is
9 \$27,057.36, and interest to the petition date is \$8,947.29. [“Proof of Claim” filed December 12,
10 2012 as claim no. 5-1; Exhibit 2 to Declaration of Craig K. Welch”.]

11 7. The penalties claimed in the IRS proof of claim are non-pecuniary loss penalties
12 (punitive penalties). [“United States’ Response to Debtor Kirk Lindsay Wilson’s First Request
13 for Admissions”, Request No. 9, Exhibit 3 to Declaration of Craig K. Welch”.]

14 8. The penalties claimed in the IRS proof of claim are imposed with respect to
15 taxable transactions that occurred in 2008. [“United States’ Response to Debtor Kirk Lindsay
16 Wilson’s First Request for Admissions”, Request No. 10, Exhibit 3 to Declaration of Craig K.
17 Welch”.]

18 9. The Chapter 7 Trustee paid \$63,484.12 to the IRS on March 24, 2014. [“United
19 States’ Answer”, paragraph 13, filed September 9, 2014 as docket #5.]

20 10. The unpaid balance of the IRS claim was \$28,289.03. [“United States’ Answer”,
21 paragraph 13, filed September 9, 2014 as docket #5.]

22 11. The unpaid balance of the IRS claim, \$28,289.03, was subordinated to other
23 unsecured claims because it was a claim for a fine or penalty. [“Summary of Trustee’s Final
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1 Report and Applications for Compensation” filed February 11, 2014, as docket #4.]

2 12. On February 11, 2014, the Trustee filed his “Summary of Trustee’s Final Report”
3 [Exhibit 4 to “Declaration of Craig K. Welch”].

4 13. The IRS was served with notice of the hearing on the Trustee’s Final Report and
5 the deadline for objection to the Final Report, but the IRS did not object to the subordination of
6 the unpaid balance of the IRS claim, \$28,289.03. [Exhibit 5 to “Declaration of Craig K.
7 Welch”].

8 14. On April 21, 2014, the Debtor was notified by the California Franchise Tax Board
9 that the IRS had “intercepted” the Debtor’s 2013 tax refund in the amount of \$1,513.00. [“Notice
10 of Intercepted Funds”, dated 04/21/14, Exhibit 6 to “Declaration of Kirk Wilson”].

11 15. The IRS received the intercepted tax refund in the amount of \$1,513.00, on
12 May 1, 2014 and applied it to pay the 2008 tax penalties. [“Account Transcript”, Exhibit 7 to
13 “Declaration of Kirk Wilson”].

14 16. The IRS has levied on the Debtor’s social security benefits and has taken \$163.95
15 from the Debtor’s social security benefit payments. [IRS Letter dated 09/10/14, Exhibit 8 to
16 “Declaration of Kirk Wilson”].

17 **DISCUSSION**

18 **A. Tax penalties imposed on transactions that are more than three years**
19 **old are discharged.**

20 The IRS is collecting tax penalties from the discharged Debtor that were imposed with
21 respect to transactions that occurred more than three years before bankruptcy. These penalties
22 were discharged pursuant to the provisions of 11 U.S.C. §523(a)(7) and the collection of these
23 penalties by the IRS violates the discharge injunction.

24 Exceptions to a debtor’s discharge are listed in 11 U.S.C. §523(a). Sub-section 523(a)(1)

1 provides that tax claims are excepted from discharge if they are entitled to priority under 11
2 U.S.C. §507(a) (the so-called “three year rule”) or if a return was not filed earlier than two years
3 before bankruptcy. Sub-section 523(a)(7) provides that generally tax penalties are not discharged
4 if they relate to taxes which are non-dischargeable under 11 U.S.C. §523(a), with one significant
5 exception which applies in this case. Tax penalties are dischargeable if they are imposed with
6 respect to a transaction that occurred more than three years prior to bankruptcy.
7

8 This rule appears in subsection (B) of 11 U.S.C. §523(a)(7) which provides that a
9 punitive tax penalty is discharged if it arises from a transaction that is more than three years old.
10 Sub-section (7) provides as follows:
11

12 (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for
13 the benefit of a governmental unit, and is not compensation for actual pecuniary
14 loss, other than a tax penalty--

15 (A) relating to a tax of a kind not specified in paragraph (1) of this
16 subsection; or

17 **(B) imposed with respect to a transaction or event that
18 occurred before three years before the date of the filing of the
19 petition;**

20 11 USCS § 523(A)(1) & (7). [Lexis, 2014; *Emphasis added.*]

21 The Ninth Circuit Court of Appeal explained the meaning of sub-part B of this statute in
22 *McKay v United States* 957 F.2d 689, 693,(9th Cir. 1992):
23

24 The other group of penalties withdrawn from the nondischargeable group is
25 described in part (B). It is quite straightforward. It makes dischargeable any tax
26 penalty "imposed with respect to a transaction or event that occurred before three
27 years before the date of the filing of the petition." A penalty imposed on unpaid
28 taxes accruing more than three years before the filing of the bankruptcy petition
are dischargeable.

McKay v. United States, at 693.

26 The tax penalties at issue in this case are imposed on transactions that occurred in 2008.
27 [See Undisputed Facts numbers 6, 7, and 8 above.] This bankruptcy case commenced on July 24,
28

1 2012, which is more than three years after the end of 2008. Therefore, the tax penalties have
2 been discharged.

3
4 **B. All non-dischargeable taxes and interest have been paid.**

5 As shown on the “Summary of Trustee’s Final Report and Applications for
6 Compensation” filed February 11, 2014, all priority, non-dischargeable taxes were paid by the
7 estate. The remaining balance are the dischargeable penalties. Therefore, the debtor has no
8 remaining obligations to the IRS from the 2008 tax year.

9
10 **C. The Debtor has been damaged by the IRS violation of the Debtor’s Discharge.**

11 As shown by Kirk Wilson’s Declaration, the IRS seized his 2013 tax refund of \$1,513.00,
12 and \$163.95 of his social security benefits. Both of these seizures were applied by the IRS to
13 payment of discharged tax penalties. By means of this action the Debtor seeks an order holding
14 the IRS in contempt for violation of the Debtor’s discharge, and reimbursement of the Debtor’s
15 attorney’s fees incurred in this adversary proceeding.

16
17 **D. Attorneys fees and costs pursuant to 26 U.S.C. §7430.**

18 The Internal Revenue Code provides that;

19 (a) In general. In any administrative or court proceeding which is brought by or
20 against the United States in connection with the determination, collection, or
21 refund of any tax, interest, or penalty under this title, the prevailing party may be
awarded a judgment or a settlement for--

- 22 (1) reasonable administrative costs incurred in connection with such
administrative proceeding within the Internal Revenue Service, and
- 23 (2) reasonable litigation costs incurred in connection with such court proceeding.

24 *26 U.S.C. §7430(a) [Lexis, 2014].*

25 Therefore, the Debtor seeks an award of his attorneys fees and costs according to proof.

26
27 **CONCLUSION**

28 Punitive tax penalties arising from transactions that occurred more than three years before

1 bankruptcy are dischargeable. *11 U.S.C. §523(a)(7)(B)*. In this case, the IRS has been collecting
2 tax penalties arising from the 2008 tax year. Those transactions occurred more than three years
3 before July 24, 2012 when this case was commenced. Therefore they are discharged.
4

5 Notwithstanding the discharge of these penalties, the IRS has collected \$1,676.95 from
6 the Debtor after entry of the discharge on account of those penalties. For that reason, the Debtor
7 seeks an order holding the IRS in contempt and ordering the reimbursement of the \$1,676.95 and
8 the Debtor's attorneys fees and costs, together with whatever other sanction the court deems
9 appropriate.
10

11 Dated: January 22, 2015

Law Office of Craig K. Welch

12 By/s/Craig K. Welch
13 Craig K. Welch, SBN 078546
14 Attorney for Debtor.
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CRAIG K. WELCH # 078546
LAW OFFICE OF CRAIG K. WELCH
809 Petaluma Boulevard North
Petaluma, Ca. 94952
Telephone (707) 782-1790
Facsimile (707) 782-1795
Email: cwelch@craigwelchlegal.com

Attorneys for Debtor,
Kirk Lindsay Wilson

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re

KIRK LINDSAY WILSON

Debtor

KIRK LINDSAY WILSON,

Plaintiff,

v.

UNITED STATES OF AMERICA, and its
agency, INTERNAL REVENUE SERVICE.

Case No. 12-11995 -AJ
Chapter 7

A.P. No 14-01106 -AJ

Date: February 20, 2015
Time: 9:00 a.m.
Place: 99 South E Street
Santa Rosa, Ca. 95404

**DECLARATION OF KIRK WILSON IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

I, Kirk Lindsay Wilson, declare:

1. I am the Debtor in this bankruptcy case and I have personal knowledge of the facts contained in this Declaration.

2. On April 21, 2014, I received a notice from the California Franchise Tax Board ("FTB") dated April 21, 2014, notifying me that the IRS had "intercepted" my 2013 tax

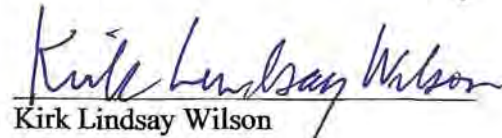
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refund in the amount of \$1,513.00. A true and correct copy of the notice is attached hereto as Exhibit 6.

3. I obtained an "Account Transcript" from the IRS for my 2008 taxes, a copy of which is attached as Exhibit 7, which shows that the IRS received the intercepted tax refund in the amount of \$1,513.00, on May 1, 2014 and applied it to pay the 2008 tax penalties.

4. On or about September 10, 2014, the IRS levied on my social security benefits and took \$163.95 from my social security benefit payments. A copy of the IRS letter notifying me of the levy is attached as Exhibit 8.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Sebastopol, California on January 20, 2015.


Kirk Lindsay Wilson

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EXHIBIT 6

Declaration of Kirk Wilson in Support of Motion for Summary Judgment



STATE OF CALIFORNIA
FRANCHISE TAX BOARD
 PO BOX 942867
 SACRAMENTO CA 94267-0041

Notice of Intercepted Funds

Notice Date: 04/21/14
 Tax Year: 2013
 Notice ID: 14-13836732E
 Account No: 110-92266-95
 Account No: 110-70445-76

KIRK WILSON
 LENA MOFFAT
 266 WASHINGTON CT
 SEBASTOPOL CA 95472-3170

If you owe money to a state, local, or government agency, California law allows us to intercept your state income tax refund up to the amount you owe the agency. The agency reports to us what you owe them, and we deduct the amount from your state income tax refund. (California Government Code Sections 926.8 and 12419)

The following agency states you owe them money. We deducted the amount you owe from your state income tax refund and sent the intercepted funds to the agency we list below.

We are only informed of the amount due to the other agency. We do not have any detailed information about your account with them. Contact the agency directly if you have questions.

