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TOLLING THE THREE-YEAR PERIOD FOR DISCHARGE OF INCOME TAXES: IS THERE PLAIN MEANING IN 11 U.S.C. § 507(a)(8)(A)(i)?

*The Honorable William Houston Brown**
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This Article examines the split in reported authority concerning the provisions of those parts of the Bankruptcy Code[1] that preclude the discharge of certain income or gross receipts tax debts.[2] When a debtor files multiple bankruptcy petitions, an issue is whether or not the three-year nondischargeability period for income or gross receipts taxes is suspended and enlarged during the pendency of the prior bankruptcy case or cases.[3]

Some recent judicial decisions have disagreed with the prevailing interpretation that a debtor's previous bankruptcy case suspended the running of the statutory time period for possible discharge of income or gross receipts taxes owing to a governmental unit, whether federal or state.[4] The emerging minority of judicial opinions, although few in number, have found the applicable statutes to be clear and have concluded that a debtor's prior bankruptcy case does not toll the statutory period, a result that allows a repeat bankruptcy filer an opportunity to discharge more income tax debts. Some of the majority, as well as minority, opinions found comfort in the clarity of the controlling statutes.[5] One of the minority views was expressed by the Court of Appeals for the Fifth Circuit, in *Quenzer v. United States,*[6] making an analysis of its view particularly appropriate for those practicing law in that circuit. A few courts outside of the Fifth Circuit have agreed with the result of that court's opinion. Lower courts within the Fifth Circuit, however, may not be compelled to apply *Quenzer* as controlling prece-

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1. The Bankruptcy Code, which will be referred to throughout this article as the "Code," is found in title 11 of the United States Code.

2. "Debt" is defined as "liability on a claim," and a "claim" is defined, in part, as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(12), (5)(A) (1994).

3. See *United States v. Richards (In re Richards),* 994 F.2d 763, 765 n.3 (10th Cir. 1993), for a negative example of the effect of a debtor filing for bankruptcy relief, prolonging the case, then dismissing and refiling in order to take advantage of the expiration of the applicable time period for discharge of taxes.

4. The pertinent three-year time period is found in 11 U.S.C. § 507(a)(8)(A)(i) (1994). *See infra* note 14 and accompanying text.

5. *Contrast In re* Taylor, 81 F.3d 20, 25 (3d Cir. 1996) ("[I]t seems clear that Congress intended to provide the government a full and unimpeded three years to collect taxes.") *with* Quenzer v. United States (*In re* Quenzer), 19 F.3d 163, 165 (5th Cir. 1993) ("Under the plain language of section 108(c), however, that suspension applies only to nonbankruptcy law and nonbankruptcy proceedings.").

6. *Quenzer,* 19 F.3d at 165.

dent because of that decision's failure to fully analyze the § 108(c) arguments or to reach the § 105(a) arguments.[7]

This Article explores the rationale of the conflicting decisions, questioning how the statutes can be so clear to divergent viewpoints. The Article concludes by recommending that Congress, which is currently examining the National Bankruptcy Review Commission's recommendations and other suggestions for changes to the Bankruptcy Code,[8] should amend the applicable sections of the Code to specify the effect of prior bankruptcy filings on the dischargeability of taxes in subsequent cases. Our conclusion is consistent with one of the National Bankruptcy Review Commission's recommendations that Congress should amend Bankruptcy Code §§ "507(a)(8) and 523(a)(1) to provide for the tolling of relevant periods in the case of successive filings."[9]

I. RELEVANT STATUTORY PROVISIONS

Pursuant to § 523 of the Bankruptcy Code, certain debts are excepted from the discharge that is available to individual debtors under § 727(a).[10] The exception for tax debts, found in § 523(a)(1), automatically excludes from the discharge, which is available in chapters 7, 11, or 12, or partially in chapter 13, of the

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7. In *Solito v. United States,* 172 B.R. 837 (W.D. La. 1994), a decision prior to the Fifth Circuit's *Quenzer,* the district court applied § 105(a) to suspend the three-year period. In *Quenzer,* the Fifth Circuit did not reach the § 105(a) argument because it was not argued in the trial court. *Quenzer,* 19 F.3d at 163. *See also* Ramos v. Internal Revenue Serv. (*In re* Ramos), 208 B.R. 655 (W.D. Tex. 1996); Clark v. Internal Revenue Serv. (*In re* Clark), 184 B.R. 728 (Bankr. N.D. Tex. 1995). Both of these are § 507(a)(8)(A)(ii) opinions issued after *Quenzer.*

8. In the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, Congress created the National Bankruptcy Review Commission and that Commission's final report, BANKRUPTCY: THE NEXT TWENTY YEARS, was issued on October 20, 1997.

