

Tax refunds  
Current monthly income  
11 U.S.C. § 101(10A)  
Disposable income  
11 U.S.C. § 1325(b)(2)  
Projected disposable income

In re Orozco, Case No. 19-60726-pcm13  
In re Figueroa, Case No. 19-61230-pcm13

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In this opinion involving two cases, the court discussed how to treat tax refunds in a chapter 13 case. The issue was whether the debtors' chapter 13 plans could be confirmed where they did not provide for payment of any tax refunds into the plan. One case involved below-median debtors; the other involved an above-median debtor.

The court explained that tax refunds may be based on overwithholding or tax credits. It also explained how each type of refund should be accounted for in determining projected disposable income that must be paid into a plan when there is an objection to the plan. The approach is different depending on whether a debtor is an above-median debtor or is a below-median debtor. Above-median debtors must use Official Form 122C-2 to report their reasonably necessary expenses in calculating disposable income; below-median debtors do not use the official form but instead show their expenses on Schedule J.

The court concluded that, if a debtor properly accounts for anticipated tax refunds in calculating projected disposable income, as outlined in the opinion, then the tax refund income is already included in the calculation and the debtor's plan need not provide that refunds be paid over to the trustee. If the debtor does not properly account for anticipated tax refunds in calculating projected disposable income, the debtor's plan cannot be confirmed over an objection.

Because these debtors did not demonstrate that they had properly accounted for their tax refunds in calculating their projected disposable income, and therefore their plan payment, their plans could not be confirmed.



1 determining projected disposable income. For the reasons below, I  
2 further conclude that a debtor's tax refunds must be turned over to the  
3 trustee unless they are excluded by a non-standard provision in the plan,  
4 or the debtor has met his or her burden of showing that the refunds are  
5 otherwise accounted for in calculating projected disposable income.

#### 6 JURISDICTION AND VENUE

7 The court has subject matter jurisdiction over these cases pursuant  
8 to 28 U.S.C. § 1334(a). These matters are core proceedings under 28  
9 U.S.C. § 157(b)(2)(A), (E), & (L). Venue in this district is proper  
10 pursuant to 28 U.S.C. §§ 1408-09(a).

#### 11 BACKGROUND

12 Chapter 13 allows debtors to restructure their debts and retain non-  
13 exempt assets, in exchange for making payments over a certain period of  
14 time. Distribution of those payments is made by the chapter 13 trustee  
15 in accordance with a chapter 13 plan.

16 For a chapter 13 plan to be confirmed, it must comply with the  
17 Bankruptcy Code. § 1325(a)(1). One of the requirements under the Code  
18 is that debtors commit all or a portion of their future earnings or other  
19 future income "to the supervision and control of the trustee as is  
20 necessary for the execution of the plan[.]" § 1322(a)(1). If there is  
21 an objection to confirmation of a plan, debtors must either pay their  
22 unsecured creditors in full, or pay all of their "projected disposable  
23 income" to unsecured creditors during the applicable commitment period.  
24 § 1325(b)(1).

25 In the District of Oregon, debtors are required to use a local form  
26 chapter 13 plan. The local plan requires debtors to pay to the trustee

1 monthly payments, proceeds from avoided transfers, and net tax refunds  
2 during the life of the plan.

3 Paragraph 3(c) of that form plan provides:

4 3. **Payments to the Trustee.** Debtor must pay to the trustee:

5 (a) a monthly payment of \$ \_\_\_\_\_;

6 (b) all non-exempt proceeds from avoided transfers, including  
7 those from transfers avoided by the trustee;

8 (c) upon receipt, net tax refunds attributable to the following  
9 tax years: \_\_\_\_\_; net tax refunds are those tax refunds not  
10 otherwise provided for in the plan, less tax paid by debtor for a  
11 deficiency shown on any tax return for that same tax year or tax  
12 paid by setoff by a tax agency for a postpetition tax year.

13 Debtors in these cases inserted the word "none" in paragraph 3(c).

14 The trustee objects to confirmation of debtors' plans on the grounds  
15 that debtors have failed to provide for payment of all of their projected  
16 disposable income, because they have failed to provide for payment of  
17 their tax refunds into their plans.

#### 18 ANALYSIS

##### 19 A. Calculation of Disposable Income

20 The disputes in these cases arise from ambiguities created by  
21 amendments to the Bankruptcy Code in the 2005 Bankruptcy Abuse Prevention  
22 and Consumer Protection Act ("BAPCPA"). Among the many changes made to  
23 the Code in 2005 was the implementation of a "means test." The means  
24 test serves at least two vital functions in bankruptcy cases filed after  
25 October 17, 2005.