Original amount of your state income tax refund.....	\$	1,513.00
Amount sent to the agency.....	\$	1,513.00
Refund amount sent to you.....	\$	0.00

INTERNAL REVENUE SERVICE
 PO BOX 12067
 FRESNO CA 93776
 800-829-7650

AGENCY ACCT NO: 20081230WI
 AMT OWED: \$ 1,513.00

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EXHIBIT 7

Declaration of Kirk Wilson in Support of Motion for Summary Judgment

 **Internal Revenue Service**
 United States Department of the Treasury

This Product Contains Sensitive Taxpayer Data

Account Transcript

Request Date: 06-10-2014
 Response Date: 06-10-2014
 Tracking Number: 100200580781

FORM NUMBER: 1040
 TAX PERIOD: Dec. 31, 2008

TAXPAYER IDENTIFICATION NUMBER: ██████████-7872
 SPOUSE TAXPAYER IDENTIFICATION NUMBER: ██████████-4104*

KIRK WILSON

--- ANY MINUS SIGN SHOWN BELOW SIGNIFIES A CREDIT AMOUNT ---

ACCOUNT BALANCE:	15,570.98	
ACCRUED INTEREST:	8,295.77	AS OF: Jun. 30, 2014
ACCRUED PENALTY:	7,374.31	AS OF: Jun. 30, 2014

ACCOUNT BALANCE PLUS ACCRUALS
 (this is not a payoff amount): 31,241.06

** INFORMATION FROM THE RETURN OR AS ADJUSTED **

EXEMPTIONS:	01	
FILING STATUS:	Married Filing Separate	
ADJUSTED GROSS INCOME:	268,213.00	
TAXABLE INCOME:	260,430.00	
TAX PER RETURN:	56,977.00	
SE TAXABLE INCOME TAXPAYER:	0.00	
SE TAXABLE INCOME SPOUSE:	0.00	
TOTAL SELF EMPLOYMENT TAX:	0.00	

RETURN DUE DATE OR RETURN RECEIVED DATE (WHICHEVER IS LATER)	Feb. 08, 2011
PROCESSING DATE	Mar. 21, 2011

TRANSACTIONS

CODE EXPLANATION OF TRANSACTION	CYCLE DATE	AMOUNT
---------------------------------	------------	--------

150	Tax return filed	20111008	03-21-2011	\$56,977.00
n/a	89221-039-55208-1			
460	Extension of time to file ext. Date 10-15-2009		04-15-2009	\$0.00
140	Inquiry for non-filing of tax return		06-14-2010	\$0.00
971	Notice issued CP 0059		07-05-2010	\$0.00
166	Penalty for filing tax return after the due date	20111008	03-21-2011	\$12,819.82
276	Penalty for late payment of tax	20111008	03-21-2011	\$6,837.24
196	Interest charged for late payment	20111008	03-21-2011	\$5,166.54
971	Notice issued CP 0014		03-21-2011	\$0.00
971	Tax period blocked from automated levy program		07-18-2011	\$0.00
971	Collection due process Notice of Intent to Levy -- issued		07-15-2011	\$0.00
971	Account match for federal levy payment program		08-22-2011	\$0.00
971	Collection due process Notice of Intent to Levy -- refused or unclaimed		08-23-2011	\$0.00
971	Notice issued CP 0091		10-17-2011	\$0.00
971	Final notice before levy on social security benefits		10-17-2011	\$0.00
971	Account match for federal levy payment program		12-26-2011	\$0.00
670	Payment		12-14-2011	-\$148.65
582	Lien placed on assets due to balance owed		01-13-2012	\$0.00
360	Fees and other expenses for collection		02-06-2012	\$26.00
670	Payment		01-11-2012	-\$158.55
971	Issued notice of lien filing and right to Collection Due Process hearing		01-17-2012	\$0.00
670	Payment		02-08-2012	-\$158.55
670	Payment		03-14-2012	-\$158.55
670	Payment		04-11-2012	-\$158.55
670	Payment		05-09-2012	-\$158.55
670	Payment		06-13-2012	-\$158.55
670	Payment		07-11-2012	-\$158.55

520	Bankruptcy or other legal action filed	07-24-2012	\$0.00
521	Removed bankruptcy or other legal action	11-06-2012	\$0.00
971	Tax period blocked from automated levy program	03-18-2013	\$0.00
960	Appointed representative	03-04-2013	\$0.00
670	Payment Undesignated Bankruptcy	03-24-2014	-\$63,484.12
670	Payment	05-01-2014	-\$1,513.00
971	Tax period blocked from automated levy program	06-09-2014	\$0.00
971	Account match for federal levy payment program	06-02-2014	\$0.00

This Product Contains Sensitive Taxpayer Data

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EXHIBIT 8

Declaration of Kirk Wilson in Support of Motion for Summary Judgment

P. O. BOX 1686
BIRMINGHAM, AL 35201-1686



**THIS IS NOT A BILL
PLEASE RETAIN FOR YOUR RECORDS**

09/10/14

108194915



KIRK L WILSON
266 WASHINGTON CT
SEBASTOPOL, CA 95472-3170

As authorized by Federal law, we applied all or part of your Federal payment to a debt you owe. The government agency (or agencies) collecting your debt is listed below.

Internal Revenue Service
Federal Payment Levy Program
Stop 686
PO Box 57
Bensalem, PA 19020
800-829-3903
PURPOSE: Tax Levy

TIN Num: [REDACTED]-7872
TOP Trace Num: 108194915
Acct Num: [REDACTED]787230200812
Amount This Creditor: \$163.95
Creditor: 51 Site: MC

The Agency has previously sent notice to you at the last address known to the Agency. That notice explained the amount and type of debt you owe, the rights available to you, and that the Agency intended to collect the debt by intercepting any Federal payments made to you, including tax refunds. **If you believe your payment was reduced in error or if you have questions about this debt, you must contact the Agency at the address and telephone number shown above.** The U. S. Department of the Treasury's Financial Management Service cannot resolve issues regarding debts with other agencies.

We will forward the money taken from your Federal payment to the Agency to be applied to your debt balance; however, the Agency may not receive the funds for several weeks after the payment date. If you intend to contact the Agency, please have this notice available. Please do not contact the Social Security Administration regarding this reduction made in your Federal payment.

U. S. Department of the Treasury
Financial Management Service

PAYMENT SUMMARY

PAYEE NAME: KIRK L WILSON
PAYMENT BEFORE REDUCTION: \$1093.00
TOTAL AMOUNT OF THIS REDUCTION: \$163.95
PAYING FEDERAL AGENCY: Social Security Administration
CLAIM ACCT NUM: [REDACTED] A

PAYEE TIN: [REDACTED]7872
PAYMENT DATE: 09/10/14
PAYMENT TYPE: EFT
BENEFICIARY TIN: [REDACTED]7872

FOR OFFICIAL USE ONLY: 0000061025 10819491546755278703594214013ALTR-P01KIRK062877

RL0709



MELINDA HAAG (CABN 132612)
United States Attorney
THOMAS MOORE (ASBN 4305-O78T)
Chief, Tax Division
JOSE A. OLIVERA (CABN 279741)
Assistant United States Attorney
450 Golden Gate Avenue, Box 36055
San Francisco, California 94102-3495
Telephone: (415) 436-6888
FAX: (415) 436-7009

Attorneys for the United States of America

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SANTA ROSA DIVISION

IN RE KIRK LINDSAY WILSON,	)	Bankr. Case No. 12-11995
)	
Debtor.	)	Chapter 7
)	
KIRK LINDSAY WILSON,	)	Adversary No. 14-01106
)	
Plaintiff,)	
)	
v.	)	DECLARATION OF GERALD ANGELES
)	
UNITED STATES OF AMERICA,	)	Judge: Honorable Alan Jaroslovsky
	)	Date: February 20, 2015
Defendant.	)	Time: 9:00 a.m.
	)	Place: 99 South E. Street
	)	Santa Rosa, California 95404

I, Gerald Angeles, pursuant to 28 U.S.C. § 1746, hereby declare that:

1. I am over the age of 18 and competent to testify as to the matters set forth in this declaration.
2. I am employed as an Insolvency Specialist by the Internal Revenue Service (“IRS”) with a post of duty in Oakland, California.
3. In my capacity as an IRS Insolvency Specialist, my responsibilities include reviewing IRS records and verifying certain information with respect to taxpayers’ federal tax accounts. In the course of my duties I have access to, and am familiar with, the uses of various IRS computer

1 systems, including the IRS’s Integrated Data Retrieval System (“IDRS”). The IDRS is a
 2 computer system that contains information about various tax accounts, including individual
 3 taxpayer tax accounts. The IDRS allows IRS employees to access tax assessment information
 4 and updated balance information for individual taxpayer tax accounts, including interest to a
 5 specified date.

- 6 4. I have reviewed the IDRS records pertaining to Kirk Lindsay Wilson’s 2008 federal income tax
 7 account.
- 8 5. According to the IDRS records, Kirk Lindsay Wilson was assessed penalties for tax year 2008
 9 for failure to file a 2008 tax return and failure to pay his 2008 income tax liability. These
 10 penalties were assessed on March 21, 2011.
- 11 6. The table below identifies the amount owed by Kirk Lindsay Wilson for tax penalties assessed
 12 against him for tax year 2008, including interest as of February 6, 2015. These calculations are
 13 based on attached Exhibit A and information from the IDRS.

Tax Period	Type of Penalty	Current Assessed Amounts	Balance as of 2/6/2015
2008	Failure to Pay Penalty	\$ 6,837.24	\$14,211.55
2008	Failure to File Penalty	\$3,403.25	\$ 3,403.25
2008	Interest on Tax Assessment	\$5,166.54	
Total			\$31,512.57 ¹

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27 _____
 28 ¹ This figure includes interest of \$13,897.77 that has accrued on the failure to file and pay penalties and interest that accrued on the prior tax assessment as of February 6, 2015.

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7. Attached hereto as Exhibit A are true and correct copies of the interest calculations as of February 6, 2015, performed using the IDRS on Kirk Lindsay Wilson's 2008 income tax account. According to these interest calculations, as of February 6, 2015, Kirk Lindsay Wilson is liable to the United States in the amount of \$31,512.57 for unpaid penalties and interest.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 5, 2015, in Oakland, California.

/s/ Gerald Angeles
Gerald Angeles
Internal Revenue Service

EXHIBIT A

(Interest Calculations)

INTSTD [REDACTED] 7872
30 200812 02062015 WILS
6,837.24 ASSESSED FTP
5,166.54 ASSESSED INT
3,403.25 TAX & PENALTY
15,407.03 ASSESSED TOTAL
7,374.31 ACCRUED FTP
8,731.23 ACCRUED INT
16,105.54 TOTAL ACCRUALS
14,211.55 TOTAL FTP
13,897.77 TOTAL INT
31,512.57 BALANCE DUE

Employee #2737625562 Page 001 of 005 PAGE 002

Page: 1 Document Name: osc idrs

INTSTD [REDACTED] 7872 30 200812

INTEREST COMPUTATION TABLE

CODE	TRANS-AMT	DATE	TO-DT	INT-PRINCIPAL	FACTOR	INTEREST-
AMT						
4%	.00	20090331	00000000	.00	000000000	
.00						
1500	56,977.00	20090415	20090930	56,977.00	018580458	1,058
.66						
4%	.00	20090930	20091015	58,035.66	001645097	95
.47						
1660	12,819.82	20091015	20091231	70,950.95	008473593	601
.21						
4%	.00	20091231	20100630	71,552.16	020032540	1,433
.37						
4%	.00	20100630	20101231	72,985.53	020367930	1,486
.56						
3%	.00	20101231	20110321	74,472.09	006596735	491
.27						
2760	6,837.24	20110321	20110331	81,800.60	000822221	67
.26						
4%	.00	20110331	20110930	81,867.86	020256121	1,658
.33						
3%	.00	20110930	20111214	83,526.19	006183167	516
.46						
6700	148.65-	20111214	20111231	83,894.00	001398179	117
.30						
3%	.00	20111231	20120111	84,011.30	000902008	75
.78						
6700	158.55-	20120111	20120206	83,928.53	002133332	179
.05						
3600	26.00	20120206	20120208	84,133.58	000163941	13
.79						
6700	158.55-	20120208	20120314	83,988.82	002872853	241
.29						
6700	158.55-	20120314	20120411	84,071.56	002297623	193
.16						
6700	158.55-	20120411	20120509	84,106.17	002297623	193
.24						
6700	158.55-	20120509	20120613	84,140.86	002872853	241
.72						
6700	158.55-	20120613	20120630	84,224.03	001394356	117
.44						

Employee #2737625562 Page 002 of 005 PAGE 003

INTSTD [REDACTED] 7872 30 200812

INTEREST COMPUTATION TABLE

CODE AMT	TRANS-AMT	DATE	TO-DT	INT-PRINCIPAL	FACTOR	INTEREST-
3% .08	.00	20120630	20120711	84,341.47	000902008	76
6700 .28	158.55-	20120711	20121231	84,259.00	014280756	1,203
3% .85	.00	20121231	20130630	85,462.28	014987300	1,280
3% .76	.00	20130630	20131231	86,743.13	015237592	1,321
3% .80	.00	20131231	20140324	88,064.89	006844957	602
6700 .78	63,484.12-	20140324	20140501	25,183.57	003128041	78
6700 .06	1,513.00-	20140501	20140910	23,749.35	010907931	259
6700 .80	163.95-	20140910	20150206	23,844.46	012321362	293