9. National Bank. Review Comm'n Final Report, BANKRUPTCY: THE NEXT TWENTY YEARS (October 20, 1997), 951. The full report is available in print from the United States Government Printing Office or on the internet at http://www.nbrc.gov/index.html. [hereinafter "NBRC Report"].

10. 11 U.S.C. §§ 523(a), 727(a) (1996). Section 727(a)(1) restricts a bankruptcy discharge to individuals and § 523(a) provides in its subsections (1) through (18) a description of debts, including the taxes discussed in this Article, that are excepted from the general § 727(a) discharge. There are, therefore, remedies available to creditors either to object to the debtor's general discharge on those grounds found in § 727(a) or to seek one of the § 523(a) exceptions from discharge. If an action is filed in the bankruptcy court, both remedies require the filing of a complaint, or "adversary proceeding," pursuant to Part VII of the Federal Rules of Bankruptcy Procedure, of which Rules 4004 and 4007 govern the time for filing such complaints. Interaction of § 523(c) and Rule 4007(b) permit the filing of some dischargeability complaints, including those under § 523(a)(1), "at any time," and subject matter jurisdiction is not exclusively in the bankruptcy court for those complaints not listed in § 523(c).

Bankruptcy Code, any debt—

> (1) for a tax or a customs duty—
> (A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;
> (B) with respect to which a return, if required—
> (i) was not filed; or
> (ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
> (C) with respect to which the debtor made a fraudulent return or wilfully attempted in any manner to evade or defeat such tax.[11]

This Article concerns itself only with the disjunctive part (A) of this statute, and it does not address part (B)'s requirement that a tax return be timely filed or part (C)'s alternative attention to fraudulent returns or willful attempts to evade or defeat taxes.[12] The attention of this Article, therefore, is on the income or gross receipts taxes that are potentially dischargeable as a result of § 523(a)(1)(A)'s reference to § 507(a)(8).[13]

Section 507 of the Code establishes the priorities for payment of allowed claims against the bankruptcy estate,[14] and § 507(a)(8) provides, in its pertinent part:

> Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for –
> (A) a tax on or measured by income or gross receipts –
> (i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition.[15]

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11. 11 U.S.C. § 523(a)(1) (1994). This section excludes its taxes totally from the discharge available in chapters 7, 11, or 12. It excludes its taxes from the partial discharge that may be available under § 1328(b). To the extent taxes are paid in full, pursuant to § 1322(a)(2), those tax claims would be satisfied and the chapter 13 debtor may receive a discharge upon "completion by the debtor of all payments under the plan." 11 U.S.C. § 1328(a) (1994).

12. See Darrell Dunham & Alex Shimkus, *Tax Claims in Bankruptcy*, 67 AM. BANKR. L.J. 343, 352 (Summer 1993) for the distinction that § 523(a)(1)(B) and (C) taxes, although nondischargeable, are not accorded the priority status of § 523(a)(1)(A) taxes.

13. Section 523(a)(1)(A) also refers to § 507(a)(2) for other taxes excepted from discharge. Section 507(a)(2) debts are those "unsecured claims allowed under section 502(f) of this title," or those claims "arising in the ordinary course of the debtor's business or financial affairs after the commencement" of an involuntary case but before "the order for relief shall be determined." 11 U.S.C. § 502(f) (1994).

14. The statutory priorities for payment of claims against the estate begin with administrative expenses and proceed through nine levels of priority. 11 U.S.C. § 507(a)(1)-(9) (1994).

15. 11 U.S.C. § 507(a)(8)(A)(i) (1994). Section 507(a)(8)(A)(ii) and (iii) address the timing of assessments for taxes, issues that are similar to those discussed in this Article. *See, e.g.*, Acosta v. Internal Revenue Serv., 184 B.R. 544 (W.D. Tenn. 1995) (holding that debtor's prior Chapter 7 case suspended the 240-day priority period for tax assessment). Sections 507(a)(8)(B)-(G) address property, employment, excise, and customs taxes, as well as penalties, which are excepted from the discharge, and these taxes are not discussed in this Article.

