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Otherwise Dischargeable Tax Debt: In re Haas and Judicial Construction of § 523(a)(1)(C)

Jeffrey J. Cymrot*

I. INTRODUCTION

Few features of bankruptcy are more fundamental than the fresh start afforded by a discharge pursuant to § 524 of the Bankruptcy Code.¹ Subject to the exceptions set forth in § 523 of the Bankruptcy Code, a discharge issued by a bankruptcy court bars creditors from taking action to collect the debt they claim the debtor owes.² Whether a discharge applies to tax debt, however, is uncertain in an important group of cases, namely those involving § 523(a)(1)(C).

This subsection provides:

(a) A discharge under section 727, 1141, 1228(a), or 1328(b) of this title does not discharge an individual debtor from any debt

(1) for a tax

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax.

Assume the following facts. Spouses commence a liquidating chapter 7 case. They disclose income tax debt for returns due more than three years prior to the filing date of their case.³ The debtors have

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¹ Sassoon & Cymrot LLP, Boston, Massachusetts.
³ Among other things, 11 U.S.C. § 524 (2003) provides to the debtor the following protections against interference with the debtor's discharge:

(a) A discharge in a case under this title;

(1) voids any judgment at anytime obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under sections 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.

3. Subsection 507(a)(8) of the Bankruptcy Code (West Compact 1999) identifies the following tax debt:

(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.
filed their returns;\(^4\) more than two years have elapsed since they filed the returns in question;\(^5\) there is no allegation of fraud as to the returns filed.

The debtors in this hypothetical situation emerge from their bankruptcy with tax debt not excluded from discharge. Whether these debtors emerge from the bankruptcy filing with their tax debt discharged, however, raises a different question. The Bankruptcy Code does not provide an affirmative discharge of tax debt in the first instance. Instead, it excepts from discharge tax debts of various types\(^6\) and leaves the status of remaining tax debt unresolved. The debtors in this hypothetical situation emerge from their bankruptcy owing otherwise dischargeable tax debt.\(^7\)

Otherwise dischargeable debt differs from other obligations a debtor brings to a bankruptcy. The Bankruptcy Code's promise of a fresh start does not extend to all debts. As we have seen, the law sets forth exceptions to the fresh start policy, in pertinent part, at 11 U.S.C. § 523; and it adopts different statutory formulations for particular excepted debts. In most instances these formulations share the following characteristic: grant of a discharge either includes a specific

Income tax debt of the type identified in 11 U.S.C. § 523(a)(8) is excepted from discharge pursuant to 11 U.S.C. § 523(a)(1)(A) (2003) if the associated return was due less than 3 years prior to commencement of the debtor's case, assuming no extensions were granted.

4. By filing their returns, the debtors in this hypothetical situation avoid the exception to discharge set forth in § 523(a)(1)(B)(i).

5. At least two years having elapsed from the date the debtors filed the returns in question to the date they commenced their case, the debtors in this hypothetical situation avoid the exception to discharge set forth in U.S.C. § 523(a)(1)(B)(ii). Assuming that the debtors filed the returns also permits the writer, infra, to address the consequences of timely versus untimely filed returns.

6. See supra notes 4 through 5.

7. For purposes of this article, tax debt not excepted by either 11 U.S.C. § 523 (a)(1)(A) or (B), but possibly excepted from discharge by (C), is identified as otherwise dischargeable debt or otherwise dischargeable tax debt.

The Bankruptcy Code implicitly recognizes otherwise dischargeable tax debt. The injunctive relief stay imposed by § 362(a) of the Bankruptcy Code, commonly known as the automatic stay, does not operate to stay private or governmental activities specified in subsection § 362(b). Consider the following exception to the automatic stay:

(a) The filing of a petition . . . does not operate as a stay: (9) under subsection (a), of (D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

11 U.S.C. § 362(b)(9)(D) (West Compact 2000) (emphasis added). Post-petition tax liens, therefore, are stayed if they relate to property transferred out of the estate and tax debt that cannot be discharged, but not stayed if they relate to otherwise dischargeable tax debt, since the underlying debt may be discharged.
debt and protects it with the discharge injunction, § 524 of the Bankruptcy Code, or excepts the debt from either discharge or protection of the discharge injunction. In this way, the law provides debtors with a degree of certainty. Debtors know, or should know, based on their attorneys' advice, which debts they may discharge by filing bankruptcy. Some debts are discharged as a matter of course, others are not. Further, adversary proceedings allow parties to a bankruptcy case to change the predictable consequence of filing bankruptcy.

Thus, the law permits a creditor to challenge the presumption of discharge on the grounds that the debtor incurred debt through fraud or debt arising during the course of a divorce or separation. The Bankruptcy Code also excepts other debt from discharge, subject to challenge through an adversary proceeding, such as debts arising from alimony, maintenance, and support and student loans made, insured, or guaranteed by a governmental unit. Otherwise dischargeable tax debt is different.

Among debts commonly found in a bankruptcy, otherwise dischargeable tax debt is unique; it is the only debt that lingers after discharge, neither discharged nor excepted from discharge. Otherwise dischargeable tax debt is subject to discharge if and only if either the debtor or the tax authority moves to obtain a determination of its status. The mechanism, again, lies in an adversary proceeding. The Bankruptcy Code authorizes bankruptcy courts to determine the dischargeability of tax debt, but as we shall see, such a request is fraught with risk in light of prevailing judicial constructions of the statute. That is, courts in most instances except otherwise dischargeable debt from discharge when it comes before them for willful evasion of the obligation to pay the tax. As a result some practitioners advise their clients not to move the question, which creates another issue: what policies does the Bankruptcy Code promote if the government has the opportunity to ask the court to determine the dischargeability of otherwise dischargeable tax debt knowing that judicial construction of the statute weighs heavily in favor of the government? Most debtors with otherwise dischargeable tax debt obtain no definitive relief.