Employee #2737625562 Page 003 of 005 PAGE 004

Page: 1 Document Name: osc_idrs

INTSTD [REDACTED] 7872 30 200812

FTP COMPUTATION TABLE

BEGIN TC 150 ASSESSMENT, FTP START DATE IS 20090415

CODE	DATE	TRANS-AMT	TO-DT	FTP-PRINCIPAL	MO	PCT	PNLTY-
AMT							
1500	20090415	56,977.00	20090415	56,977.00	00	.00	
.00							
1960	20110321	5,166.54		56,977.00	00	.00	
.00							
2760	20110321	6,837.24		56,977.00	00	.00	
.00							
1660	20110412	12,819.82		56,977.00	00	.00	
.00							
0050	20090415	.00	20110615	56,977.00	26	13.00	7,407
.01							
0100	20110609	.00		56,977.00	00	.00	
.00							
6700	20111214	148.65-	20111215	56,828.35	06	6.00	3,418
.62							
6700	20120111	158.55-	20120115	56,669.80	01	1.00	568
.28							
3600	20120206	26.00		56,669.80	00	.00	
.00							
6700	20120208	158.55-	20120215	56,511.25	01	1.00	566
.70							
6700	20120314	158.55-	20120315	56,352.70	01	1.00	565
.11							
6700	20120411	158.55-	20120415	56,194.15	01	1.00	563
.53							
6700	20120509	158.55-	20120515	56,035.60	01	1.00	561
.94							
6700	20120613	158.55-	20120615	55,877.05	01	1.00	560
.36							
6700	20120711	158.55-	20120715	55,718.50	00	.00	
.00							
5200	20120724	.00	20120815	55,718.50	00	.00	
.00							

Employee #2737625562 Page 004 of 005 PAGE 005

Page: 1 Document Name: osc_idrs

INTSTD [REDACTED] 7872 30 200812

FTP COMPUTATION TABLE

6700 20140324	55,718.50-	20140415	.00	00	.00
.00					
END TC 150 ASSESSMENT, FTP PENALTY AMOUNT IS			14,211.55		

Employee #2737625562 Page 005 of 005 PAGE 001

Date: 2/5/2015 Time: 12:05:45 PM

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

KIRK LINDSAY WILSON,

No. 12-11995

Debtor(s).

KIRK LINDSAY WILSON,

Plaintiff(s),

v.

A.P. No. 14-1106

UNITED STATES OF AMERICA,

Defendant(s).

Memorandum on Motion for Summary Judgment

Chapter 7 debtor Kirk Wilson obtained an extension of his time to file his 2008 tax return until October 15, 2009, but failed to file the return until 2011. Wilson filed his bankruptcy petition on July 24, 2012. The Chapter 7 trustee recovered significant assets and was able to pay Wilson's 2008 income taxes in full, but not the penalties. The issue in this adversary proceeding is whether the penalties associated with the 2008 income taxes have been discharged. Wilson has moved for

1 summary judgment.

2 26 U.S.C. § 6651(a)(1) provides a penalty for failure to file a tax return; § 6651(a)(2) provides
3 a penalty for failure to pay a tax. In this case, the IRS agrees that any penalties imposed by §
4 6651(a)(2) have been discharged. The only penalties in dispute here are on account of § 6651(a)(1).

5 This dispute is governed by § 523(a)(7)(b), which provides that a tax penalty is discharged if it
6 was “imposed with respect to a transaction or event” that occurred more than three years before the
7 bankruptcy petition. Wilson argues that the penalties were imposed with respect to his 2008 tax
8 liability, due April 15, 2009, and therefore were more than three years old when he filed his
9 bankruptcy. The IRS argues that the penalties were imposed in October of 2009, when Wilson missed
10 his extended filing deadline, and were therefore less than three years old when the bankruptcy petition
11 was filed.

12 Despite many cases cited by both sides, this appears to be a matter of first impression. None of
13 the cited cases dealt specifically with the situation where the taxes were due outside the three-year
14 period but the return, due to an extension, became due within the three-year period. The primary case
15 relied upon by Wilson, *McKay v. U.S.*, 957 F.2d 689, 693 (9th Cir. 1992), did not specifically deal with
16 failure to file penalties incurred within the three-year period. All of the cases cited by the IRS were
17 factually distinguishable and merely dicta as to the issue before the court.

18 The court agrees with Wilson that *McKay* is the governing case on the issue before the court,
19 even though its facts are distinguishable. That case instructs that § 523(a)(7)(b) is to be applied
20 according to its plain meaning, so that “[a] penalty imposed on unpaid taxes accruing more than three
21 years before the filing of the bankruptcy petition is dischargeable.” If this simple statement is the
22 applicable law, then Wilson’s penalties for failure to file his return are dischargeable.

23 Income taxes accrue on April 15 of the year following the tax year in question. *U.S. v. Green*,
24 201 F.3d 251, 257 (3rd Cir. 2000); *U.S. v Rocky Mountain Holdings, Inc.*, 782 Fed.Supp.2d 106, 120
25 (E.D.Pa. 2011). Since Wilson’s 2008 income tax obligation accrued on April 15, 2009, a date more
26 than three years before his bankruptcy petition, the court is required by the articulated rule in *McKay*

1 to declare the penalties imposed with respect to them discharged.

2 The court recognizes that by so ruling it is extending *McKay* rather than merely applying it.
3 Still, there seems to be a logical reason for such an extension. In *McKay*, the court implicitly
4 interpreted the phrase “imposed with respect to a transaction or event” as referring to the tax obligation
5 itself. If the statute had read “imposed on account of a transaction or event,” the IRS would have a
6 stronger argument that the three-year period is measured from the date the return became late.
7 However, the phrase “with respect to” lends itself readily to *McKay*’s rule that if the penalty is
8 imposed with respect to 2008 income taxes then it is dischargeable three years after April 15, 2009.
9 The court therefore sees its ruling as consistent with both *McKay* and the language of the Bankruptcy
10 Code.¹

11 Moreover, the penalties imposed on account of failure to file a return are computed by
12 reference to the tax obligation itself. Measuring the three-year period from accrual of the obligation,
13 as *McKay* seems to require, therefore seems appropriate. The result would certainly be different as to a
14 filing penalty not computed by reference to the underlying tax liability. See, e.g., *In re Wilson*, 407
15 B.R. 405, 409 (10th Cir. BAP 2009).

16 The court notes that the IRS position came to light when it intercepted a state tax refund of
17 \$1513.00 due to Wilson and seized a small amount from his Social Security benefits. The complaint
18 prays for return of these funds as well as attorney’s fees and damages against the IRS. While the court
19 will order the return of the intercepted funds, it does not find an award of attorney’s fees or other
20 damages appropriate at this time for two reasons. First, while the court does not agree with the IRS
21 position it does not find it to be without merit. The IRS did cite several cases which supported its
22 position, though all of them were factually distinguishable, dicta, from a circuit not following *McKay*,

24
25 ¹Wilson argues that he obtained an admission from the IRS that the late filing penalties were
26 assessed with respect to the 2008 taxes, making statutory analysis unnecessary. The court finds this
argument less than compelling, but need not address it since the court has reached the same result
without depending on the admission.

1 and/or decided before *McKay*. Secondly, the issue has not been briefed by either side and there is no
2 evidence from Wilson establishing any damages beyond the seized funds.

3 For the foregoing reasons, the court will grant Wilson's motion in part. The court will declare
4 that all penalties associated with his 2008 federal income tax liability have been discharged; it will
5 order the IRS to return the funds intercepted or setoff after entry of the discharge on account of those
6 penalties; and it will enjoin the IRS from further actions to collect them.

7 Counsel for Wilson shall submit an appropriate form of order which counsel for the IRS has
8 approved as to form, and, if the parties agree that this memorandum disposes of all matters in dispute,
9 an appropriate form of judgment.

10
11 Dated: February 25, 2015


Alan Jaroslovsky
U.S. Bankruptcy Judge

Entered on Docket
March 12, 2015
EDWARD J. EMMONS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

1 CRAIG K. WELCH # 078546
2 LAW OFFICE OF CRAIG K. WELCH
3 809 Petaluma Boulevard North
4 Petaluma, Ca. 94952
5 Telephone (707) 782-1790
6 Facsimile (707) 782-1795
7 Email: cwelch@craigwelchlegal.com

8 Attorneys for Debtor,
9 Kirk Lindsay Wilson

10 UNITED STATES BANKRUPTCY COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 In re

13 KIRK LINDSAY WILSON

14 Debtor

15 KIRK LINDSAY WILSON,

16 Plaintiff,

17 v.

18 UNITED STATES OF AMERICA, and its
19 agency, INTERNAL REVENUE SERVICE.

Case No. 12-11995 -AJ
Chapter 7

A.P. No 14-01106 -AJ

Date: February 20, 2015
Time: 9:00 a.m.
Place: 99 South E Street
Santa Rosa, Ca. 95404

20 **ORDER GRANTING, IN PART,**
21 **MOTION FOR SUMMARY JUDGMENT**

22 The motion of Plaintiff, Kirk Lindsay Wilson (“Wilson”) , for summary judgment, or in
23 the alternative for an order specifying facts without substantial controversy, came on regularly
24 for hearing at the above date and place, and the Court having considered the documents on file
25 and the argument of counsel, and good cause appearing, therefor

26 IT IS HEREBY ORDERED that:
27
28

1. All tax penalties associated with the Wilsons’s 2008 federal income taxes have been discharged pursuant to 11 U.S.C. §523(7)(B); and
2. Defendant, United States of America, and its agency, Internal Revenue Service, shall refund to Wilson the sums collected or seized on account of the 2008 tax penalties, including the sum of \$1,676.95 consisting of a state tax refund of \$1,513.00 and \$163.95 of social security benefits; and
3. Defendant, United States of America, and its agency, Internal Revenue Service, are hereby enjoined from taking any further action to collect tax penalties associated with Wilson’s 2008 federal income taxes; and
- 4, Wilson’s request for an award of attorneys is denied. This issue may proceed to trial.

Dated: March 12, 2015



Alan Jaroslovsky
U.S. Bankruptcy Judge

APPROVED AS FORM:

/s/Jose A. Olivera
JOSE A. OLIVERA (CABN 279741)
Assistant United States Attorney

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE ALAN JAROSLOVSKY, JUDGE

In Re:	)	Case No. 12-11995
	)	Chapter 7
KIRK LINDSAY WILSON,)	
)	
Debtor.)	
<hr/>		
	)	Adv. No. 14-01106
KIRK LINDSAY WILSON,)	
)	
Plaintiff,	)	<u>PLAINTIFF'S MOTION for</u>
	)	<u>SUMMARY JUDGMENT</u>
v.)	
)	
UNITED STATES of AMERICA, and)	
its agency the Internal)	
Revenue Service,)	
)	
Defendant.	)	Friday, February 20, 2015
<hr/>		
	)	Santa Rosa, California

Appearances:

For the Plaintiff:	Craig K. Welch, Esq. Law Office of Craig K. Welch 809 Petaluma Boulevard, North Petaluma, California 94952
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For the Defendant:	Jose Apolinar Olivera, Assistant U.S. Attorney Office of the United States Attorney 450 Golden Gate Avenue, Ninth Floor San Francisco, California 94102
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Digital Court Recorder:	United States Bankruptcy Court Clerk of the Court Wendy Karnes 99 South E Street Santa Rosa, California 95404 (707) 547-5900
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transcript produced by federally-approved transcription service.

PALMER REPORTING SERVICES

Motion for Summary Judgment

1 Friday, February 20, 2015 9:18 o'clock a.m.

2 P R O C E E D I N G S

3 THE CLERK: Number 3, Wilson versus the United States
4 of America.

5 MR. WELCH: Good morning, Your Honor. Craig Welch
6 appearing for the debtor and the moving party.

7 MR. OLIVERA: Good morning, Your Honor. José Olivera
8 for the United States.

9 THE COURT: Well, when I looked at this, it seemed
10 pretty simple. It looked like the taxes would have been
11 dischargeable if the debtor hadn't requested an extension of the
12 time to file. But because of the extension, the three-year
13 period had not run when the bankruptcy was filed.

14 MR. WELCH: Except the three-year period did run when
15 the bankruptcy was filed. We're talking about 523(a)(7)(B) here
16 and discharge of punitive tax penalties. The interesting thing
17 about this case is that -

18 THE COURT: Don't the penalties go with the taxes?

19 MR. WELCH: Well, that seems to be what the IRS wants
20 to say, too. But that's not what the statute says and it's not
21 what the case law says.