Taken together, § 523(a)(1)(A) and § 507(a)(8)(A)(i) link discharge of these taxes to their priority status.[16] Generally speaking, income or gross receipts taxes for which a return becomes due within three years of the filing of a bankruptcy petition are not only excepted from the otherwise dischargeable prepetition debts, they also are accorded eighth level priority status for payment. Nondischargeability is limited to unsecured taxes by the terms of § 507(a)(8), but § 523(a)(1)(A) makes it unnecessary that a claim be filed or allowed.[17] The result of these combined sections is that these types of tax debts may be paid if there are sufficient funds available in the bankruptcy estate to reach the eighth level of priority distribution, but if insufficient funds remain to pay such debts in full, the balances would remain a personal liability of the debtor, who would be denied a discharge of the particular tax debts covered by these sections of the Code.[18]

II. MAJORITY VIEW—THE THREE-YEAR PERIOD IS TOLLED DURING THE PENDENCY OF A PRIOR BANKRUPTCY CASE

A clear majority of courts, including the Courts of Appeals for the Third, Seventh, Eighth, and Tenth Circuits,[19] have held that the time period for the nondischargeability of taxes pursuant to § 507(a)(8)(A)(i) is tolled and enlarged when the debtor had a prior bankruptcy case pending during its three-year period. In reaching this conclusion, some of these majority-view courts have relied upon the extension-of-time provisions found in § 108(c),[20] while other courts have utilized the bankruptcy court's broad equitable powers found in § 105(a).[21]

Although the "Bankruptcy Code does not contain any provisions which explicitly suspend" § 507(a)(8)(A)(i)'s three-year priority period, § 108(c) generally extends any applicable limitation periods which are created by nonbankruptcy law, court order, or agreement, for those with causes of action against the debtor in a nonbankruptcy court and where that creditor is hampered from proceeding

16. Dunham & Shimkus, *supra* note 12, at 353 ("[A]ll priority tax claims are nondischargeable by operation of § 523(a)(1).").

17. Jack F. Williams, *The Federal Tax Consequences of Individual Debtor Chapter 11 Cases,* 46 S.C.L. REV. 1203, 1207 & n.24 (Summer 1995) (citing *In re* Olsen, 123 B.R. 312, 314 (Bankr. N.D. Ill. 1991)); *see also* Stephen W. Sather, *Tax Issues in Bankruptcy,* 25 ST. MARY'S L.J. 1363, 1373 (1994) ("Federal tax liens are not discharged, even if the underlying taxes are discharged.").

18. The debtor's property that otherwise is exempt from the creditor's reach would remain liable for tax debts that survive the discharge. 11 U.S.C. § 522(c)(1) (1994).

19. *In re* Taylor, 81 F.3d 20 (3d Cir. 1996); Montoya v. United States (*In re* Montoya), 965 F.2d 554 (7th Cir. 1992); Waugh v. Internal Revenue Serv. (*In re* Waugh), 109 F.3d 489 (8th Cir. 1997), *cert. denied,* 118 S. Ct. 80 (1997); United States v. Richards (*In re* Richards), 994 F.2d 763 (10th Cir. 1993). The Ninth Circuit, in *In re West,* 5 F.3d 423 (9th Cir. 1993), *cert. denied,* 511 U.S. 1081 (1994), similarly construed § 507(a)(8)(A)(ii).

20. *See, e.g., Waugh,* 109 F.3d at 491-94.

21. *See, e.g., Richards,* 994 F.2d at 765.

outside the bankruptcy court due to the automatic stay provision of § 362.[22] Section 108(c) provides, in relevant part:

> Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of —
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
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> (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.[23]

A provision that some courts have found to be complementary to § 108(c) is in the Internal Revenue Code (IRC), which "suspends the tax collection limitation period while the debtor's assets are in the custody or control of any court and for an additional six months after dismissal of the debtor's case."[24] The applicable IRC section provides:

> Cases under Title 11 of the United States Code. The running of the period of limitations provided in section 6501or 6502 on the making of assessments or collection shall, in a case under title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collecting and –
>
> (1) for assessment, 60 days thereafter, and
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> (2) for collection, 6 months thereafter.[25]

Courts that follow the majority view on tolling typically have interpreted Code § 108(c) as an activator of IRC § 6503, "thereby preventing the periods for nondischargeability from running during the course of a debtor's bankruptcy case and for six months thereafter."[26] Assuming that it is appropriate to look to the legislative history behind § 108(c),[27] these courts use it to support their conclusion that

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22. *Waugh,* 109 F.3d at 492; *see also* Brickley v. United States (*In re* Brickley), 70 B.R. 113, 115 (Bankr. 9th Cir. 1986). Under 11 U.S.C. § 362(a) (1994), the filing of a bankruptcy petition "operates as a stay" as to those actions described in § 362(a)(1)-(8). Subsections (b)(1)-(18) provide exceptions to the automatic stay.

23. 11 U.S.C. § 108(c) (1994).

24. *Taylor,* 81 F.3d at 23. The Internal Revenue Code is found in title 26 of the United States Code.

25. 26 U.S.C. § 6503(h) (1994).