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through a bankruptcy, or they obtain a result they do not want: the court orders their tax debt excepted from discharge.\footnote{14} This article reviews and analyzes recent developments in case law construing otherwise dischargeable tax debt, beginning with a decision of the Eleventh Circuit Court of Appeals, \textit{In re Haas}.\footnote{15} The debtor in \textit{Haas} commenced a bankruptcy case owing otherwise dischargeable tax debt. The decision sparked a debate within the Eleventh Circuit, evidenced in two subsequent decisions on the same statute, one in 2000 and the other in 2002,\footnote{16} and in other circuits over the legal standard for discharge of tax debt. This article examines judicial constructions of § 523(a)(1)(C) given by circuit courts of appeal in recent years, and finds limitations in these constructions. Judicial construction of the statute divides into two strands, the first heavily dependent on provisions of the Internal Revenue Code treating tax evasion,\footnote{17} the second centering on the elements of proof needed to satisfy the statute's phrase "willfully attempt[ ] . . . to evade."\footnote{18} In either instance few debtors invoking their right to have the dischargeability of their tax debt determined by the bankruptcy court and few debtors against whom a governmental authority seeks a determination of dischargeability will avoid having their otherwise dischargeable tax debt excepted from discharge.

The article also discusses case law of the First Circuit, where there exists no authoritative guidance from the Court of Appeals. The article demonstrates that appellate panels have struggled with construction of the statute due to its language and concludes by asking whether the Bankruptcy Code should continue to deny a fresh start to

\begin{footnotesize}
\item[\footnote{14}] The Internal Revenue Service has internal administrative procedures for dealing with the obligations of debtors who commence a case with otherwise dischargeable tax debt. In the vast majority of cases, these procedures have from the debtor's perspective the same consequence as an order of discharge on otherwise dischargeable debt: the government, internally, elects not to pursue the debtor for tax debt that is otherwise dischargeable, and the government ceases its collection action. This administrative procedure, however, does not operate as the equivalent of a permanent injunction under § 524, which prevents the creditor from taking action to collect the debt; moreover, the debtor in most instances has no idea that the Internal Revenue Service has acted in a private and unilateral manner. The Internal Revenue Service may, with a keystroke, change the status of the debtor's account in its records and elect to pursue him on the basis of willful evasion of otherwise dischargeable tax debt. Finally, neither the Internal Revenue Code nor the Bankruptcy Code contains a provision for notice of the Internal Revenue Service's action.
\item[\footnote{15}] \textit{In re Haas}, 48 F.3d 1153 (11th Cir. 1995).
\item[\footnote{16}] See \textit{In re Griffith}, 206 F.3d 1389 (11th Cir. 2000); \textit{In re Fretz} 244 F.3d 1323 (11th Cir. 2001).
\item[\footnote{17}] See \textit{In re Toti}, 24 F.3d 806 (6th Cir. 1994); \textit{In re Bruner}, 55 F.3d 195 (5th Cir. 1995).
\item[\footnote{18}] See \textit{In re Tudisco}, 183 F.3d 133, 136 (2d Cir. 1999).
\end{footnotesize}
debtors with otherwise dischargeable tax debt and no prior findings as to willful evasion of tax debt.

II. DISCUSSION

A. In Re Haas: Omission and Discharge of Tax Debt

In In re Haas, the Eleventh Circuit Court of Appeals held that a debtor who intentionally failed to pay taxes, had properly filed returns and had acknowledged that he owed tax, had not willfully evaded a tax in violation of § 523(a)(1)(C). \(^{19}\) While the taxpayer in Haas had accurately filed returns for the years 1977 through 1985, "he used his income to pay his personal and business debts rather than his tax liability." \(^{20}\) In 1987 the taxpayer pled guilty to multiple counts of failure to pay income or employment taxes. In 1991 the taxpayer and his spouse commenced a chapter 11 case and sought a determination of the dischargeability of his federal tax liabilities for the years 1977 to 1987.

The district court in Haas had applied what it identified as a civil standard\(^ {21}\) for determining a willful failure to pay taxes; a debtor financially able to pay taxes who chooses not to pay has willfully evaded a tax if: (1) the debtor has a duty under the law, (2) the debtor knew he had the duty and (3) the debtor voluntarily and intentionally violated that duty. \(^ {22}\) The district court equated the phrase "willfully attempted in any manner to evade or defeat" a tax in the Bankruptcy Code with comparable language in the civil penalty section of the Internal Revenue Code, 26 U.S.C. § 6672. \(^ {23}\) It concluded that "[t]here is

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20. Id.
21. Compare, In re Pert, 248 B.R. 659, 664-67 (Bankr. M.D. Fla. 2000), where the bankruptcy court discusses this test for willfulness and finds its derivation in criminal tax cases rather than civil tax cases (citing Cheek v. United States, 498 U.S. 192, 201 (1991)). Application of the more stringent criminal standard for finding willfulness provides the underpinning for holding that "an affirmative act beyond mere failure to pay is required to find a debt nondischargeable under § 523(a)(1)(C)." In re Pert, 248 B.R. at 665. This is the law of the Eleventh Circuit. See, In re Fretz 244 F.3d 1323 (11th Cir. 2001) and discussion infra.
23. Id. Section 6672(a) of the Internal Revenue Code relates to trust fund taxes. In pertinent part, 26 U.S.C. § 6672(a) states,

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.
no requirement that the debtor commit a fraudulent act in order to make an attempt to evade a tax” if the taxpayer can afford to pay.\textsuperscript{24}

The Eleventh Circuit rejected the argument that the phrase “willfully attempted in any manner to evade or defeat such tax” from the statute carries the plain meaning that a debtor’s voluntary, conscious, and intentional failure to pay taxes falls within it.\textsuperscript{25} The appellate panel observed that this interpretation of “willfully” in § 523(a)(1)(C) proved too much:

The government argues that if a debtor had both an awareness of his duty to pay his taxes and the present ability to pay them but nonetheless failed to satisfy that duty, then the tax liability is non-dischargeable . . . .