22 THE COURT: It's been a while since I visited this
23 issue, but I have visited it. And the law that sticks in my
24 head, which is of course often wrong, is that the taxes go - the
25 penalties go with the taxes.

Motion for Summary Judgment

1 MR. WELCH: To some extent, yes. But if the penalties
2 are punitive in nature, then 523(a)(7)(B) says that if they were
3 imposed with respect to transactions that occurred more than
4 three years prior to bankruptcy, then the taxes are discharged.

5 In this case, the tax year was 2008. And it's our
6 position that the penalties were imposed with respect to the
7 transactions that occurred in 2008 that gave rise to the tax.
8 That's more than three years before bankruptcy.

9 Similarly, the late-payment penalty is also imposed
10 with respect to a deadline that was more than three years prior
11 to bankruptcy, which was April 15th of 2009, and that more than
12 three years prior bankruptcy. And that's when the taxes were
13 last payable without penalty. And the large majority of the
14 penalty is the tax-payment penalty. The only thing that
15 occurred within three years of bankruptcy was the extension of
16 the time to file.

17 But if you look at the Ninth Circuit decisions, they
18 don't agree with the many, many, many 1990s Bankruptcy Court's
19 decisions cited by the IRS. And, in fact, they say something
20 different than those old cases.

21 The *McKay* case is the one that's cited prominently,
22 both in my opening brief and the second brief. That's the Ninth
23 Circuit Court of Appeals. And that case is from 1992. And, as
24 the quote in the brief says, the Ninth Circuit looked at it and
25 said: The penalty imposed on unpaid taxes occurring more than

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1 three years before bankruptcy are dischargeable.

2 So the question is: When did the taxes accrue?

3 THE COURT: So you are conceding that the tax itself
4 was not discharged, but you're -

5 MR. WELCH: Yes.

6 THE COURT: - saying that the penalties were
7 discharged?

8 MR. WELCH: Right. The tax was paid in full. There
9 was more than enough money to pay the tax, plus the penalties,
10 plus the interest, plus anything else. It was \$450,000 in the
11 estate. But this whole case started because of the debtor's
12 ex-wife, who they - they had business together. And she took
13 the business, didn't give him the information to file the
14 returns, why the return got filed late. In the end, the trustee
15 sued the ex-wife and recovered, I think, 450,- or \$500,000. And
16 that was enough to pay all of the priority claims in full. And,
17 in fact, the taxes in this case were paid as priority claims,
18 but the penalties were not paid.

19 THE COURT: Okay.

20 MR. WELCH: And so now the question becomes were the
21 penalties discharged. And I think there's a couple of cases
22 that are both Ninth Circuit - they're all Ninth Circuit cases
23 that really inform Your Honor's decision here.

24 In the first one is the *McKay* case from 1992, which
25 the Ninth Circuit simply says that if the transactions on which

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1 the penalties were imposed were more than three years before
2 bankruptcy, it really doesn't connect to the tax at all. It's
3 the penalties that get discharged.

4 And then there's the case which is cited in the reply
5 brief – I found it after I wrote the first brief – which is this
6 *Joy versus the Franchise Tax Board*. And that's from 2009.

7 That's also a Ninth Circuit Court of Appeals decision. And that
8 dealt with California tax and whether or not the penalties on a
9 California tax were dischargeable. And again in that case the
10 Ninth Circuit found that the tax and the transaction for those
11 on which that tax was imposed had accrued by the end of the
12 taxable year, which in this case would be December 31st, 2008.
13 That's more than three years prior to bankruptcy.

14 So by analogy to the state tax law, the same would be
15 true of the federal tax law. If the transactions that gave rise
16 to the tax were more than three years prior to bankruptcy, then
17 the punitive penalties are discharged regardless of whether the
18 taxes are discharged or not. For instance, what if the debtor
19 had filed his tax return within two years of bankruptcy, that
20 would make under 523(a) – that would make the taxes
21 nondischargeable, but the penalties might still be dischargeable
22 simply because the transactions on which the penalties were
23 imposed were in fact more than three years prior to bankruptcy.

24 So there isn't this unity between imposition of the
25 penalties and the three-year rule about nondischargeability of

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1 taxes. Congress clearly wanted to say that the debtor should be
2 discharged from these punitive tax penalties. They – and it
3 seems to me that that's exactly what's happened. Now on – I
4 want to go one step further with this. I believe that is the
5 decision Your Honor should come to, that all of these penalties
6 were discharged because the transactions accrued more than –
7 were more than three years prior to bankruptcy.

8 But as to the late-payment penalty, I don't see how
9 there can even be any dispute about that. The late-payment
10 penalty was imposed because the taxes weren't paid on April
11 15th. And there is a Ninth Circuit case on that as well. And
12 that is the case also cited in the reply brief. It's the
13 *Pan-American Van Lines* case from 1979. That's an old case. In
14 that case the taxes – the tax penalties for nonpayment were
15 discharged because they were first due on April 15th. Even
16 though the debtor got an extension to file the return – even
17 though you get an extension to file the return, the taxes are
18 still payable back on April 15th. You don't get to file an
19 extension to file your return and then just not pay your taxes.
20 You still have to pay your taxes.

21 So both of those events, that is: The last date to
22 pay the taxes without penalty, that occurred more than three
23 years prior bankruptcy; the transactions on which the tax
24 accrued all occurred in 2008, that's more than three years prior
25 to bankruptcy; and although there isn't the Ninth Circuit case

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1 that says this is how it works with federal income tax
2 penalties, there is a Ninth Circuit case that says this is how
3 it works with state income tax penalties. And there's also a
4 Ninth Circuit case that says this is how it works as to
5 late-payment penalties.

6 So the only thing where we have – not a Ninth Circuit
7 case to direct Your Honor – is on the issue of late filing. But
8 again the statute doesn't distinguish between late filing and
9 late-payment penalties. It simply asks: When did the
10 transactions occur on which these penalties accrue.

11 And in this case it's particularly unfair, because
12 there was enough money to pay all of these things in full.
13 Except they weren't paid in full because the penalties were
14 subordinated by the trustee as being nonpriority. And now we
15 are in this interesting situation where if the debtor had the
16 money he would have paid the taxes and he would have paid the
17 penalties. But one of the reasons we filed the bankruptcy is
18 the debtor had no money. He's living on his Social Security.
19 He didn't have the wherewithal to engage in litigation with his
20 ex-wife and file the bankruptcy. The trustee filed a lawsuit.
21 The trustee gets the \$450,000. And inside of paying taxes and
22 the penalties, he paid only the taxes, leaving the debtor
23 hanging on these penalties.

24 And it seems very clear from these Ninth Circuit
25 decisions that in fact these penalties were discharged. My

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1 arguments to that effect with the IRS persons, as documented by
2 the litigation and the declarations that have been filed, fell
3 on deaf ears. And here we are today, the IRS is still trying to
4 collect these.

5 And there's one other thing which Your Honor
6 definitely needs to think about in this case, which might be
7 different and unique from other cases, is prior to filing this
8 motion, I wasn't quite sure what the IRS' position would be on
9 this, so I served a request for – a set of requests for
10 admissions. And you'll see that prominently discussed in the
11 briefs. And there's a copy of the request for admissions
12 attached to my declaration filed in support of this motion.

13 And on Request Number 10 it simply asks the IRS to
14 admit that the transactions on which the – the penalties were
15 imposed occurred in 2008. And they admitted that. That's the
16 key issue. That's more than three years prior to bankruptcy
17 under 2523(a)(7)(B), not – punitive penalties that accrued on
18 transactions. They're imposed with respect to transactions that
19 occurred more than three years prior to bankruptcy are
20 dischargeable and are discharged. And they have admitted that.

21 The response is: Oh, but that's an issue of law and
22 you can't admit that. I think they're reading that really
23 narrowly. It is in fact an issue of fact as to when these
24 transactions occurred and which ones they were imposed. And I
25 think they have admitted that. And I don't think Your Honor

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1 should allow them to retract that admission. There isn't any
2 equity here that would justify such a retraction. Here we are,
3 we're only 30 days before trial. Trial is in March. And
4 there's no reason for them to be able to change their position
5 on these factual admissions right before trial.

6 THE COURT: All right. Thank you, counsel.

7 MR. OLIVERA: Good morning, Your Honor. So the issue
8 here is nonpecuniary tax penalties, Your Honor. And it's
9 failure to file penalties and failure to pay penalties. And
10 under 523(a)(7) there are two exceptions to the general rule of
11 nondischargeability for these type of penalties. And that is if
12 the tax penalty is related to a tax that is nondischargeable –
13 or, excuse me – dischargeable, then the tax – the penalties
14 associated with that tax are dischargeable. That doesn't apply
15 here, as I stated in opposition. And that's because the taxes
16 were not dischargeable, therefore the exception under
17 523(a)(7)(A) does not apply. So that leaves the plaintiff with
18 only one exception and that is 523(a)(7)(B). And (a)(7)(B) says
19 tax penalties, these nonpecuniary tax penalties, are imposed
20 with respect – are dischargeable if they are imposed with
21 respect to a transaction that occurred before – three years
22 before the bankruptcy filing. That is the applicable one here.

23 However, that does – plaintiff does not qualify for
24 that one either. And the reason is, as I state in my
25 opposition, is that all the cases that I have found, and

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1 plaintiff actually cites to no case that holds that the
2 imposition of failure to pay and failure to file penalties
3 occurs when the tax accrues. It doesn't because that's not when
4 the penalty arises, Your Honor. The penalty arises when the
5 failure occurs, and in this case it's when – the due date. And
6 the due date is the – is the operative time here. Because the
7 taxpayer filed an extension, his tax return was due on 8 – on –
8 excuse me – October 15th, 2009.

9 On midnight, when the clock went from, you know, 11:59
10 to midnight, from October 15 to October 16, that's when the
11 penalties could be imposed for failure to file. That's when
12 they could be imposed. And under the statute that would be
13 within three years of the July 24th, 2012 bankruptcy filing.
14 And the law is clear on this, Your Honor. There's no – there's
15 no case that I have found, and plaintiff hasn't cited to one,
16 that interprets 523(7)(B) the way he asked this Court to
17 interpret the one sentence in *McKay* that the Court does not
18 discuss. And no other Court, including Ninth Circuit Bankruptcy
19 Courts have interpreted it that way, and that is that penalties
20 are imposed with regard to tax accruals that occurred in this
21 case in 2008. It – it doesn't make any sense when you read it
22 with the statute.

23 And as far as the accrual of tax, that – the United
24 States agrees that the accrual of tax in this case occurred in
25 2008. That – it's clear that's when taxes accrue, but that's

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1 not when the penalties were imposed. And that's what the issue
2 is in this case, when the penalties were imposed.

3 THE COURT: Now the penalties for failure to pay -

4 MR. OLIVERA: Failure to pay and failure to file, that
5 is correct, Your Honor.

6 THE COURT: All right. Failure to file, tho- - you're
7 saying those came into being in October?

8 MR. OLIVERA: So - so to correct here - myself here
9 from the papers, the failure to pay penalties are dischargeable,
10 Your Honor. We admit that.

11 THE COURT: Oh, okay.

12 MR. OLIVERA: They occurred on October 15th - or,
13 excuse me - April 15th, 2009. That's when those taxes should
14 have been paid. That is three years before the, you know, the
15 July -

16 THE COURT: Yeah.

17 MR. OLIVERA: So those are dischargeable. It's the
18 failure to file penalties that are not dischargeable. And the -
19 the cases cited in the reply do not - they misconstrue the
20 actual issue in this case, which is When were the penalties
21 imposed.

22 And they are imposed on the event or transaction which
23 occurred here, Your Honor, when the failure to file happened,
24 with regard to the failure to file penalties, and that was
25 October 16th. Failure to file occurred on October 15th,

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1 penalties could be imposed on October 16th.

2 THE COURT: All right. So we're all in agreement that
3 the failure to pay penalties are discharged?

4 MR. OLIVERA: That's correct, Your Honor.

5 THE COURT: All right. You're saying that the failure
6 to file penalties accrued in October. And that was within three
7 years of the filing?

8 MR. OLIVERA: That is correct. That's right.

9 And with regard to the admission, Your Honor, just to
10 address that. This case was transferred to me. I've reviewed
11 the admissions. In the opposition, I state that this is an
12 issue of law because the Statute 6651(a)(1) addresses when
13 penalties for failure to file arise. So does the case law that
14 I've cited, which I – I believe I cited about eight cases that
15 hold this way, including some bankruptcy Ninth Circuit cases.