26. *In re* Eysenbach, 183 B.R. 365, 369 (W.D.N.Y. 1995).

27. *See* contrary view of the appropriateness of looking to legislative history, *infra* note 53 and accompanying text.

Congress intended for Code § 108(c) and IRC § 6503 to jointly suspend the three-year priority period found in § 507(a)(8)(A)(i):

> In the case of Federal tax liabilities, the Internal Revenue Code suspends the statute of limitations on a tax liability of a taxpayer from running while his assets are in the control or custody of a court and for 6 months thereafter (sec. 6503(b) of the Code). The Amendment applies this rule in a title 11 proceeding. Accordingly, the statute of limitations on collection of nondischargeable Federal tax liability of a debtor will resume running after 6 months following the end of the period during which the debtor's assets are in control or custody of the bankruptcy court. This rule will provide the Internal Revenue Service adequate time to collect nondischargeable taxes following the end of the title 11 proceedings.[28]

Based upon such historical congressional language, these courts have said that Congress could not have intended to allow a taxpayer to escape liability because of the expiration of the statute of limitations for tax collection while the debtor's assets are protected by the automatic stay.[29] Under this rationale, these courts believe that allowing the statute of limitations to run while the debtor's assets are protected by a bankruptcy filing would render § 108(c) meaningless and "would open the door to schemes of tax avoidance by debtors who could simply dismiss and refile their case after the expiration of the three-year period of nondischargeability."[30] As the Ninth Circuit has observed, Code § 108(c)'s implicit incorporation of IRC § 6503 "reflects a policy determination that "'it would be unfair to allow the statute [of limitations] to run against the government's right to enforce a tax lien when, even if the government did bring suit, it couldn't collect because it couldn't 'get at' the taxpayer's assets'"" while a bankruptcy case was pending.[31]

While most majority-view courts utilize Code § 108(c) and IRC § 6503 in order to toll the three-year priority period found in § 507(a)(8)(A)(i), several courts have employed § 105(a) to accomplish the identical result.[32] The latter section provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.[33]

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28. Brickley v. United States (*In re* Brickley), 70 B.R. 113, 115 (Bankr. 9th Cir. 1986) (quoting S. Rep. No. 989, 95th Cong., 2nd Sess. 30-31 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5816-5817).

29. *Taylor,* 81 F.3d at 23-24; *Brickley,* 70 B.R. at 115.

30. *Brickley,* 70 B.R. at 115.

31. *In re* West, 5 F.3d 423, 426 (9th Cir. 1993), *cert. denied,* 511 U.S. 1081 (1994) (applying § 507(a)(8)(A)(ii)); *see also* Montoya v. United States (*In re* Montoya), 965 F.2d 554, 557 (7th Cir. 1992) ("Section 108(c) implicitly incorporates the limitations period of § 6503 by preserving nonbankruptcy statutes of limitations which have not yet expired.").

32. Clark v. Internal Revenue Serv. (*In re* Clark), 184 B.R. 728 (Bankr. N.D. Tex. 1995); Solito v. United States, 172 B.R. 837 (W.D. La. 1994); *see also* United States v. Richards (*In re* Richards), 994 F.2d 763, 765-66 (10th Cir. 1993); Ramos v. Internal Revenue Serv. (*In re* Ramos), 208 B.R. 655 (W.D. Tex. 1996) (assessment opinions under § 507(a)(8)(A)(ii)).

33. 11 U.S.C. § 105(a) (1994).

In the case of *In re Richards*, for example, the Court of Appeals for the Tenth Circuit stated that "[a]lthough the reasoning of the courts which have addressed the precise present problem varies, . . . neither the three-year period provided for in 11 U.S.C. § 507(a)(8)(A)(i) nor the 240-day period provided for in 11 U.S.C. § 507(a)(8)(A)(ii) runs during the pendency of the first of two successive bankruptcies."[34] That court went on to hold that the bankruptcy court's equitable power found in § 105(a) was "broad enough" to suspend the running of § 507(a)(8)(A)(ii)'s 240-day assessment period during the pendency of the prior bankruptcy case.[35] "This use of the equitable authority in 11 U.S.C. § 105(a) is not inconsistent with any specific provision of the Bankruptcy Code, and, in our view, is consistent with the underlying philosophy of the Bankruptcy Code."[36] Use of equitable tolling power may be appropriate, especially in those cases where the proof establishes that the debtor used a prior bankruptcy filing intentionally to avoid tax obligations.[37]

Under the majority's rationale, allowing the government the entire three years to collect delinquent taxes, without the restraints of the automatic stay, is "necessary" and "appropriate" to carry out the discharge provisions of the Bankruptcy Code.[38] Moreover, those courts would say that suspending the three-year period while the debtor is under the protection of the automatic stay fulfills and preserves the congressional intent to afford the government "certain time periods to pursue its tax collection efforts."[39]