The difficulty with the government’s “plain meaning” interpretation of section 523(a)(1)(C) is that it effectively would make all tax debts non-dischargeable. If every knowing failure to pay taxes constituted an evasion of taxes under section 523(a)(1)(C), then discharge of tax liability would be available only to those very few debtors who discovered their debts to the IRS in the course of their bankruptcy proceedings. Moreover, every debtor, at least in theory, has the present ability to pay his income or employment taxes; if a debtor did not have positive net income, then he would not have been assessed income or employment taxes in the first instance. The government’s reading of section 523(a)(1)(C) would allow an exception to swallow the general rule of discharge for tax liabilities.\textsuperscript{26}

According to the Eleventh Circuit, the district court’s expansive interpretation of § 523(a)(1)(C) would contravene the Bankruptcy Code’s purpose of allowing a fresh start for the honest but unfortunate debtor.\textsuperscript{27}

The Eleventh Circuit compared the language of § 523(a)(1)(C) with the language of four provisions of the Internal Revenue Code where Congress had distinguished between evasion of a tax and evasion of payment of the tax.\textsuperscript{28} For instance, 26 U.S.C. § 7201 states in pertinent part that “[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title \textit{or the payment thereof} shall . . . be guilty of a felony.” (emphasis added).\textsuperscript{29} The omission of

\textsuperscript{24} Haas, 173 B.R. at 758-59.
\textsuperscript{25} Haas, 48 F.3d at 1155.
\textsuperscript{26} Id. at 1155-56 (emphasis in original).
\textsuperscript{27} Id. at 1156.
\textsuperscript{28} Id.
\textsuperscript{29} See 26 U.S.C. § 7201 (West 1988 & Supp. 2000). Commenting on this language in 26 U.S.C. § 145(b), currently codified as 26 U.S.C. § 7201, the Supreme Court stated 60 years ago: Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its efforts to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished “in any manner.” By way of illus-
the phrase "or the payment thereof" from § 523(a)(1)(C), after Congress had included this language in the Internal Revenue Code, "indicates that Congress did not intend that a failure to pay taxes, without more, should result in the non-dischargeability of a debtor's tax liabilities in bankruptcy."30 In the Eleventh Circuit, a debtor's failure to pay his taxes, alone, is not sufficient to except the tax debt from discharge pursuant to § 523(a)(1)(C).31

The Eleventh Circuit clarified and narrowed the scope of its holding in Haas when it decided In re Griffith.32 In the latter decision the appellate panel reaffirmed its "first holding from Haas that mere non-payment of taxes is insufficient to establish the exception found in § 523(a)(1)(C)."33 Reacting to criticism leveled against Haas by sister courts of appeal, the appellate panel in Griffith concluded that § 523(a)(1)(C) "renders non-dischargeable tax debts where the debtor engaged in affirmative acts seeking to evade or defeat collection of taxes."34 It applied a three-prong test, drawn from In re Bruner35 and analyzed infra, to determine whether the debtor's failure to pay a tax liability was willful within the meaning of § 523(a)(1)(C).36 The Bruner case, like the facts of Griffith, involved affirmative acts but not acts of omission. Examples of the latter include failure to file tax returns when due and failure to pay taxes as they become due.

B. In re Toti and In re Bruner: Two Plain Readings of the Statute

The Sixth Circuit Court of Appeals held that a debtor can run amiss of § 523(a)(1)(C) by not filing tax returns and by failing to pay taxes, that is, by acts of omission. In In re Toti the Sixth Circuit held that § 523(a)(1)(C) applies to acts of commission and acts of omission.37 The taxpayer in Toti neither filed nor paid federal income taxes from 1974 through 1981, "despite the fact he knew he was liable for taxes

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30. Haas, 48 F.3d at 1157 (citing In re Gaithwright, 102 B.R. 211, 213 (Bankr. D.Or. 1989)).
31. Id. at 1158.
32. In re Griffith, 206 F.3d 1389 (11th Cir. 2000).
33. Id. at 1394.
34. Id. at 1395.
35. In re Bruner, 55 F.3d 195 (5th Cir. 1995).
36. Griffith, 206 F.3d at 1396-97.
37. In re Toti, 24 F.3d 806 (6th Cir. 1994).
and he had the wherewithal to pay his taxes during some of the years at least.\textsuperscript{38} In 1981, after an indictment, the taxpayer pled guilty to willful failure to file his 1976 tax return in violation of 26 U.S.C. § 7203. After commencing his chapter 7 case in 1990, the taxpayer brought an action to determine his tax liabilities.\textsuperscript{39} The bankruptcy court held the taxes dischargeable.\textsuperscript{40}

According to the Sixth Circuit,

In so holding, the [bankruptcy] court applied a criminal standard to the § 523(a)(1)(C) phrase “willfully attempt in any manner to defeat such tax.” This requires the government to present evidence that the debtor engaged in the willful commission of an act to evade or defeat his tax liability. This is the same standard as in the statute making tax evasion a felony. I.R.C. § 7201. The bankruptcy court held that failing to file a return and make a payment is merely an omission and, since the Bankruptcy Code requires the commission of an act, Toti’s omission did not fall within the willfulness standard.\textsuperscript{41}

The district court\textsuperscript{42} reversed and remanded the case to the bankruptcy court, holding that the latter had applied an incorrect legal standard. On further appeal, the Sixth Circuit rejected Toti’s argument that a tax liability may be denied discharge only when the debtor has evaded paying taxes with affirmative acts.\textsuperscript{43}

The Sixth Circuit Court of Appeals held that a plain reading of § 523(a)(1)(C) “includes both acts of commission and acts of omission.”\textsuperscript{44} It upheld the district court’s use of a civil definition of willful intention to evade: the term “willful”, the appellate panel held, should be equated with voluntary, conscious, and intentional evasion of tax liabilities.\textsuperscript{45} This holding provided the jumping off point for the Haas appellate panel, which arrived at an interpretation of the statute permitting a discharge to a debtor who failed to pay taxes, without more.

The Fifth Circuit extended Toti the following year in Matter of Bruner.\textsuperscript{46} The taxpayer in Bruner had failed to file or pay taxes from 1981 through 1988.\textsuperscript{47} He was indicted for willful failure to file federal income taxes for 3 years and pled guilty to one count.\textsuperscript{48} The taxpayer

\textsuperscript{38. Id. at 807.}
\textsuperscript{39. Id. at 808.}
\textsuperscript{40. See United States v. Toti, 141 B.R. 126 (Bankr. E.D. Mich. 1991).}
\textsuperscript{41. Toti, 24 F.3d at 808.}
\textsuperscript{42. United States v. Toti, 149 B.R. 829 (E.D. Mich. 1993).}
\textsuperscript{43. Toti, 24 F.3d at 809.}
\textsuperscript{44. Id.}
\textsuperscript{45. Id.}
\textsuperscript{46. In re Bruner, 55 F.3d 195 (5th Cir. 1995).}
\textsuperscript{47. Id. at 196.}
\textsuperscript{48. Id.}
and his spouse commenced a chapter 7 case in 1993 and then sought a determination of tax liability.\textsuperscript{49} When the taxpayer appealed the district court's holding that the tax liabilities for the period in question were excepted from discharge because the taxpayer and his spouse had willfully attempted to evade or defeat their taxes for those years,\textsuperscript{50} the Fifth Circuit adopted a three-prong test for determining whether debtors willfully attempt in any manner to evade or defeat a tax in violation of § 523(a)(1)(C):

the proper test is whether, in the case of a debtor who is financially able to pay his taxes but chooses not to do so, (1) the debtor had a duty under the law, (2) the debtor knew he had that duty, and (3) the debtor voluntarily and intentionally violated that duty.\textsuperscript{51}