16 Plaintiff hasn't cited one case other than a single
17 sentence in *McKay* that no Court has interpreted the way
18 plaintiff asked this Court to interpret it.

19 And also the way the phrasing of Request for Admission
20 10, which is the – the request for admission at issue here, the
21 way it is phrased it's – it's ambiguous. And any ambiguity is
22 to be found against the drafter. And it is ambiguous because
23 the word "occurred" is omitted from the request for admission
24 and "accrued" is inserted. "Taxable" is also inserted. The
25 statute language does not include that language. And,

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1 additionally, the terms were not defined by the plaintiff within
2 his request for admission. So it would be impossible for the
3 United States to interpret exactly what he meant.

4 Now should the United States have admitted that?
5 Obviously, Your Honor, it would have been preferable to ask for
6 some clarification. But either way it's ambiguous at best and
7 it should be found against the drafter.

8 THE COURT: Okay. I've got my work cut out for me.
9 Anything further before I take the matter under submission?

10 MR. WELCH: I would like to do that, Your Honor. I
11 would like to ad one other thing, if I can. I brought this up
12 in the reply brief. When you calculate tax penalties, you have
13 to look at the tax. It's a percentage of the tax. It's imposed
14 with respect to the tax, not with respect to the day of filing
15 or deadlines. It's – the – the penalties are imposed with
16 respect to the tax. So if the late-filing penalty was point – I
17 think it's .5 percent of the amount of tax due, if there had
18 been no tax due there would be no penalties.

19 It seems to me that the plain reading of the statute
20 which says imposed on transactions that occurred more than three
21 years prior to bankruptcy, it says with respect to. And that's
22 exactly how the tax is calculated. If you – and that's in the
23 first section of the Internal Revenue Code and a third section
24 where it says: The penalty is imposed with respect to the tax
25 due.

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1 And it seems to me that Congress was simply following
2 that language. And it seems really clear that when in Congress
3 was trying to set aside and discharge certain particular kinds
4 of penalties, it was trying to say that if the tax year was more
5 than three years before bankruptcy, those are the transactions
6 with respect to which the penalty is imposed because that's how
7 it's calculated.

8 MR. OLIVERA: Your Honor, if I may address the –

9 THE CLERK: You need to use the microphone, please.

10 THE COURT: Well, –

11 MR. OLIVERA: But –

12 THE COURT: – I'm going to listen to whatever you have
13 to say. So there's no need to stand around.

14 MR. OLIVERA: Okay.

15 THE COURT: And there's no need to interrupt until
16 we're sure that Mr. Welch is through.

17 MR. OLIVERA: Oh, I apologize, Your Honor.

18 THE COURT: But I will listen to whatever you have to
19 say. Why don't you have a seat.

20 MR. WELCH: I am done, Your Honor, unless you have a
21 question.

22 THE COURT: Well, I did. I wasn't – your last
23 argument, I wasn't fully following. Would you repeat it,
24 please?

25 MR. WELCH: I was simply trying to follow the logic of

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1 the sentence structure in the Statute 523(a)(7)(B). And when
2 you read it, it's very clear. It says: Imposed with respect to
3 transactions that occurred more than three years prior to
4 bankruptcy.

5 THE COURT: Well, -

6 MR. WELCH: And the question is imposed with respect
7 to, what does that mean? It doesn't mean the date they - the
8 penalties were imposed. It means the transactions with respect
9 to which the penalties were imposed. So it means something
10 other than the date that the penalties were imposed, simply when
11 you look at the structure of the language. It doesn't -
12 otherwise it would simply say: It was penalties that were
13 imposed on the date they were due. It's not about the due date
14 of the penalties. It's about when the transactions occurred
15 with respect to which the penalties were imposed.

16 THE COURT: Well, I don't understand as to the failure
17 to file penalties. You're saying that those were not incurred
18 in October when your client didn't file a tax return within the
19 extended deadline?

20 MR. WELCH: That's when - that's when they set the
21 penalties. That's when he became liable to pay them. But
22 that's not with respect to which the penalties were imposed.
23 The penalties are calculated with respect to the tax and the
24 taxable transactions, all of which occurred in 2008.

25 THE COURT: But the taxes were not dischargeable.

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1 They were entitled to priority.

2 MR. WELCH: That's because he didn't file the tax
3 return to within two years of bankruptcy, Your Honor.

4 THE COURT: Yeah.

5 MR. WELCH: And that's exactly the situation that
6 Congress was looking at. They said, okay, if you don't file
7 your tax return until right before bankruptcy, okay, it's not
8 dischargeable. It's not the three-year rule; it's the two-year
9 rule.

10 And – but they said, nonetheless, we're going to set
11 aside a category of penalties that will be dischargeable.
12 Regardless, you could file the tax return the day before
13 bankruptcy and the penalties would still be disposed –
14 dischargeable as long as they were imposed with respect to
15 transactions that occurred more than three years prior to
16 bankruptcy. If you were to read it as the due date being that,
17 the date that you would look at to for saying they were
18 dischargeable or not dischargeable, it would make 523(a)(7)(B)
19 meaningless. It would have no meaning because it would always
20 be – it would always be within three years of bankruptcy.
21 That's why there are penalties in the first place.

22 And this was simply to – Congress was separating the
23 issue of nonpunitive penalties from the issue of whether or not
24 the taxes were themselves dischargeable. And the irony is here
25 there was enough money to pay these taxes and to pay the

Motion for Summary Judgment

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1 penalties. And the – to some extent the debtor is being treated
2 unfairly. He had the assets to pay it; they weren't in his
3 possession. Somebody had to sue to get them. The trustee was
4 the likely party to do that. They did do that. And they got
5 way more than enough to pay these. And they weren't given
6 priority because they were punitive penalties. And now the IRS
7 wants to collect them from a debtor who's living on Social
8 Security. And it seems extremely unfair. And I – and I do
9 think there are cases that are on point here. And those are
10 Ninth Circuit cases I was just discussing.

11 The cases that he's saying are – that counsel is
12 saying are on point are, in fact, from other districts. One is
13 from Alaska. Other ones are from the – Georgia. They're all
14 Bankruptcy Court decisions, they're all from the 1990s. They're
15 all from before any of these Ninth Circuit cases except for the
16 *Pan-American Van Line's* cases, which is from 1979, and that
17 deals directly with the issue of late-payment penalties. That's
18 why they're conceding it, because it says, hey, the late payment
19 penalties are imposed on the date the taxes are done. So it
20 doesn't really matter when you talk about taxable transactions
21 or the date that the penalty's imposed. The only distinction
22 with the late penalty filing is that it was – the – the debtor –
23 if it gets imposed on that date, but the question is: With
24 respect to what transactions?

25 Well, if you look at the way the tax law is written,

Motion for Summary Judgment

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1 penalties are calculated based upon the taxable transactions.
2 If no transactions had occurred in 2008, there wouldn't be a
3 penalty. The penalty would be zero. So the penalty is imposed
4 with respect to the tax liability of the transactions that gave
5 rise to the tax liability in 2008, which is more than three
6 years prior to bankruptcy. It's that simple.

7 MR. OLIVERA: Just quickly, Your Honor. The statute
8 says imposed. And the – the only way a failure to file penalty
9 can be imposed is when the failure to file occurs, which in this
10 case, again, would be October 16th.

11 Regarding the calculation of the failure to file
12 penalties, it's correct that the failure to file penalties are
13 calculated based on an income tax liability that accrued in 2008
14 in this case. But that's not when these penalties could be
15 imposed. They could be imposed, which is the language of the
16 statute, on October 15th. So regardless of how the penalties
17 are calculated, the keyword here is when could they be imposed.
18 Imposed. And that's October 15th, which is within three years
19 of the bankruptcy filing.

20 Thank you, Your Honor.

21 MR. WELCH: If I may, one other thing. A different
22 subject. I won't beat that dead horse anymore.

23 THE COURT: I'm going to take this under submission,
24 so it's not a question of the one who speaks last wins. But –

25 MR. WELCH: No, I understand that. And I don't intend

Motion for Summary Judgment

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1 to do that. I just want to draw Your Honor's attention to
2 another issue, which hasn't been completely discussed in the
3 briefs. But in the declaration in support of the opposition
4 filed by the IRS, there's a breakdown of the late-filing
5 penalty, the late-payment penalty, and interest.

6 I was unable to tell from that whether they're saying
7 that interest is on the penalties or interest on the tax. And
8 that's not real clear to me. But anything that was on the tax
9 should have had priority and should have been paid. And we've
10 attached as an exhibit to the declaration the trustee's final
11 account, where he lays this out. It seems to me that all the
12 priority portions of the tax were paid in full at that time.
13 And what I – one of the things we were looking for in this
14 lawsuit is a declaration that all of the tax and all the
15 interest on that tax has been paid in full. That seems to be
16 what happened in the bankruptcy. And the only issue we're
17 talking about here is the penalties. And then there's a bunch
18 of interest listed, and it's not real clear where that came
19 from. That's it.

20 MR. OLIVERA: Would you like me to address that, Your
21 Honor?

22 THE COURT: Sure.

23 MR. OLIVERA: Oh, thanks. Regarding the interest, the
24 interest is what accrued on the tax penalties. There was also
25 interest on the tax liability itself. But because of the answer

Motion for Summary Judgment

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1 that was filed admitted certain things that perhaps were
2 incorrect, we just went ahead and said in our opposition that
3 the tax liability was discharged – or, excuse me – the interest
4 was paid in full, but in fact there is some of that interest
5 that associates with the actual tax liability, not the
6 penalties. But either way in this case, Your Honor, the
7 collection efforts by the IRS here, I believe, were about \$1500,
8 which would be within the filing, that would – would still go to
9 the failure to file penalty here. And this is addressing a
10 different issue, I guess, here when – with regard to the
11 sanctions that's asked for by the plaintiff.

12 But even if this Court, Your Honor, were to take the
13 admission that the United States made as binding and that it
14 actually means that the transactions that occurred here occurred
15 in 2008, when the IRS acted in its collection efforts, Your
16 Honor, back in, I believe it was, 2012, to obtain the \$1500
17 estate income tax refund check here, he was acting in accordance
18 with the law as the United States understands the law to be
19 interpreting 523(a)(7)(B).

20 So with regard to the interest that plaintiff just
21 asked about, it is the United States' understanding that it is
22 interest accrued on the failure to file and failure to pay
23 penalties. If that answers...

24 THE COURT: Well, but the – you're agreeing that the
25 failure to file penalties are discharged.

Motion for Summary Judgment

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1 MR. OLIVERA: The failure to pay penalty, yes, Your
2 Honor.

3 THE COURT: So wouldn't the interest on those
4 penalties also be discharged -

5 MR. OLIVERA: That's correct, Your Honor. That is
6 correct. The tax - whatever interest accrued on the actual tax
7 liability and whatever interest accrued on the failure to pay
8 penalty would be - would be gone.

9 THE COURT: Okay. I understand that we've got a trial
10 coming up, so I will do my best to have a written decision for
11 you within ten days.

12 MR. OLIVERA: Thank you, Your Honor.

13 (The hearing was adjourned at 9:46 o'clock a.m.)

14 -o0o-

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State of California)
) SS.
County of San Joaquin)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

I am a Certified Electronic Reporter and Transcriber by the American Association of Electronic Reporters and Transcribers, Certificate Nos. CER-124 and CET-124; and also a Certified Verbatim Reporter-Master (CVR-M) by the National Verbatim Reporters Association, Member ID No. 3418. Palmer Reporting Services is approved by the Administrative Office of the United States Courts to officially prepare transcripts for the U.S. District and Bankruptcy Courts.

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United States Bankruptcy Court
Northern District of California

In re:
Kirk Lindsay Wilson
Debtor

Case No. 12-11995-AJ
Chapter 7

CERTIFICATE OF NOTICE

District/off: 0971-1

User: wbkarnes
Form ID: CAODSC7

Page 1 of 3
Total Noticed: 30

Date Rcvd: Nov 06, 2012

Notice by first class mail was sent to the following persons/entities by the Bankruptcy Noticing Center on Nov, 08, 2012.