Whether dependent upon § 105(a) or § 108(c), the majority-view courts have expressed no difficulty in reaching their conclusion that a debtor's prior bankruptcy case suspends the running of § 507(a)(8)'s time periods for tax assessment or collection during the pendency of that case, thereby precluding the discharge of applicable taxes in a subsequent bankruptcy case if the time of suspension brings the taxes within the applicable period. Assuming that the plain language of § 108(c) precludes its application to the bankruptcy law found in § 507(a)(8)(A)(i), some of the majority-view courts have concluded that this presents one of those "'"rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters"'."[40] In the view of the Eighth Circuit, for example, if it "applied the plain meaning of section 108(c) and held that the priority period of section 507(a)(8)(A)(i) is not suspended during bankruptcy proceedings, Congress' intent to afford the IRS a

34. *Richards*, 994 F.2d at 766.

35. *Id.* at 765.

36. *Id.* In *United States v. Energy Resources Co.*, 495 U.S. 545, 549 (1990), the Supreme Court referred to the "traditional understanding" that bankruptcy courts are courts of equity; however, that Court also has said that the bankruptcy court's equitable powers "must and can only be exercised within the confines of the Bankruptcy Code." Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988).

37. *Clark*, 184 B.R. at 728.

38. 11 U.S.C. § 105(a) (1994).

39. *Solito*, 172 B.R. at 840 (quoting *Richards*, 994 F.2d at 765).

40. Waugh v. Internal Revenue Serv. (*In re* Waugh), 109 F.3d 489, 493 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 80 (1997) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242, 109 S. Ct. 1026, 1031 (1989)).

three-year period for the collection of taxes certainly would be frustrated."[41] Similarly, the Third Circuit has concluded that an overly restrictive application of § 507(a)(8)(A) "would lead to absurd results, as the government would lose its priority claim to back taxes as a result of the taxpayer's abuse of the bankruptcy process."[42] The latter court construed Supreme Court authority on statutory construction as departing from strict application of the Bankruptcy Code if it would "'conflict with any other section of the Code, or with any important state or federal interest'," or with "'a contrary view suggested by the legislative history'."[43]

III. MINORITY VIEW—THE THREE-YEAR PERIOD IS NOT TOLLED DURING THE PENDENCY OF A PRIOR BANKRUPTCY CASE

The minority view, which has emerged subsequent to most of the majority-view opinions, holds that the three-year period is not tolled or enlarged during the pendency of a prior bankruptcy case, at least when the minority courts' conclusions are based upon their views of the plain language of § 108(c).[44] Although that section provides generally for an extension of time to commence or continue a civil action against the debtor, by its own terms its application is limited expressly to those time periods that are established by "'applicable nonbankruptcy law'," or "'an order entered in a nonbankruptcy proceeding'," or "'by agreement'."[45] In the opinions of the minority courts, because §§ 507 and 523 are provisions of the Bankruptcy Code rather than of nonbankruptcy law, such provisions are not subject to the tolling powers of § 108(c): "The Bankruptcy Code nor the I.R.C. serve to toll, suspend or extend the relevant periods because §§ 108(c) and 6503(h) do not apply to bankruptcy laws."[46]

Moreover, the minority-view courts observe that since the plain language of the relevant Bankruptcy Code sections are unambiguous and, in their opinions, do not lead to an absurd result, a resort to the legislative history to support an extension of the three-year "look back" period is not appropriate.[47] "Had Congress wished specifically to set tolling limitations with respect to the Bankruptcy Code provisions, it could have inserted the appropriate language."[48] Therefore, according to the minority view, if Congress had intended for the three-year look back period in § 507(a)(8)(A)(i) to be suspended during the pendency of a prior bankruptcy case, it easily could have made that intention clear,