In \textit{Haas}, the Eleventh Circuit Court of Appeals had criticized the plain reading this test gave to the statute,\textsuperscript{52} only to embrace it later in \textit{Griffith}.\textsuperscript{53}

In dicta, the \textit{Bruner} decision offered the following commentary on construing acts of omission and affirmative acts under the statute:

Section 523(a)(1)(C) surely encompasses both acts of commission as well as culpable omissions. The language of the statute itself reveals that a willful attempt "in any manner" to evade or defeat a tax precludes discharge . . . [W]e need not squarely resolve the "affirmative act" argument forwarded by the Bruners, because the Bruners did engage in affirmative acts designed to evade their tax liabilities.\textsuperscript{54}

Some Circuit Courts of Appeal have chosen to construe § 523(a)(1)(C) in a manner that does not align themselves with the \textit{Toti-Bruner} line of cases in full. The Tenth Circuit Court of Appeals, for instance, in \textit{Dalton v. I.R.S.}, held that nonpayment of taxes, by itself, does not compel a finding of non-dischargeability; "[r]ather, nonpayment is relevant evidence which a court should consider in the totality of conduct to determine whether . . . the debtor willfully attempted to evade or defeat taxes."\textsuperscript{55} Even though the Tenth Circuit was addressing the conduct element of § 523(a)(1)(C), the holding leaves open the possibility that omission, such as failure to pay taxes,

\textsuperscript{49} Id.
\textsuperscript{50} The Fifth Circuit's opinion explains that under Louisiana law the taxpayer's spouse owned a one-half, undivided interest in the taxpayer's income. Even if the spouse did not have a paying job, therefore, she had imputed income and a duty to pay taxes on the income. \textit{Id.} at 199.
\textsuperscript{51} Id. at 197.
\textsuperscript{52} \textit{Haas}, 48 F.3d at 1155-56.
\textsuperscript{53} \textit{Griffith}, 206 F.3d at 1396.
\textsuperscript{54} See \textit{Bruner}, 55 F.3d at 200 (emphasis in original).
\textsuperscript{55} \textit{Dalton v. I.R.S.}, 77 F.3d 1297, 1301 (10th Cir. 1996). \textit{See also}, \textit{In re Birkenstock}, 87 F.3d 947, 951 (7th Cir. 1996); \textit{In re Fretz}, 244 F.3d 1323, 1330 (11th Cir. 2001).
may result in a finding of non-dischargeability of tax debt after thoroughgoing consideration of the debtor's conduct, an examination focusing on willful conduct.

C. In re Tudisco: An Analysis of Willfulness

In general, circuit courts of appeal focus their attention on the willful element of § 523(a)(1)(C). In these courts willful requires that the debtor's attempts to avoid his tax liability are voluntary, conscious, and intentional.56 Such actions fall under the statute if they constitute "willful[ ] attempt[s] in any manner to evade or defeat" a tax debt.57 Either acts of omission or affirmative acts, or both, will bring a debtor under the statutory exception to otherwise dischargeable tax debt.

In this vein, the Second Circuit Court of Appeals drew on the decisions of six other circuits when it decided In re Tudisco in 1999.58 The Second Circuit appellate panel’s decision phrased the issue in terms of whether the debtor had "willfully evaded taxes" and concentrated its discussion on construing willfulness. "The willfulness exception [set forth in § 523(a)(1)(C)] consists of a conduct element (an attempt to evade or defeat taxes) and a mens rea requirement (willfulness)."59

The conduct element, according to the Second Circuit, "surely encompasses both acts of commission as well as culpable omissions."60 The mens rea requirement "mandates that the debtor's conduct be undertaken "voluntarily, consciously or knowingly, and intentionally.'"61 Use of the descriptors culpable to describe omissions and mens rea to describe the intent requirement of willfulness suggests a court should search for evidence of guilty or wrongful purpose.62 The court did not need to concentrate on the distinction between acts of commission and acts of omission since it cites either as willful.63

The Tudisco appellate panel, while cognizant of the possibility of conflict between the holdings of Haas and Bruner, finessed the conflict:

To the extent that In re Haas and In re Bruner actually do conflict, we need not, however, decide between them. Because Tudisco engaged in more than "mere nonpayment," his conduct constitutes an

56. See In re Fegeley, 118 F.3d 979, 984 (3d Cir. 1997) (citing Dalton v. I.R.S., 77 F.3d 1297, 1302 (10th Cir. 1996); In re Bruner, 55 F.3d 195, 199 (5th Cir. 1995)).
59. Id.
60. Id. (quoting In re Bruner, 55 F.3d 195, 200 (5th Cir. 1995)).
61. Tudisco, 183 F.3d at 137 (quoting Dalton v. I.R.S., 77 F.3d 1297, 1302 (10th Cir. 1996)).
62. See BLACK'S LAW DICTIONARY 889 (5th ed. 1979), which defines mens rea in these terms.
63. Tudisco, 183 F.3d at 137.
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attempt to evade or defeat taxes under either standard. His failure to pay taxes was accompanied by a failure to file his tax returns, at least until 1992. While he may not have transferred assets or created shell corporations, Tudisco did submit a patently false affidavit to his employer. . . . Under the circumstances, we conclude that the bankruptcy court’s finding – that Tudisco attempted to evade or defeat federal income taxes – is not clearly erroneous.64

In construing willfulness as it appears in § 523(a)(1)(C), several bankruptcy courts had before them significant findings of fact or admissions. Thus, in Toti, Bruner, Fegeley, Birkenstock, and Haas, the debtors had prior to filing bankruptcy pled guilty to or had been convicted of willful failure to file taxes.65 The appellate courts in these cases had before them debtors with potent, culpable omissions. In the usual and ordinary case, the debtor does not bring a conviction for tax evasion to the issue of non-dischargeable tax debt, a circumstance providing ready evidence of both wrongful conduct and purpose.