- db +Kirk Lindsay Wilson, 266 Washington Court, Sebastopol, CA 95472-3170
- traty +MacConaghy and Barnier, PLC, 645 First St. West, #D, Sonoma, CA 95476-7044
- 12776124 +Beam, Karin P., Spaulding McCullough and Tansil, 90 South E Street,
Santa Rosa, CA 95404-6500
- 12776125 +Catherine Conner, Conner, Lawrence and Rodney, 829 Sonoma Avenue, Santa Rosa, CA 95404-4757
- 12776126 +Cathy Zier, c/o Peter Simon of Beyers Costin, 200 Fourth Street, Suite 400,
Santa Rosa, CA 95401-8535
- 12776127 +Chase, Po Box 24696, Columbus, OH 43224-0696
- 12776130 +Guy Kornblum, Guy Kornblum and Associates, 1388 Sutter St. Ste. 820,
San Francisco, CA 94109-5453
- 12880436 +James Walker, Scott Lueders, Esq., 750 Grant Ave. #250, Novato, CA 94945-7003
- 12776132 #+Jim Walker, CPA, Kenneth Frank Accountancy, APC, 1450 Grant Ave., #202,
Novato, CA 94945-3142
- 12776133 +Joel Richard Rubin, 3333 Mendocino Ave. Ste. 202, Santa Rosa, CA 95403-2233
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- 12776135 +Kevin Veenstra, Sonoma Law Group Inc., 445 Orchard St. Ste. 204, Santa Rosa, CA 95404-4267
- 12776136 +Law Ofc Martin G. McOmber, 3510 Unocal Pl. #200, Santa Rosa, CA 95403-0918
- 12776137 +Leo Bartolotta, Geary Shea O'Donnell Grattan, and Mitchell,
37 Old Courthouse Sq., 4th Floor, Santa Rosa, CA 95404-4929
- 12776138 +Lewis Warren, Abbey Weitzenberg Warren and Emery, 100 Stony Point Dr., #200,
Santa Rosa, CA 95401-4150
- 12853929 Linda Tavis, 4010 Montecito Ave., Santa Rosa, CA 95404-1924
- 12776140 +Lisa Villalovos CPA, dba JTT Accounting and Bookkeeping, P.O. Box 2651,
Sebastopol, CA 95473-2651
- 12776141 +Michael Dietrick, Law Offices Of Michael Dietrick, 10 Keller St, Ste. 275,
Petaluma, CA 94952-2345
- 12776142 +Murphy, James A., Murphy, Pearson, Bradley and Feeney, 88 Keaerny Street, 10th Floor,
San Francisco, CA 94108-5568
- 12776143 +Oliker, Robert, Baddley Oliker and Sartori, 17 Keller Street, Petaluma, CA 94952-2938
- 12776144 +Rod Moore, 17 Keller Street, Petaluma, CA 94952-2938
- 12776139 +The Tavis Firm, c/o Michael Fallon, Esq., 100 E. St. #219, Santa Rosa, CA 95404-4606
- 12776145 +Wilson Karin, Mark Potter; White and Potter, 1160 N. Dutton Avenue, Suite 170,
Santa Rosa, CA 95401-4669
- 12776146 +Wilson, Joan, c/o Mark Potter, White and Potter, 1160 N. Dutton Avenue, Suite 170,
Santa Rosa, CA 95401-4669
- 12776147 +Zier, Cathy, c/o Peter Simon, Beyers-Costin, 200 Fourth Street, Suite 400,
Santa Rosa, CA 95401-8535

- Notice by electronic transmission was sent to the following persons/entities by the Bankruptcy Noticing Center.
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P.O. Box 826880, Sacramento, CA 94280-0001
 - smg EDI: CALTAX.COM Nov 07 2012 04:13:00 CA Franchise Tax Board, Bankruptcy Group,
P.O. Box 2952, Sacramento, CA 95812-2952
 - 12776128 +EDI: CHASE.COM Nov 07 2012 04:13:00 Chase, P.o. Box 15298, Wilmington, DE 19850-5298
 - 12776129 EDI: CALTAX.COM Nov 07 2012 04:13:00 Franchise Tax Board, Bankruptcy Unit, PO Box 2952,
Sacramento, CA 95812-2952
 - 12776131 EDI: IRS.COM Nov 07 2012 04:14:00 Internal Revenue Service, Department Of The Treasury,
P.O. Box 9019, Holtsville, NY 11842-9019

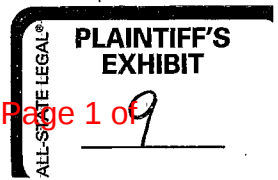
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- **** BYPASSED RECIPIENTS (undeliverable, * duplicate) ****
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- cr* +Rod Moore, 17 Keller Street, Petaluma, CA 94952-2938

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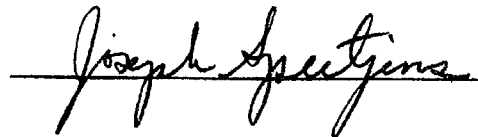
***** BYPASSED RECIPIENTS (continued) *****

I, Joseph Speetjens, declare under the penalty of perjury that I have sent the attached document to the above listed entities in the manner shown, and prepared the Certificate of Notice and that it is true and correct to the best of my information and belief.

Meeting of Creditor Notices only (Official Form 9): Pursuant to Fed. R. Bank. P. 2002(a)(1), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

Date: Nov 08, 2012

Signature:

A handwritten signature in black ink, reading "Joseph Speetjens", written over a horizontal line.

District/off: 0971-1

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Total Noticed: 30

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The following persons/entities were sent notice through the court's CM/ECF electronic mail (Email) system on November 6, 2012 at the address(es) listed below:

Craig K. Welch on behalf of Debtor Kirk Wilson cwelch@craigwelchlegal.com
Gina R. Klump on behalf of Creditor Rod Moore klumplaw@gmail.com, gina.klump@gmail.com
John H. MacConaghy on behalf of Defendant Timothy Hoffman macclaw@macbarlaw.com,
dyork@macbarlaw.com;smansour@macbarlaw.com;mjewett-brewster@macbarlaw.com;kmuller@macbarlaw.com
Office of the U.S. Trustee / SR USTPRegion17.SF.ECF@usdoj.gov, ltroxas@hotmail.com
Timothy W. Hoffman twhl761@sbcglobal.net, ca73@ecfcbis.com

TOTAL: 5

Form CA0dsc7

UNITED STATES BANKRUPTCY COURT
Northern District of California (Santa Rosa)

In re:	Kirk Lindsay Wilson 266 Washington Court Sebastopol, CA 95472	Case Number: 12-11995 AJ 7 Chapter: 7
	Debtor(s)	
	Debtor/Joint Debtor Social Security Number(s): XXX-XX-7872	

DISCHARGE OF DEBTOR

It appearing that the debtor(s) is/are entitled to a discharge, **IT IS ORDERED:**
The debtor(s) is/are granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code).

Dated: 11/6/12

By the Court:

Alan Jaroslovsky
United States Bankruptcy Judge

SEE THE BACK OF THIS ORDER FOR IMPORTANT INFORMATION.

Doc # 24

CAocsd7 continued

EXPLANATION OF BANKRUPTCY DISCHARGE IN A CHAPTER 7 CASE

This court order grants a discharge to the person named as the debtor. It is not a dismissal of the case and it does not determine how much money, if any, the trustee will pay to creditors.

Collection of Discharged Debts Prohibited

The discharge prohibits any attempt to collect from the debtor a debt that has been discharged. For example, a creditor is not permitted to contact a discharged debtor by mail, phone, or otherwise, to file or continue a lawsuit, to attach wages or other property, or to take any other action to collect a discharged debt from the debtor. *[In a case involving community property:]* A creditor who violates this order can be required to pay damages and attorney's fees to the debtor. [There are also special rules that protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.] A creditor who violates this order can be required to pay damages and attorney's fees to the debtor.

However, a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the discharged debtor's property after the bankruptcy, if that lien was not avoided or eliminated in the bankruptcy case. Also, a debtor may voluntarily pay any debt that has been discharged.

Debts That are Discharged

The chapter 7 discharge order eliminates a debtor's legal obligation to pay a debt that is discharged. Most, but not all, types of debts are discharged if the debt existed on the date the bankruptcy case was filed. (If this case was begun under a different chapter of the Bankruptcy Code and converted to chapter 7, the discharge applies to debts owed when the bankruptcy case was converted.)

Debts that are Not Discharged.

Some of the common types of debts which are not discharged in a chapter 7 bankruptcy case are:

- a. Debts for most taxes;
- b. Debts incurred to pay nondischargeable taxes (applies to cases filed on or after 10/17/2005);
- c. Debts that are domestic support obligations;
- d. Debts for most student loans;
- e. Debts for most fines, penalties, forfeitures, or criminal restitution obligations;
- f. Debts for personal injuries or death caused by the debtor's operation of a motor vehicle, vessel, or aircraft while intoxicated;
- g. Some debts which were not properly listed by the debtor;
- h. Debts that the bankruptcy court specifically has decided or will decide in this bankruptcy case are not discharged;
- i. Debts for which the debtor has given up the discharge protections by signing a reaffirmation agreement in compliance with the Bankruptcy Code requirements for reaffirmation of debts.
- j. Debts owed to certain pension, profit-sharing, stock bonus, other retirement plans, or to the Thrift Savings Plan for federal employees for certain types of loans from these plans (applies to cases filed on or after 10/17/2005).

This information is only a general summary of the bankruptcy discharge. There are exceptions to these general rules. Because the law is complicated, you may want to consult an attorney to determine the exact effect of the discharge in this case.

Case No. 3:15-cv-01448-VC
(Related Case No. 3:15-cv-02028-VC)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

6	In re	)	Bankruptcy Case No. 12-11995
7	KIRK LINDSAY WILSON,	)	Chapter 7
8	Debtor.)	
9	<hr/>		
10	KIRK LINDSAY WILSON,	)	Adversary No. 14-01106-AJ
11	Plaintiff,)	
12	v.)	
13	UNITED STATES OF AMERICA, and its)	
14	agency, INTERNAL REVENUE SERVICE,)	
15	Defendant.)	
	<hr/>		

This is an appeal from a Final Order of the United States Bankruptcy Court for the Northern District of California, the Honorable Alan Jaroslovsky presiding, entered on March 12, 2015, granting, in part, Appellee Kirk Lindsay Wilson’s Motion for Summary Judgment in adversary proceeding case number 14-01106-AJ.

APPELLANT UNITED STATES OF AMERICA’S OPENING BRIEF

MELINDA HAAG (CABN 132612)
 United States Attorney
 THOMAS MOORE (ASBN 4305-078T)
 Chief, Tax Division
 JOSE A. OLIVERA (CABN 279741)
 Assistant United States Attorney
 450 Golden Gate Avenue, Box 36055
 San Francisco, California 94102-3495
 Telephone: (415) 436-6888
 Facsimile: (415) 436-7009
 E-mail: jose.olivera@usdoj.gov

Attorneys for the United States of America

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 1. *The sentence in McKay relied upon by the Bankruptcy Court is ambiguous*8

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TABLE OF AUTHORITIES

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5 *In re Allen*, 272 B.R. 913 (Bankr. E.D. Va. 2002)..... 7

6 *In re Atlantic-Pacific Trading Co.*, 64 F.3d 1292 (9th Cir. 1995)..... 8

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10 *In re Frary*, 117 B.R. 541 (Bankr. D. Alaska 1990)..... 7

11 *In re Hedgecock*, 160 B.R. 380 (D. Or. 1993)..... 6

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13 *In re Meyer*, No. 8-11-73179-478, 2013 WL 865544 (Bankr. E.D.N.Y.
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1 **I. STATEMENT OF JURISDICTION**

2 The Bankruptcy Court had subject matter jurisdiction over the adversary proceeding from which
3 this appeal is made, pursuant to 28 U.S.C. § 157(b)(2)(I). The district court has appellate jurisdiction
4 over appeals of final orders entered by bankruptcy courts within the same judicial district. *See* 28
5 U.S.C. § 158(a). This is an appeal from a final order (“Order”) issued by the Bankruptcy Court on
6 March 12, 2015. (Dkt. No. 5, Bankruptcy Record on Appeal (hereinafter “RA”) No. 5-17.) The United
7 States filed a timely Notice of Appeal from the final order on March 21, 2015. (Dkt. No. 1, United
8 States’ Notice of Appeal.) The same day, the United States filed a statement of election to have the
9 United States District Court for the Northern District of California hear its appeal of the Order, pursuant
10 to 28 U.S.C. 158(c)(1)(A), Fed. R. Bankr. P. 8001, and 9th Cir. BAP L.R. 8001(e)-1. (Dkt. No. 1-1,
11 United States’ Statement of Election.)