41. *Id.* at 493.
42. *In re* Taylor, 81 F.3d 20, 23 (3d Cir. 1996).
43. *Id.* at 25 (quoting *Ron Pair Enters.*, 489 U.S. at 243).
44. Quenzer v. United States (*In re* Quenzer), 19 F.3d 163, 165 (5th Cir. 1993); Nolan v. United States (*In re* Nolan), 205 B.R. 885 (Bankr. M.D. Tenn. 1997); *In re* Pastula, 203 B.R. 941 (Bankr. E.D. Mich. 1997); Gore v. United States (*In re* Gore), 182 B.R. 293 (Bankr. N.D. Ala. 1995); Turner v. United States (*In re* Turner), 182 B.R. 317 (Bankr. N.D. Ala. 1995).
45. *Turner,* 182 B.R. at 326 (quoting *In re* Eysenbach, 170 B.R. 57, 59 (Bankr. W.D.N.Y. 1994)); *Quenzer,* 19 F.3d at 165; *Gore,* 182 B.R. at 301; *Pastula,* 203 B.R. at 946; *Nolan,* 205 B.R. at 889.
46. *Pastula,* 203 B.R. at 946 (citing *In re* Macko, 193 B.R. 72 (Bankr. M.D. Fla. 1996)).
47. *Nolan,* 205 B.R. at 888; *see also Pastula,* 203 B.R. at 945.
48. *Pastula,* 203 B.R. at 946.

the same way it made the nonbankruptcy tolling provision relating to offers in compromise found in Treasury Regulations applicable to § 507(a)(8)(A)(ii)'s time period.[49] The "proximity of this specific" tolling provision found in § 507(a)(8)(A)(ii) "demonstrates again that Congress focused on the need for some extensions and tolling of the time periods in § 507(a)(8)."[50] The minority-view courts see the difference in the two Code subsections as an example of the "precision with which Congress crafted the balance between the dischargeability of taxes and the collection needs of the government in § 507(a)(8)(A)(i) and (ii)."[51] Another court observed: "The 'unambiguous language of the statutes involved is the clearest indicator of the intent of Congress'."[52]

While some of the majority-view courts have invoked § 105(a)'s broad equitable powers in order to toll the three-year period, the courts within the minority view have found this practice to be inappropriate, at least in the absence of actual proof of debtor misconduct.[53] One court commented, for example: "Absent some indication of misconduct, equity cannot be invoked by the court except to avoid some egregious travesty of justice which would inure to the government IRS as the result of nefarious conduct on the debtors part in filing or maintaining the first bankruptcy case."[54] In response to the majority view's argument that, without tolling, debtors will abuse the bankruptcy system in order to excessively discharge tax liabilities, the court in *In re Nolan* pointed out there are two Bankruptcy Code provisions designed to prevent such an abuse:

> "Fears" of debtor abuse of the IRS and manipulation of bankruptcy filings to avoid the nondischargeability of taxes are resolved by other provisions of the Bankruptcy Code. For example, 11 U.S.C. § 349 permits a bankruptcy court to insulate taxes from discharge at dismissal of a bankruptcy case if it appears that the debtor is serially filing and dismissing to manipulate the dischargeability of taxes. The bankruptcy court can grant the IRS relief from the stay for cause under [§] 362(d)(1) where the passage of time in a bankruptcy case will inappropriately defeat the collection rights of the government.[55]

In fact, the *Nolan* opinion only addressed the § 108(c) issue and preserved for trial "the government's equitable arguments."[56] In so doing, that court nevertheless stated that § 105(a)'s use was not justified merely because the debtor had filed bankruptcy previously during the three-year period, and the court distinguished the statutory elements found in the Bankruptcy Code from a statute of limitation:

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49. *Turner,* 182 B.R. at 326 (pointing out that Treas. Reg. § 301.7122-1(f) is applicable to the § 507(a)(7)(A)(ii) time period because of the statute's reference to "offers in compromise"); *Gore,* 182 B.R. at 302.

50. *Nolan,* 205 B.R. at 890.

51. *Id.* at 890-91.

52. *Pastula,* 203 B.R. at 946 (quoting *Gore,* 182 B.R. at 301).

53. *Nolan,* 205 B.R. at 888.

54. *Pastula,* 203 B.R. at 948.

55. *Nolan,* 205 B.R. at 891 (citations omitted).

56. *Id.* at 894.

> The three year look back in § 507(a)(8)(A)(i) is a substantive element of the government's cause of action under § 523(a)(1)(A), not a statute of limitations. Ordinary principles of "equitable tolling" employed by many of the reported decisions are not applicable. This element of the government's cause of action can be supplied by a court applying equitable principles only upon proof of substantial debtor misconduct. The courts that have allowed "equitable tolling" without proof of debtor misconduct have mistaken the three year look back for a statute of limitations. If this debtor committed wrongful acts justifying the equitable relief sought by the IRS, 11 U.S.C. § 105 provides a remedy. Nothing in § 105 provides that remedy based only on a permitted bankruptcy filing during the three year period in § 507(a)(8)(A)(i).[57]

The minority-view courts essentially rely upon statutory construction which demands that a statute, which is clear on its face, should not be interpreted by resort to legislative history or to other extraneous interpretive sources.[58] They also force attention to the difference between a statute of limitation and the statutory three-year element, which is necessary to priority and dischargeability status.[59] The minority points also to § 523(b) as evidence that Congress understood that a debtor might file "more than one bankruptcy case and [receive] more than one automatic stay."[60] The latter section provides, in relevant part:

> Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1) . . . of this section, . . . in a prior case concerning the debtor under this title, . . . is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.[61]

That is, the relevant taxes must be nondischargeable in the present bankruptcy case. Dischargeability is not denied merely because the taxes were excepted from discharge in a prior case.[62]

IV. COMMENTS AND CONCLUSION

The fact that both the majority and minority courts find clarity in the intent of Congress supports a need for either the Supreme Court or Congress to address the split in the courts' views. In the current climate of critical analysis of the Bankruptcy Code, it would be easy to speculate that Congress would not agree with the minority-view courts. The authors suggest that Congress should take the opportunity, while it is considering other changes to the Bankruptcy Code, to amend § 507(a)(8)(A)(i) and to specify its intent. As the minority-view courts and previous commentary on this statute have pointed out, the assumption that §

57. *Id.* at 888 (citations omitted).
58. *Id.*
59. *Id.*
60. *Id.* at 890.
61. 11 U.S.C. § 523(b) (1994).
62. *Nolan*, 205 B.R. at 888.

108(c) automatically suspends § 507(a)(8)(A)(i)'s three-year period for collection of income and gross receipts taxes is subject to various criticisms, including that:

> [Section]108(c) is useful merely for the policy supporting that section. Facially, § 108(c) gives a 30-day extension to non-bankruptcy limitations periods to enforce claims. Such limitations periods traditionally are used to bar stale claims. Subpart (A)(i)'s three-year period, however, furthers a different policy, because it distinguishes otherwise valid claims from priority claims . . . . The policy that supports a provision extending the right to file stale claims does not necessarily also support making them nondischargeable.[63]

The majority-view courts remind us, however, that the legislative history comments indicate that some members of Congress were convinced that § 108(c), coupled with the Internal Revenue Code, would suspend the three-year period. Section 507(a)(8)(A)(i) contains its own time period, a fact which weakens the argument that § 108(c) automatically extends that Bankruptcy Code element of time. Nevertheless, the minority view's argument that Congress demonstrated careful statutory crafting by incorporating a Treasury Regulation extension in § 507(a)(8)(A)(ii), while omitting any comparable extension in subsection (i), assumes that Congress did, in fact, intend this distinction to make a difference and further assumes that there is a logical reason for Congress to grant an extension for tax assessments but not for collection.[64] The minority courts find some support for their position in § 523(b), which indicates that Congress understood that a debtor could file more than once for bankruptcy relief and that "non-fraud taxes [that were] declared nondischargeable in a prior bankruptcy case can be discharged in a subsequent bankruptcy case."[65] In the face of such conflicting support for the opposing views of the statutes, the ultimate question surrounding § 507(a)(8)(A)(i) remains: What was Congress' priority scheme and are the courts tinkering with it?[66]

One solution from some of those critical of using § 108(c) to extend the three-year period is the suggestion that the Bankruptcy Code be amended to give the taxing authorities a ninety-day period after commencement of a bankruptcy case to file for relief from the stay for tax collection purposes. If such a motion for relief from the stay was granted, the taxing authority would proceed with collection efforts and presumably, the three-year period would not be an issue in the bankruptcy court. In the absence of such a motion, "the limitations period governing dischargeability of the taxes would continue to run," but if such a motion was filed and denied, "the limitations period should be tolled."[67] The authors of

63. Dunham & Shimkus, *supra* note 12, at 348.

64. *See* Gore v. United States (*In re* Gore), 182 B.R. 293, 304 (Bankr. N.D. Ala. 1995); Turner v. United States (*In re* Turner), 182 B.R. 317, 328 (Bankr. N.D. Ala. 1995).

65. *Nolan*, 205 B.R. at 890.

66. *Id.* at 892 (citing United States v. Noland, 116 S. Ct. 1524 (1996) as authority that bankruptcy courts should not utilize equity to subordinate tax penalty claims so as to alter § 507's priority scheme).

67. Dunham & Shimkus, *supra* note 12, at 398.

this Article suggest that a simpler solution may be for Congress to amend § 507(a)(8)(A)(i) to provide, similarly to subsection (ii), language such as the following:

> [F]or a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years, plus any time applicable under Internal Revenue Code § 6503(h), before the date of the filing of the petition.