A recent Eleventh Circuit case, In re Fretz, illustrates the conclusions available to a court determining the dischargeability of tax debt when it finds a debtor’s omissions culpable.66 Construing otherwise dischargeable tax debt for the third time in six years, the Eleventh Circuit Court of Appeals in the Fretz decision held that the conduct requirement of § 523(a)(1)(C) is satisfied where a debtor not only fails to pay taxes but also fails to file tax returns.67 In the Eleventh Circuit, as in several others, the law may have moved in a direction other than a straightforward application of the three-prong Bruner test and toward an emphasis on finding willful conduct, but by no means has it lessened the consequences of failure to file and pay taxes in the context of bankruptcy.

D. Analysis of Bruner and Tudisco

The three-prong test proffered by the Sixth Circuit Court of Appeals in Bruner, in this writer’s opinion, does little to separate debtors

64. Id. (citations omitted).

65. See In re Toti, 24 F.3d 806, 807 (6th Cir. 1994) (willful failure to file 1976 tax return); In re Bruner, 55 F.3d 195, 196 (5th Cir. 1995) (guilty plea on one count of willful failure to file federal income taxes); In re Fegeley, 118 F.3d 979, 981 (3d Cir. 1997) (willful failure to file 1985 tax return); In re Birkenstock, 87 F.3d 947, 949 (7th Cir. 1996) (jury verdict on willful failure to file tax returns for 4 years); In re Haas, 48 F.3d 1153, 1154 (11th Cir. 1995) (guilty plea to failure to pay income taxes for 3 years and employment taxes). But see, In re Tudisco, 183 F.3d 133, 137 (2d Cir. 1999) (sufficient evidence to support conclusion of willfulness in absence of plea or jury verdict).

66. In re Fretz, 244 F.3d 1323 (11th Cir. 2001).

67. Id. at 1329 (citing In re Fegeley, 118 F.3d 979, 984; In re Toti, 24 F.3d 806, 809 (6th Cir. 1994)).
not deserving of a discharge of tax debt from deserving debtors. Debtors can avoid the first prong by proving that they do not owe the tax, in which case they do not have a duty to pay it. Liability, however, is rarely an issue in cases of otherwise dischargeable tax debt. As for the second prong, almost all debtors with a duty to pay taxes - except for innocent spouses who are also debtors - have knowledge of the duty. The test cannot rely on the third and remaining prong, which is satisfied if the debtor knowingly or intentionally (that is, willfully) fails to pay taxes due, because few debtors with knowledge of tax debt merely forget to pay the tax. The test, in effect, will lead a court to except tax debt from discharge if it finds that the debtor is aware of tax debt. Intent, meaning willfulness, is too easy to prove using the three-prong test.68

In *Spies v. United States*,69 Justice Jackson had this to say about willfulness:

> The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said is a word of many meanings, its construction often being influenced by its context. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstance of the taxpayer.70

Justice Jackson’s caution, expressed in the context of a prosecution for felony tax evasion pursuant to the forerunner of § 7201 of the Internal Revenue Code, applies to § 523(a)(1)(C) of the Bankruptcy Code. The legislative history of § 523(a)(1)(C) is no more helpful to us than the legislative history of the Internal Revenue Code was to the Su-


69. 317 U.S. 492 (1943).

One should be cautious, in the absence of a clear expression of congressional intent, about transferring the meaning of willfulness in the context of a willful failure to pay taxes due and owing that appears at 26 U.S.C. § 6672 and elsewhere in the Internal Revenue Code to the Bankruptcy Code at § 523(a)(1)(C).

The three-prong test advanced in Bruner also illustrates the difficulty faced by courts in determining the plain meaning of the statute. Parsed with care, the statute does not have a plain meaning. Perhaps that is why circuit panels have struggled with § 523(a)(1)(C).

The holding of the Second Circuit Court of Appeals in Tudisco is reminiscent of Bruner, where the evidence also demonstrated that the debtor went beyond mere nonpayment of taxes. In each instance, the law advanced by the decision amounts to dicta. The Tudisco decision omits a principled basis to distinguish, as did the Haas appellate panel, mere nonpayment from the combination of omissions or affirmative acts that will prove willfulness. There appears to be no reason preventing a court from excepting tax debt from discharge after finding that a debtor's failure to pay taxes when due, and nothing more, constituted a culpable omission. A court, in the opinion of this writer, may easily reach this result using the three-prong Bruner test; the Tudisco test does not exclude it.

The willfulness analysis offered in Tudisco does not withstand scrutiny either. The difficulty arises from distinguishing the conduct element, which consists of an attempt to evade or defeat taxes (either by acts of commission or by culpable omissions), from the mens rea requirement, which mandates voluntary and knowing conduct. Willful conduct, meaning conduct with a wrongful purpose, characterizes both elements. The test points a court in the direction of culpable conduct, affirmative or omitted, relating to non-dischargeable tax debt, and logic dictates that any such conduct will suffice to trigger the statute. The test cannot help the court determine, in the usual and ordinary debtor's case, the combination of affirmative acts and omissions needed to find the conduct culpable under the statute and non-dischargeable. It is too easy to prove non-dischargeability using the Tudisco test.

Aside from the utility or appropriateness of the Bruner and Tudisco tests, unless Congress clarifies the statute, Haas at best will stand for little more than a statistical aberration – the unusual debtor who files his returns on time and merely fails to pay on time. The Haas appellate panel offered insight into otherwise non-dischargeable debt: ap-

71. Id. at 495.
plying a definition of willfulness that turns on voluntary and intentional conduct, whether affirmative acts or omissions, will effectively make all tax debts non-dischargeable, thereby diluting the promise of a fresh start in bankruptcy. Under either test, Bruner or Tudisco, bankruptcy will not fulfill the promise of a fresh start for the typical debtor with otherwise dischargeable tax debt. Thus, the active debate among bankruptcy courts over defining willfulness and the consequences of using a civil versus a criminal definition does not address whether the statute's treatment of otherwise dischargeable tax debt should frustrate the promise of a fresh start in bankruptcy. As we shall see, infra, the test is not at issue: it is the statute that needs repair.