12 **II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

13 The issues presented for review are as follows:

14 1. Whether the Bankruptcy Court erred in interpreting the “transaction or event” language in 11
15 U.S.C. § 523(a)(7)(B) as referring to the date income tax accrues, rather than the transaction or event
16 giving rise to the failure-to-file tax penalty?

17 Standard of Review: A Bankruptcy Court’s conclusions of law are reviewed *de novo*. *Miller v.*
18 *United States*, 363 F.3d 999, 1003-04 (9th Cir. 2004).

19 2. Whether the Bankruptcy Court erred in finding that the failure-to-file tax penalty assessed
20 against Appellee Kirk Lindsay Wilson for tax year 2008 was discharged under 11 U.S.C. §
21 523(a)(7)(B)?

22 Standard of Review: A bankruptcy court’s conclusions of law are reviewed *de novo* and its
23 findings of fact are reviewed for clear error. *Miller v. United States*, 363 F.3d 999, 1003-04 (9th Cir.
24 2004). The issue of dischargeability of a debt is a mixed question of fact and law that is reviewed *de*
25 *novo*. *Id.* at 1004.

III. STATEMENT OF THE CASE

1
2 Kirk Lindsay Wilson's 2008 federal income tax return was originally due on April 15, 2009, but
3 he obtained an extension of time to file until October 15, 2009. (RA No. 5-11 at 2:18-20.) Wilson did
4 not actually file his 2008 tax return until February 2, 2011. (RA No. 5-11, at 2:21-24.) Wilson was
5 assessed penalties for failure to file his 2008 federal income tax return and failure to pay his 2008
6 income tax liability. (RA No. 5-14, ¶ 5.) On July 24, 2012, Wilson filed a Chapter 7 bankruptcy
7 petition, and, on November 6, 2012, he received a discharge under 11 U.S.C. § 727. (RA No. 5-11 at
8 2:14-17; RA No. 5-35, p. 4.) On March 24, 2014, the Chapter 7 Trustee paid Wilson's 2008 income tax
9 liability, but not the failure-to-file penalty. (RA No. 5-11 at 3:21-23.) Subsequently, the IRS intercepted
10 Wilson's 2013 tax refund and levied on Wilson's social security benefits, seeking payment of the tax
11 penalty. (RA No. 5-12, ¶ 4; RA No. 5-12, p. 10.) On July 30, 2014, Wilson filed an adversary
12 proceeding against the United States seeking a determination that his failure-to-file tax penalty assessed
13 against him for 2008 was discharged and an award of attorney's fees. (RA No. 5-7.) The United States
14 denied that the failure-to-file tax penalty was discharged and opposed an award of attorney's fees. (RA
15 No. 5-24 at 11:17-18 and RA No. 5-8) The amount of the failure-to-file tax penalty owed by Wilson, as
16 of February 6, 2015, was \$3,403.25. (RA No. 5-14, p. 2, ¶ 6.)

17 The issue before the Bankruptcy Court was whether the failure-to-file tax penalty assessed
18 against Wilson for tax year 2008 was discharged under 11 U.S.C. § 523(a)(7)(B), which makes
19 dischargeable non-pecuniary tax penalties that are "imposed with respect to a transaction or event that
20 occurred before three years before the date of the filing of the petition." Failure-to-file penalties are non-
21 pecuniary loss penalties, as acknowledged by Wilson. (RA No. 5-11 at 3:13-16.) In this case, the
22 relevant question is what "transaction or event" is a failure-to-file tax penalty imposed with respect to?

23 The Bankruptcy Court determined that "transaction or event" under § 523(a)(7)(B) referred to
24 the date Wilson's 2008 income tax accrued—April 15, 2009, according to the Bankruptcy Court. (RA
25 No. 5-16 at 2:25-3:1.) Because April 15, 2009, is more than three years before the filing of the July 24,
26 2012, bankruptcy petition date, the Bankruptcy Court found that the failure-to-file penalty was
27 discharged. (RA No. 5-17, ¶ 2, ¶ 1.) The Bankruptcy Court based its determination on a single
28

1 ambiguous sentence misinterpreted from *McKay v. United States*, 957 F.2d 689, 693 (9th Cir. 1992), a
2 Ninth Circuit case deciding a different issue under 11 U.S.C. § 523(a)(7). (RA No. 5-16 at 2:18-22.) The
3 government has appealed this determination because “transaction or event” under § 523(a)(7)(B) does
4 not refer to the accrual of taxes, but instead refers to the date when Wilson actually failed to file his
5 2008 tax return, October 16, 2009. Because October 16, 2009, is within three years of the July 24, 2012
6 bankruptcy filing, the failure-to-file tax penalty assessed against Wilson for tax year 2008 should be
7 deemed excepted from discharge under 11 U.S.C. § 523(a)(7).

8 IV. SUMMARY OF THE ARGUMENT

9 The Bankruptcy Court erred in finding that the failure-to-file tax penalty assessed against Kirk
10 Lindsay Wilson for tax year 2008 was discharged under 11 U.S.C. § 523(a)(7)(B) because the
11 Bankruptcy Court: (A) misinterpreted the “transaction or event” language in § 523(a)(7)(B) as referring
12 to the date taxes accrue rather than the date giving rise to the tax penalty (i.e., Wilson’s failure to file his
13 2008 tax return by the due date), while summarily and incorrectly dismissing as dicta cases directly on
14 point; and (B) misconstrued a single ambiguous sentence in *McKay v. United States*, 957 F.2d 689, 693
15 (9th Cir. 1992) as supporting its interpretation that the “transaction or event” language in § 523(a)(7)(B)
16 refers to the date taxes accrue. Accordingly, the Bankruptcy Court’s order discharging the failure-to-file
17 tax penalty assessed against Wilson pursuant to 11 U.S.C. § 523(a)(7)(B) should be reversed and the
18 penalty should be excepted from discharge under 11 U.S.C. § 523(a)(7).

19 V. ARGUMENT

20 A. The Bankruptcy Court Misinterpreted the “Transaction or Event” Language In 11 U.S.C. § 21 523(a)(7)(B) As Referring to the Date Tax Accrues Rather Than the Date Giving Rise to the Tax 22 Penalty.

23 *1. General Law Regarding Discharge and Exceptions to Discharge*

24 A Chapter 7 bankruptcy discharge order discharges a debtor from all debts that arose before the
25 filing of the debtor’s bankruptcy petition, except those debts listed under Section 523 of the Bankruptcy
26 Code. 11 U.S.C. § 727(b). Section 523 of the Bankruptcy Code excepts from discharge various
27 categories of debts owed by a debtor, including non-pecuniary penalties owed by a debtor to a
28 government entity. 11 U.S.C. § 523(a)(7). Because the failure-to-file penalty at issue here is a non-

1 pecuniary penalty that was assessed against Wilson for failing to file his 2008 income tax return, the
2 applicable exception to discharge is listed under 11 U.S.C. § 523(a)(7). (RA No. 5-11 at 3:13-16.)
3 Section 523(a)(7) states that a discharge under 11 U.S.C. § 727 (the discharge Wilson received) does not
4 discharge an individual debtor from any debt:

5 (7) to the extent such a debt is for a fine, penalty, or forfeiture payable to and for the
6 benefit of a governmental unit, and is not compensation for actual pecuniary loss, other
7 than a tax penalty—

- 8 (A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or
9 (B) imposed with respect to a transaction or event that occurred before three years
10 before the date of the filing of this petition;

11 11 U.S.C. § 523(a)(7).

12 As the language of § 523(a)(7) demonstrates, debts for non-pecuniary penalties for the benefit of
13 a government entity are excepted from Chapter 7 discharges. But, § 523(a)(7) creates two exceptions to
14 the discharge exception. Both exceptions apply solely to tax penalties. The first exception, §
15 523(a)(7)(A) (hereinafter “Section A”), “makes dischargeable tax penalties attributable to dischargeable
16 taxes,” and the second, 523(a)(7)(B) (hereinafter “Section B”), makes dischargeable a tax penalty
17 imposed with respect to a transaction or event occurring more than three years before a debtor’s
18 bankruptcy petition filing. *McKay v. United States*, 957 F.2d 689, 693 (9th Cir. 1992); *In re Burns*, 887
19 F.2d 1541, 1545 (11th Cir.1989) (Section A and Section B create “two independent measures for the
20 dischargeability of tax penalties” under § 523(a)(7)). In other words, a “tax penalty is discharged if the
21 tax to which it relates is discharged (in the precise terms of the statute, not nondischargeable), or if the
22 transaction or event giving rise to the penalty occurred more than three years prior to the filing of the
23 bankruptcy petition.” *In re Burns*, 887 F.2d at 1544. If the tax penalty does not meet the requirements
24 under either Sections A or B, the tax penalty is excepted from discharge under 11 U.S.C. § 523(a)(7).

25 Here, Wilson concedes that the failure-to-file penalty assessed against him for 2008 related to a
26 non-dischargeable tax, making Section A inapplicable. (RA No.5-11 at 3:21-23; RA No. 5-11 at 6:4-9.).
27 Wilson’s 2008 income tax liability was excepted from discharge under two separate 11 U.S.C. § 523
28 statutes: (1) under § 523(a)(1)(A) (referring to § 507(a)(8)(i)) because the due date of his 2008 tax

1 return, October 15, 2009, was within three years before the July 24, 2012 bankruptcy petition date; and
2 (2) under § 523(a)(1)(A)(B)(ii) because his 2008 tax return was filed after it was due and within two
3 years before his bankruptcy petition filing date. (RA No. 5-11 at 2:18-21; RA No. 5-11 at 2:21-24.) As
4 such, Section A of § 523(a)(7) is inapplicable and the failure-to-file tax penalty assessed against Wilson
5 may only be discharged if the penalty meets the requirements of Section B.

6 *2. The Failure-to-File Tax Penalty At Issue Was Excepted from Discharge Because “Transaction*
7 *or Event” in § 523(a)(7)(B) Refers to the “Transaction or Event” Giving Rise to the Penalty.*

8 Under Section B of 11 U.S.C. § 523(a)(7), a non-pecuniary tax penalty is discharged if it is
9 “imposed with respect to a transaction or event that occurred before three years before the date of the
10 filing of this petition.” As stated above, the Bankruptcy Court determined that the failure-to-file tax
11 penalty assessed against Wilson was discharged under Section B because “transaction or event” in the
12 statute refers to the date taxes accrue. In support of this interpretation, the Bankruptcy Court relied
13 primarily on a misinterpretation of *McKay*, and summarily and incorrectly dismisses as dicta all cases
14 cited by the United States directly on point. The Bankruptcy Court’s interpretation of “transaction or
15 event” is incorrect and untenable given the plain language of the statute, the language of the Tax Code
16 section for failure-to-file penalties, and the supporting case law.

17 The Ninth Circuit has interpreted Section B as straightforward. *McKay*, 957 F.2d at 693. The
18 plain language of Section B discharges any tax penalties “imposed with respect to a transaction or event
19 occurring more than three years before” the filing of the bankruptcy petition. In other words, the
20 transaction or event “giving rise” to the tax penalty must have occurred more than three years before the
21 filing of the bankruptcy petition for the penalty to be discharged. *In re Burns*, 887 F.2d at 1544.
22 “Transaction or event” under Section B is not defined by the bankruptcy code, but federal tax law
23 defines “transaction or event” because it states when a failure-to-file penalty arises—the date the failure
24 to file occurs. Under the Internal Revenue Code, a failure-to-file tax penalty can only be imposed when
25 the taxpayer actually fails to file the income tax return by the due date. 26 U.S.C. § 6651(a)(1) (a
26 failure-to-file tax penalty “shall be added to an individual’s tax liability in case of failure to file an
27 income tax return on the date prescribed therefore and “determined with regard to any extensions of time
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1 for filing . . .”) Although individual income tax returns for a tax year are generally due on April 15 of the
2 following year, 26 U.S.C. § 6651(a)(1) requires that any extension to file an income tax return expire
3 before the penalty can be imposed.