Such a change is necessary in order to prevent continued needless litigation. Under the statutes, as presently written, there can be no doubt that the automatic stay, which is triggered upon the filing of each bankruptcy petition, will result in delay to taxing authorities that are stayed in their collection efforts while § 362(a) is in effect. In the typical bankruptcy case, that delay may not be prejudicial, either because the prepetition, priority taxes are paid in full, for example, through a Chapter 13 plan,[68] or because the debtor's case is administered or dismissed, but closed promptly. The dismissal or closing of a case results in relief from the automatic stay, including for purposes of tax collection.[69] Where the debtor is a repeat filer, however, the potential for prejudicial delay is enhanced. It may be true, as the minority-view courts have suggested, that the taxing authority could move for relief from the stay in every case where potential prejudice exists or that the government could seek relief upon dismissal of every such case under § 349, which generally provides that "[u]nless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed."[70] The government, therefore, could move the bankruptcy court to order, in a case subject to dismissal, that specific tax debts would not be eligible for discharge in a future bankruptcy case. Requiring the government to anticipate that § 349(a) relief may be necessary in every case in which a subsequent filing may be possible would, at the least, be "extremely burdensome" to the government, as well as to debtors who would defend such motions, and to the bankruptcy courts.[71] The sheer number of bankruptcy filings alone would indicate the extent of the burden that may be placed on the government, the debtor, counsel, and the courts to make a § 349(a) inquiry in each dismissal scenario. Such hearings are not in the best interests of anyone and will merely increase the costs of an already costly system.

More importantly, § 349(a) simply would not apply to most dismissed cases. Many serial bankruptcy filings, for example, involve at least one Chapter 13, fol-

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68. Section 1322(a) requires that a plan, in order to be capable of confirmation under § 1325, shall provide for payment of all § 507 priority claims in full, although the payment may be in "deferred cash payments," and "unless the holder of a particular claim agrees to a different treatment of such claim." 11 U.S.C. § 1322(a)(2) (1994). An identical provision for chapter 12 plans is found in 11 U.S.C. § 1222(a)(2) (1994).

69. 11 U.S.C. § 362(c)(2) (1994).

70. 11 U.S.C. § 349(a) (1994).

71. Waugh v. Internal Revenue Serv. (*In re* Waugh), 109 F.3d 489, 494 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 80 (1997).

lowed by Chapter 7.[72] In Chapter 13, confirmation of the plan requires that the priority taxes be paid in full. The debtor will not receive a discharge of those taxes until completion of plan payments.[73] Chapter 13 cases, however, may be voluntarily dismissed at any time unless the case has been previously converted from another chapter.[74] Voluntary dismissal presents the taxing authority with little, if any, opportunity to seek § 349(a) relief.[75] Moreover, the nondischargeability of taxes that remain unpaid in uncompleted Chapter 13 plans makes § 349(a) inapplicable to such cases. In the event of serial Chapter 7 filings, § 349(a) may provide more comfort for the government, as the dismissal of a Chapter 7 case requires either a showing of "cause" or "substantial abuse," inquiries that would typically give the government notice of an opportunity to be heard and to raise § 349(a) concerns.[76] Section 349(a) only applies, however, to "debts that were dischargeable in the case dismissed," and the dischargeability issues discussed in this Article typically do not arise in the first bankruptcy case, only in a subsequent case. If the taxes were not dischargeable in the first case, § 349(a) would not apply.

There is a better and more direct solution than reliance upon § 108(c), § 105(a), § 349(a), or § 523(b), and that is amendment of § 507(a)(8)(A)(i) to suspend its three years for such period of time that the automatic stay is in effect in other bankruptcy cases during that time period. The National Bankruptcy Review Commission made such a recommendation to Congress in its recent report.[77] All that remains is for Congress to tell us that is what it tried to say when the Bankruptcy Code was enacted in 1978.[78]

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72. Such cases, in their combination, have come to be known as "chapter 20." *See, e.g.,* Pioneer Bank of Longmont v. Rasmussen (*In re* Rasmussen), 888 F.2d 703 n.1 (10th Cir. 1989).

73. 11 U.S.C. § 1328(a) (1994).

74. 11 U.S.C. § 1307(b) (1994).

75. A closed case may be reopened, in the trial court's discretion, "to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b) (1994).

76. FED. R. BANKR. P. 2002(a).

77. NBRC Report, *supra* note 9, at 951.

78. At the time of publication of this Article, a change to § 507(a)(8)(A)(i) had passed the House of Representatives, but not the Senate, with the following language added to the end of the subsection, which would be renumbered as § 507(a)(9)(A)(i): "plus any time, plus 6 months, during which the stay of proceedings was in effect in a prior case under this title." Such a change would accomplish the recommendation of this Article. *See* Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 805; *compare* Consumer Bankruptcy Reform Act of 1998, S. 1301, 105th Cong. (1998).