E. Construing the Statute in the First Circuit

The District of Massachusetts and the First Circuit have not provided fertile territory for the judicial construction of § 523(a)(1)(C). Since the adoption of the Bankruptcy Code in 1978, few Massachusetts bankruptcy courts have issued a written decision on otherwise dischargeable tax debt. The only reported recent case, involved a challenge to the dischargeability of state tax debt incurred by a debtor who, prior to commencing his chapter 7 case, had pled guilty to charges of willful failure to timely file returns between 1985 and 1989, inclusive. In a motion for partial summary judgment, the state asked the court to preclude the debtor from relitigating willful conduct on the basis of the guilty plea. In denying the state's attempt to extend the effect of collateral estoppel to judgments entered upon a guilty plea in a criminal proceeding to a subsequent civil case, the court did not cite a single case construing willfulness or § 523(a)(1)(C) decided in the First Circuit.

Few, if any, bankruptcy courts in the First Circuit outside of Massachusetts have construed otherwise dischargeable debt as it appears in § 523(a)(1)(C). No easy explanation exists for the dearth of such cases; given the scarcity of published decisions from the bankruptcy courts, it is not surprising that the First Circuit Court of Appeals has not construed the term willful within the meaning of § 523(a)(1)(C).

72. Haas, 48 F.3d at 1155. So strong is the promise of a fresh start that the appellate panel incorrectly assigns the promise of a fresh start to tax debt. Otherwise dischargeable tax debt, as argued supra, has the unique characteristic of passing through a bankruptcy without either discharge or exception from discharge.
73. See generally In re Pert, 248 B.R. 659 (Bankr. M.D. Fla. 2000).
75. Id. at 3.
76. Id. at 3-5.
However, it has construed willfulness in the context of penalty assessments on responsible persons who fail to collect or pay withholding taxes or employment taxes. The Internal Revenue Code requires employers to withhold federal taxes from employees' wages and to hold such amounts in trust for the United States. If an employer fails to remit withheld taxes, the Internal Revenue Code permits the IRS to look beyond the employer, which may be an insolvent corporation, to hold certain agents and officers personally liable. The statute provides in pertinent part that

any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to . . . pay over such tax . . . shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

The First Circuit held in Harrington that under 26 U.S.C. § 6672(a) an act is willful if "it is voluntary, conscious, and intentional; no bad motive or intent to defraud the United States need be shown, and a 'reasonable cause' or 'justifiable excuse' element has no part in this definition." Rather, an individual who acts in reckless disregard of a known or obvious risk of nonpayment of taxes acts willfully. The results raise the possibility that the First Circuit Court of Appeals may construe willfulness as it appears in § 523(a)(1)(C) in the same way that it construed the term as it appears in 26 U.S.C. § 6672(a). This reasoning may in turn lead to adoption of the three-prong test of Bruner.

Recall that 26 U.S.C. § 6672(a) served as the jumping off point for the appellate panel in Haas. As we have seen, even the circuits that have not adopted the three-prong Bruner test have, nonetheless, arrived at an interpretation of the statute permitting them to hold culpable omissions, in the form of failure to file timely tax returns and failure to pay, as sufficient evidence of willfulness under § 523(a)(1)(C). Whether a court in the First Circuit should adopt the

77. See Vinick v. Commissioner, 110 F.3d 168, 173-174 (1st Cir. 1997); Thomsen v. U.S., 887 F.2d 12, 17-20 (1st Cir. 1989); Harrington v. United States, 504 F.2d 1306, 1315 (1st Cir. 1974).
81. Id.
82. Harrington, 540 F.2d at 1316. See also Vinick, 110 F.3d at 173 (explaining "[w]illfulness under § 6672(a) does not depend on the presence of either criminal motive or the specific intent to defraud"); Thomsen, 887 F.2d at 17.
83. Vinick, 110 F.3d at 173.
84. Haas, 48 F.3d at 1155.
three-prong *Bruner* test or the test set forth in *Tudisco* is not the point; each test has its limitations, mainly owing to the statute itself.

The question for bankruptcy practitioners in general and for those within the First Circuit in particular is whether clients who commence a bankruptcy case owing otherwise dischargeable tax debt will escape § 523(a)(1)(C). If the First Circuit Court of Appeals follows the Sixth Circuit on this matter, failure to pay in and of itself could be deemed an act of omission sufficient to warrant an exception to discharge of tax debt. If the First Circuit adopts the Second Circuit's *Tudisco* test for willfullness, it will make no difference to debtors with pre-petition income tax debt who failed to file their returns on time. The mere acts of failure to pay and failure to file could be deemed sufficient to evidence a pattern of evasion sufficient to warrant an exception to discharge of tax debt. The discharge all debtors seek should come with a very large asterisk for those debtors with tax debt.

**F. Parsing The Statute’s Plain Language**

A claim involving § 523(a)(1)(C) amounts to a claim of fraud, for which the sovereign should retain the burden of proving willful, evasive conduct by a preponderance of the evidence. However, the burden on the sovereign seeking to except tax debt under existing Bankruptcy Code language is nominal when applied to evidence that a debtor made a willful attempt in any manner to evade or defeat such tax. The advantage resting with the sovereign arises from the statute’s language.

Once again, the statute in pertinent part states:

(a) A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt

(1) for a tax . . .

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax

For purposes of analysis, ignore the statute’s reference to fraudulent returns and assume that the phrase “in any manner” modifies the word “attempt[ ].” Making these assumptions allows substitution of the word “act” for “attempt[ ] in any manner” when parsing this statute but leaves it unclear how the phrase “attempt in any manner” relates to and modifies the words “willful[ ]” and “evade.” A court facing this problem appears to have two options. First, the court may

read "willfulness" and "act to evade tax" as the two necessary elements of the statute. This reading leads the court to phrase the statute in the following terms: "a willful act to evade a tax" makes the tax debt non-dischargeable. A willful act to evade tax makes no sense; the plain meaning of an evasive act is that it is willful. The Second Circuit's attempts to advance the analysis of the statute in *Tudisco* by focusing on a conduct and *mens rea* elements proved unpersuasive for the same reason.

Alternatively, the court may treat a willful, evasive act as the single and defining element of the statute. This alternative, however, makes either "willful" or "evasive" unnecessary. The court, therefore, finds itself forced to choose between assuming that an evasive act is not by definition willful, a logical impossibility, and violating accepted canons of judicial construction by treating either willful or evasive as superfluous.