4 In addition to the statutory language of Section B and the Tax Code, several cases support the
5 interpretation that “transaction or event,” concerning failure-to-file penalties, refers to the failure to file a
6 tax return—which can only occur when the time period for filing has expired. One particularly
7 persuasive case is the post-*McKay* district court appeal ruling in *In re Hedgecock*, 160 B.R. 380 (D. Or.
8 1993). In *Hedgecock*, debtors’ 1985 tax return was due on April 15, 1986¹ (no extension of time to file
9 was requested) and debtors filed their bankruptcy petition on April 24, 1990. The bankruptcy court
10 determined that the 1985 failure-to-file tax penalty was dischargeable under Section B because April 15,
11 1985, was more than three years before April 24, 1990. The United States appealed the bankruptcy
12 court’s ruling to the district court. The *Hedgecock* district court determined that in order to be
13 dischargeable, the failure-to-file tax penalty must have occurred before April 24, 1987 (i.e., more than
14 three years before the filing of the petition). In affirming the bankruptcy court’s ruling, the district court
15 held: “With respect to the penalties under [26 U.S.C.] § 6651(a) [i.e., failure to file and pay penalties]
16 there is no question that the transaction or event to which those sanctions relate is the failure to file a
17 return and pay tax on the due date.” *In re Hedgecock*, 160 B.R. at 383. *Hedgecock*’s rationale is not
18 singular. Several other courts have made similar rulings. *See In re Fortney*, 1995 WL 606099, at *4
19 (Bankr. S.D. Ga. 1995) (Under § 523(a)(7)(B), “When did the ‘transaction or event occur giving rise to
20 the [tax] penalty? The due date of the return is the date the “transaction or event” occurs for which
21 certain [tax] penalties are imposed.” The court also stated, under Section B, “A penalty for
22 underpayment of estimated tax is no different from penalties for negligence, late filing, or late payment,
23 so that for all these penalties, the due date of the return would be considered the date of the “transaction
24 or event” triggering the running of the three–year period.”); *In re Fox*, 172 B.R. 247, (Bankr. E.D. Tenn.
25 1994) (with respect to a “filing late penalty” and a “negligence penalty,” the applicable transaction or
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27 _____
28 ¹ The court identifies the 1985 tax return due date as April 15, 1985, The correct date should be April
15, 1986. Regardless of the year, the bankruptcy petition was filed more than three years later.

1 event was the date the debtor's tax returns were due); *In re Leahey*, 169 B.R. 96, 100 (Bankr. D.N.J.
2 1994); (“Penalties are incurred the first day that the tax payment or return is late”); *In re Teeslink*, 165
3 B.R. 708, 717 (Bankr. S.D. Ga. 1994) (The applicable “transaction or event” triggering this provision in
4 the case of failure to file penalties is the date the returns were last due” because “a penalty can be
5 imposed for failure to pay a tax on the date a return is due, see 26 U.S.C. § 6651(a)(2), 6151(a), the
6 same triggering date should apply for failure to pay and failure to file penalties.”); *In Matter of Stoll*, 132
7 B.R. 782, 787 (Bankr. N.D. Ga. 1990) (“the penalties were incurred on the first day that the returns were
8 late”); *In re Allen*, 272 B.R. 913, 916 (Bankr. E.D. Va. 2002) (“the [tax] penalty was incurred no earlier
9 than the date of the non-payment or non-filing” which the court determined for 1996 was April 16,
10 1997.); *In re Frary*, 117 B.R. 541 (Bankr. D. Alaska 1990). These cases require are clearly on point.

11 Wilson filed his bankruptcy petition on July 24, 2012. (RA No. 5-11 at 2:14-16.) As such, any
12 failure to file penalty arising before July 24, 2009 (i.e., three years before the filing of the petition), is
13 discharged and any arising after is excepted from discharge. Ordinarily, Wilson’s tax return would have
14 been due on April 15, 2009, but he filed an extension of time to file his 2008 income tax return to
15 October 15, 2009. (RA No. 5-11 at 2:18-21.) Because a failure to file penalty under 26 U.S.C.
16 6651(a)(1) cannot be imposed until the expiration of the extension of time, a failure to file penalty could
17 not be imposed against Wilson until October 16, 2009, the day after his 2008 tax return was due. As
18 such, the transaction or event “giving rise” to the penalty was Wilson’s failure to file his 2008 tax return
19 by the due date. Because October 16, 2009, is not more than three years before the July 24, 2012
20 bankruptcy petition date, Section B’s requirements have not been met and, accordingly, the failure-to-file
21 tax penalty at issue is excepted from discharge under the principal language of 11 U.S.C. § 523(a)(7).

22 B. The Bankruptcy Court Misconstrued a Single Ambiguous Sentence in *McKay v. United*
23 *States*, And Used It As the Primary Support For Interpreting the “Transaction or Event”
24 Language in § 523(a)(7)(B) as Referring to the Date Income Taxes Accrue

25 In its February 25, 2015, Memorandum on Motion for Summary Judgment, the Bankruptcy
26 Court based its opinion on one sentence of *McKay v. United States*: “[that a tax] penalty imposed on
27 unpaid taxes accruing more than three years before the filing of the bankruptcy petition is
28 dischargeable.” (RA No. 5-16 at 2:18-32.) The Bankruptcy Court used this sentence as support for its

1 determination that the “transaction or event” language in Section B referred to the date taxes accrue for
2 tax year 2008, which the Bankruptcy Court stated was April 15, 2009. (RA No. 5-16 at 2:23.) In doing
3 so, the Bankruptcy Court stated that it recognized that it was “extending *McKay*, rather than merely
4 applying it.” (*Id.* at 3.) But the Bankruptcy Court’s rationale is flawed for two reasons: (1) the sentence
5 that the Bankruptcy Court relied upon is ambiguous and inconsistent with the statutory language of
6 § 523(a)(7)(B); and (2) the Bankruptcy Court’s interpretation of “transaction or event” misconstrues
7 *McKay*.

8 Before delving into the Bankruptcy Court’s interpretation of *McKay*, a brief clarification must be
9 made as to when income taxes accrue. According to the Bankruptcy Court, “[i]ncome taxes accrue on
10 April 15 of the year following the tax year in question.” (RA No. 5-16 at 2:23.) The Bankruptcy Court is
11 mistaken. The Ninth Circuit is clear, income taxes accrue at the end of the tax year; December 31, 2008,
12 in this case. *See Edelson v. Commissioner*, 829 F.2d 828, 834 (9th Cir.1987) (“[T]ax liabilities, though
13 unassessed, are deemed obligations due and owing at the close of the taxable year.”); *In re Atlantic-*
14 *Pacific Trading Co.*, 64 F.3d 1292, 1300 (9th Cir. 1995). The two cases cited by the Bankruptcy Court
15 in support of income taxes accruing on April 15 do not deal with when income taxes accrue. Those
16 cases deal with when the obligation to pay income taxes begins, which is April 15 following the year at
17 issue. As such, the correct date of when income taxes accrue is December 31 of the year at issue.

18 *1. The Sentence In McKay Relied Upon By The Bankruptcy Court Is Ambiguous.*

19 The Bankruptcy Court bases its holding as to the penalty at issue on the following sentence: “[a]
20 penalty imposed on unpaid taxes accruing more than three years before the filing of the bankruptcy
21 petition is dischargeable.” *McKay*, 957 F.2d at 693. But this sentence is ambiguous because it is unclear
22 whether the word “accruing” applies to the “penalty imposed” or to the “unpaid taxes.” The Bankruptcy
23 Court assumed that the *McKay* court meant for “accruing” to apply to taxes. However, given the
24 language of § 523(a)(7)(B), the language of the failure-to-file tax penalty statute under 26 U.S.C.
25 § 6651(a)(1), and subsequent case law as described above, this interpretation does not makes sense and
26 requires the Court to add the word “accruing” to § 523(a)(7)(B), a word that does not appear in the
27 statute. In fact, with respect to § 523(a)(7)(B), the undersigned has found “accrued” used in only one
28

1 other case, but that case referred to failure-to-file penalties accruing, not the income tax, and favors the
2 interpretation advocated by the United States in this case. *See In re Meyer*, 2013 WL 865544, at *9
3 (Bankr. E.D.N.Y. Mar. 7, 2013).

4 Moreover, at least one court has been uncertain how to interpret the ambiguous *McKay* sentence.
5 In *In re Wright*, 244 B.R. 451, 457 (Bankr. N.D. Cal. 2000) a Northern District of California Bankruptcy
6 Court noted that the under *McKay* the “transaction or event” might be the underlying taxes or might be
7 the failure to file, but in that case either date was before the three-year look-back period. Given the
8 ambiguity of the single sentence serving as the foundation for the Bankruptcy Court’s opinion, and the
9 substantial authority favoring a contrary holding, this Court should rule with the majority that
10 “transaction or event” for failure-to-file tax penalties refers to the actual failure to file, not the date when
11 income taxes accrue.

12 *2. The Bankruptcy Court’s Interpretation of “Transaction or Event” as Referring to the Date*
13 *Taxes Accrue Misconstrues the Holding in McKay and Ignores the Language Differences*
14 *Between Section A & Section B under § 523(a)(7).*

15 The Bankruptcy Court construed *McKay* as “implicitly interpret[ing] . . . ‘imposed with respect
16 to a transaction or event’ as referring to the tax obligation itself.” (RA No. 16 at 3:3-8.) But *McKay* was
17 not interpreting “transaction or event” as to tax penalties, or, in particular, failure-to-file penalties.
18 *McKay* addressed whether Section A and Section B of § 523(a)(7) are to be read in the conjunctive or
19 disjunctive and held that Section A and Section B of the statute are to be read disjunctively. *McKay*, 957
20 F.2d at 693-94. It should be read for that holding and not used to explicitly or implicitly interpret
21 “transaction or event” under Section B.

22 Moreover, the Bankruptcy Court’s interpretation ignores the explicit differences in language
23 between Sections A and B of § 523(a)(7). Congress made the language of these two exceptions quite
24 different, with Section A referring to a discharge exception for those tax penalties “relating to a tax,”
25 and Section B referring to a tax penalty “imposed with respect to a transaction or event that occurred
26 before three years.” 11 U.S.C. §§ 523(a)(7)(A)&(B). Section B does not state that a tax penalty
27 imposed with respect to “a tax that occurred before three years,” before the bankruptcy filing is
28

1 dischargeable, it states a tax penalty “imposed with respect to a transaction or event” that occurred
2 before three years before the bankruptcy filing. A failure-to-file tax penalty can only arise when one
3 fails to file his tax return. Section B should be given a straightforward interpretation, which the
4 Bankruptcy Court’s order does not do.

5 Applying Section B in the most straightforward way, the failure-to-file tax penalty was imposed
6 with respect to Wilson’s failure to file. In this case, the penalty was not, and could not have been,
7 imposed on April 16, 2009, because Wilson had filed for and been granted a filing extension. (RA No.
8 5-11 at 2:18-21.) Thus, it was his failure to file by October 15, 2009, which gave rise to a penalty on
9 October 16, 2009, which is within three years of Wilson’s July 24, 2012 bankruptcy filing.
10 Consequently, the Section B requirements have not been satisfied, and the penalty imposed with respect
11 to Wilson’s failure to file is excepted from discharge under 11 U.S.C. § 523(a)(7).

12 **VI. CONCLUSION**

13 The Court should find that the failure-to-file tax penalty assessed against Wilson for tax year
14 2008 is excepted from discharge under 11 U.S.C. § 523(a)(7), and reverse the Bankruptcy Court’s order
15 on this issue.

16 Dated: July 15, 2015.

Respectfully submitted,

17 MELINDA HAAG
18 United States Attorney

19 s/ Jose A. Olivera
20 JOSE A. OLIVERA
21 Assistant United States Attorney

22 **Certification**

23 As required under Fed. R. Bankr. P. 8015(a)(7), the undersigned certifies that the
24 foregoing brief complies with the type-volume limitation of Fed. R. Bankr. P. 8015, and that the
25 total number of words in this brief is 4,654.

26 Dated: July 15, 2015.

27 s/ Jose A. Olivera
28 JOSE A. OLIVERA
Assistant United States Attorney