The language of the statute — which, it appears, Congress lifted from the Internal Revenue Code and then modified by excluding the phrase "or the payment thereof" — lacks a plain meaning susceptible of interpretation and application to debtors' cases. As written, it appears to focus the court's attention on whether there exists evidence of conduct it deems evasive or willful, using affirmative acts, omissions, or a combination of these. If we accept the facts of *Haas* (where the debtor filed accurate returns on time but did not pay tax on time) as the exception, most debtors with tax debt will find themselves vulnerable to non-dischargeability actions.

Another problem with the language of the statute arises from the issue of specific intent. At least four of the circuit courts of appeal ruling on § 523(a)(1)(C) have held that a violation of this statute does not require proof of the specific intent to evade or defeat a tax: it requires, instead, either voluntary, knowing, or intentional act or a voluntarily, knowingly, or an intentionally omitted act. Evading, or defeating, a tax, in this line of decisions, requires nothing more than an act that leads to avoidance, or defeat, of tax. Non-bankruptcy law, however, does not sanction the taxpayer who pays other debts in preference to tax debt as long as the taxpayer does not willfully avoid paying the tax debt. Thus, a debtor choosing to pay current debt in

87. See generally *In re* Wright, 191 B.R. 291 (S.D.N.Y. 1995). The district court made a "straightforward, 'plain' reading" of the statutory language, which it rendered as "intentional attempts to evade tax liability 'in any manner.'" Id. at 294.

88. See *In re* Tudisco, 183 F.3d 133, 137 (2d Cir. 1999); *In re* Fegeley, 118 F.3d 979, 984 (3d Cir. 1997); *Dalton v. I.R.S.*., 77 F.3d 1297, 1302 (10th Cir. 1996); *In re* Toti, 24 F.3d 806, 809 (6th Cir. 1994).

89. *In re* Harrington, 504 F.2d at 1313.
preference to paying taxes as they become due, who then finds himself unable to pay taxes, may face a § 523(a)(1)(C) action without the defense that he did not manifest an intent to evade.

Debtors with tax debt who come to the bankruptcy practitioner determined to obtain a fresh start pose a particular problem. Because it is not uncommon for such debtors to have also failed to file their returns on a timely basis, it has become clear from the decisions of the courts of appeal that the practitioner cannot offer any assurance that a bankruptcy will quiet tax authorities. If a practitioner advises his client with tax debt to wait for the tax authority to make the first move, he risks compromising the fresh start that is the promise of bankruptcy. The fresh start policy, therefore, conflicts with the prerogatives maintained by the tax authority — that is, the sovereign; indeed, the sovereign’s power to seek an order excepting otherwise dischargeable tax debt and then to pursue the debtor to collect appears unlimited, but for criminal prosecutions.

The applicable period of limitations for prosecution of felony tax evasion in the Internal Revenue Code is six years in the case of “willful[ ] attempt[s] in any manner to evade or defeat any tax or the payment thereof.”90 For matters other than criminal, the Internal Revenue Code prescribes an open-ended period of limitations for “willful attempt[s] in any manner to defeat or evade tax.”91 The Bankruptcy Code contains no period of limitation on an adversary proceeding to except otherwise dischargeable tax debt from discharge.92 With the exception of exposure to criminal prosecution, therefore, the debtor with otherwise dischargeable tax debt finds him-

90. Section 6531 of the Internal Revenue Code states, in pertinent part, as follows with respect to the statute of limitations for criminal prosecutions:

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitations shall be 6 years—

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof.


91. Thus, 26 U.S.C. § 6501 states, in pertinent part, the following:

(a) General Rule

Except as otherwise provided in this section, the amount of any tax imposed by his title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed).

(b) Exceptions

(2) Willful attempt to evade tax

In the case of a willful attempt in any manner to defeat or evade tax imposed by this title . . . the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

92. See FED. R. BANKR. P. 4007(b).
self in no better position post-petition with respect to his obligation to pay taxes than pre-petition; if the sovereign alleges and then proves, or counterclaims and proves, willful evasion in the bankruptcy court, it has the statutory authority to pursue the debtor. It is not atypical for disputed tax years of non-dischargeable tax debt to precede the bankruptcy by five, ten, or more years.

Given the significance of preserving the sovereign’s capacity to collect taxes, it is unlikely that the fresh start policy of bankruptcy will ever override the policy favoring collection of taxes. With good reason Congress has weighted the balance between the two policies in favor of preserving collection and away from giving such debtors a fresh start where tax debt is at issue. The problem is that Congress has not given us a useful statement of bankruptcy law that will distinguish debtors with otherwise dischargeable tax debt who deserve a discharge from those who do not. Congress appears to have grafted language from the Internal Revenue Code, where the language serves to penalize taxpayers who act to evade their obligation to pay taxes, into the Bankruptcy Code without addressing the promise of a fresh start. As the statute now reads, otherwise dischargeable tax debt passes through a bankruptcy; following issuance of a discharge, debtors find themselves uncertain about the status of this type of debt. The statute in its current form does not permit courts to protect a debtor with otherwise dischargeable tax debt.

The Bruner test, perhaps the most commonly used, renders most, if not all, otherwise dischargeable tax debt non-dischargeable. Use of the less restrictive definition of willfulness in the bankruptcy context, the analysis set forth in Tudisco, pushes the court toward considering a debtor’s omissions with respect to payment of tax as sufficient evidence of intent to evade since the debtor need not have intended his omission as an evasive act. If proving willfulness requires evidence that the act in question resulted in avoidance of taxes, and not a showing of the specific intent to avoid payment, most tax debts owed by debtors are non-dischargeable if and when the sovereign chooses to contest them.

If the sovereign can easily prove intent to evade or defeat tax, then it is the sovereign who decides whether the debtor will or will not reap the benefits of a fresh start from tax debt. One danger inherent in the current statute lies in the specter of selective prosecution. The tax authority, not the court after affording due process to the debtor, con-
trols the outcome of the debtor's bankruptcy if he has non-dischargeable tax debt.\(^{93}\)

In *Oyler v. Boles*,\(^{94}\) the Supreme Court heard the consolidated appeals of prisoners serving life sentence imposed under a West Virginia statute providing for an increased penalty "upon the third conviction 'of a crime punishable by confinement in a penitentiary.'"\(^{95}\) In prior decisions the Court had upheld the West Virginia habitual criminal statute as constitutionally sound.\(^{96}\) Alleging that the state had applied the law against "only a minority of those subject to its provisions," the appellants filed for writs of habeas corpus, alleging constitutional violations of due process and equal protection.\(^{97}\) Writing for a divided court, Justice Clark pithily rejected the argument of selective prosecution by stating that the petitioners' "allegations set out no more than a failure to prosecute others because of a lack of knowledge of their prior offenses."\(^{98}\)

The risk of selective prosecution in the context of otherwise dischargeable tax debt deserves consideration, but it is not the only public policy issue. In *Oyler v. Boles*, the prisoners complaining of selective prosecution justly came within the orbit of West Virginia's habitual criminal statute, but their complaint that others within the same orbit went unpunished proved unavailing. So, too, effectively all debtors commencing a case with otherwise dischargeable tax come within the orbit of an exception to discharge; some are penalized

93. "[S]elective prosecution occurs when a defendant 'has been singled out for prosecution when others similarly situated have not been prosecuted and the prosecutor's reasons for doing so were impermissible.'" United States v. Graham, 146 F.3d 6, 9 (1st Cir. 1998) (quoting United States v. Magana, 127 F.3d 1, 8 (1st Cir. 1997)). "[C]onscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." Oyler v. Boles, 368 U.S. 448, 456 (1962); see also United States v. Michaud, 860 F.2d 495, 499-500 (1st Cir. 1988).

Complaints to determine dischargeability of tax debt raise issues of civil law and not issues of penal law; when the sovereign commences an adversary proceeding to determine dischargeability of tax debt pursuant to § 523(a)(1)(C), or when it asserts the statute as an affirmative defense, this writer does not suggest the sovereign has prosecuted the action as a criminal matter. Nevertheless, because § 523(a)(1)(C) provides little basis for protecting debtors who commence a bankruptcy case with otherwise dischargeable tax debt, the sovereign has only to bring an action or raise the defense to produce an order excepting the tax debt at issue from discharge. In this sense, when the sovereign chooses to commence an action or to raise the defense, the choice serves to isolate a group of debtors from those with otherwise dischargeable tax debt and to render the tax debt of this group non-dischargeable. The risk of an impermissible motive in defining or identifying the group whose tax debt to except from discharge creates the specter of selective determination of non-dischargeable tax debt.

95. *Id.* at 449.
96. *Id.* at 453.
97. *Id.* at 449.
98. *Id.* at 456.
while others - the majority we may assume - are not. Without evidence of an improper motive, we cannot say that if a minority of debtors commencing a bankruptcy with otherwise dischargeable tax debt receive either an order of discharge or judgment excepting the tax debt from discharge, we have selective prosecution.

An inmate facing life imprisonment following three felony convictions differs, however, from the typical debtor who commences a bankruptcy case with otherwise dischargeable tax debt; most debtors have not received their day in court with respect to otherwise dischargeable tax debt. That is, most debtors with otherwise dischargeable tax debt do not arrive at the door of the bankruptcy court having had their tax debt adjudicated on the basis of civil or criminal tax fraud. Unlike the public policy issues raised by the habitual criminal statute and addressed by the Supreme Court in *Oyler v. Boles*, among debtors with otherwise dischargeable tax debt the public policy issue becomes more than selective prosecution of those justly liable to sanction. The public policy issue becomes whether the law affords those whose tax debt remains in limbo - for whom there exists no affirmative finding of willful conduct subjecting the debtor to sanction - just treatment under the law. The bias of the statute against debtors, at least as construed by the circuit courts of appeal, sharpens the issue. Expressed in different terms, the public policy issue becomes whether the Bankruptcy Code should deny a fresh start to debtors with otherwise dischargeable tax debt and no prior findings as to willfulness or evasiveness.

99. The majority receive the benefit of a unilateral administrative decision of no further action from the Internal Revenue Service, which, as noted, the government can unilaterally reverse. See discussion supra note 14.

100. If the debtor with otherwise dischargeable tax debt finds himself no better off post-petition than his status pre-petition, he also finds himself no worse off. The Internal Revenue Service had unlimited time to pursue the taxpayer pre-petition for evasion of tax; the Internal Revenue Service has an unlimited time to pursue the taxpayer, now debtor, post-petition for evasion of tax. The continuation of risk suggests to this writer that § 523(a)(1)(C) does not compromise the rights of the taxpayer to due process; how could it if the Bankruptcy Code neither expands nor contracts the rights and obligations of the debtor to meet his tax obligations?

It also appears that the period of limitations provisions of the Internal Revenue Service conforms to the anti-discrimination provision of the Bankruptcy Code. The latter, found at 11 U.S.C. § 525(a), prevents a governmental unit's denial, revocation, suspension or refusal to renew "a license, permit, charter, franchise, or other similar grant" to a debtor "solely because [said] debtor is or has been a debtor under this title." 11 U.S.C. § 525(a) (2002). A claim commenced in the bankruptcy court by the Internal Revenue Service to except otherwise dischargeable tax debt from discharge can hardly arise solely from the debtor's status as a debtor if the Internal Revenue Code confers an open-ended opportunity upon the government to pursue taxpayers who evade taxes. We should not, however, lose sight of the policy issue in this matter: should the Bankruptcy Code afford debtors with otherwise dischargeable tax debt a fresh start?
III. CONCLUSION

Otherwise dischargeable tax debt is unlike any other common form of debt an individual brings to a bankruptcy in that the law neither discharges it nor excepts it from discharge in the first instance. In the congressional expression of otherwise dischargeable tax debt, § 523(a)(1)(C), the policy of the Internal Revenue Code, which favors collection of tax revenue, predominates over the policy of the Bankruptcy Code, which favors a fresh start for honest debtors. Congress, however, has not expressed itself with clarity. The variety of interpretations offered by courts of appeal and the difficulty at least one appellate court has had expressing itself on the contours of the statute suggest the statute needs revision.

Perhaps Congress intended to restrict the access of debtors who commence their cases owing otherwise dischargeable tax debt to discharge of the debt. Important policy reasons for this choice exist, and the choice is without doubt a legitimate one within the context of the Constitution. It is, however, difficult, if not impossible, to infer the intent of Congress with respect to otherwise dischargeable tax debt on the basis of the phrasing of the statute and the record of judicial construction reviewed in this article. If the Bankruptcy Code should be read to permit a debtor to avoid responsibility for otherwise dischargeable tax debt only if the sovereign either permits it, or does not oppose it, Congress should say so. To date, if Congress has chosen to speak on the issue of non-dischargeable tax debt, it has yet to speak clearly.