26 First, it is used to determine whether a debtor is eligible to file  
a chapter 7 case. If a debtor's "current monthly income," as defined by  
the Code, is below the applicable state median family income for a family

1 the size of the debtor's household ("below-median debtor"), the debtor is  
2 eligible to file chapter 7. § 707(b)(7). If the current monthly income  
3 is above that threshold ("above-median debtor") and, after deducting  
4 certain specified expenses, the debtor has net income that exceeds a  
5 statutory limit, the chapter 7 filing is presumed to be an abuse of the  
6 Bankruptcy Code, because the debtor's income and expenses allow the  
7 debtor to make some payment to unsecured creditors. See § 707(b)(2).  
8 The debtor can convert the case to one under chapter 11 or chapter 13, or  
9 attempt to rebut the presumption of abuse to stay in chapter 7.  
10 §§ 707(b)(1); 707(b)(2)(B).

11 Second, and relevant to this decision, the means test is imported  
12 into Chapter 13. See § 1325(b)(2), (3). Before BAPCPA, the amount  
13 available to pay to the trustee in a chapter 13 plan (the debtor's  
14 disposable income) was determined by the debtor's Schedule I (Income) and  
15 Schedule J (Expenses). The last line of Schedule J deducts the debtor's  
16 Schedule J expenses from the Schedule I net income and arrives at a  
17 monthly net income. That monthly net income formed the basis for how  
18 much the debtor's monthly plan payment would be.

19 BAPCPA and the creation of the means test changed the equation.  
20 Congress imported the definition of current monthly income from the means  
21 test for two purposes in chapter 13. First, current monthly income  
22 determines how long a chapter 13 debtor's plan must last. For a below-  
23 median debtor, a chapter 13 plan must last a minimum of three years, the  
24 "applicable commitment period." § 1322(d)(2). For an above-median  
25 debtor, a chapter 13 plan must last five years, or until all allowed  
26 claims are paid in full. § 1322(d)(1).

1           Second, BAPCPA uses "current monthly income" as the starting point  
2 for determining disposable income in a chapter 13 case. Current monthly  
3 income is defined as the average monthly income from all sources (with a  
4 few listed exceptions such as Social Security) received by the debtor in  
5 the six months before bankruptcy. § 101(10A). Debtors report current  
6 monthly income on Official Form 122C-1.

7           Disposable income, in turn, is defined as current monthly income  
8 "less amounts reasonably necessary to be expended" for the maintenance or  
9 support of the debtor or the debtor's dependents. § 1325(b)(2). For  
10 above-median debtors, Congress went further and dictated that reasonably  
11 necessary expense amounts deducted from current monthly income to arrive  
12 at disposable income be calculated using the expenses set out in the  
13 means test, using Official Form 122C-2. See § 1325(b)(3). These  
14 expenses are based in large part on standardized Internal Revenue Service  
15 amounts, plus certain other specified expenses. § 707(b)(2)(A). The end  
16 result of deducting these specified expenses from current monthly income  
17 is the debtor's disposable monthly income, which lays the foundation for  
18 the debtor's monthly plan payment and the amount that must be paid to  
19 unsecured creditors.

20           For below-median debtors, the Code does not provide any guidance as  
21 to the calculation or definition of "amounts reasonably necessary to be  
22 expended," which are deducted from current monthly income to determine  
23 disposable income. This creates uncertainty as to how disposable income  
24 is calculated for below-median debtors. Debtors and the trustee disagree  
25 on the proper method to determine amounts reasonably necessary to be  
26 expended in a below-median case.

1 Debtors argue that calculation of disposable income for below-median  
2 debtors is the same as the calculation used for above-median debtors. In  
3 other words, they argue that they can calculate their disposable income,  
4 and therefore their projected disposable income, by using the current  
5 monthly income shown on Form 122C-1, and calculate their expenses using  
6 Form 122C-2, which applies the IRS standards and other specified expenses  
7 to determine a debtor's reasonably necessary expenses. They base their  
8 argument on the language contained in § 1325(b)(2).

9 Debtors are correct that the statutory language is the same for both  
10 above- and below-median debtors, to a point. The statute simply states  
11 that a debtor determines disposable income by deducting amounts  
12 reasonably necessary to be expended "for the maintenance or support of  
13 the debtor or a dependent of the debtor[.]" § 1325(b)(2). This  
14 paragraph of § 1325(b) does not distinguish between above- and below-  
15 median debtors. However, that is where the symmetry ends. The next  
16 paragraph, section 1325(b)(3), does make that distinction. It  
17 specifically instructs above-median debtors to follow the means test  
18 formula to calculate the "[a]mounts reasonably necessary to be expended  
19 under paragraph (2)[.]" This is done by using Official Form 122C-2. In  
20 contrast, the Code does not direct below-median debtors to use the means  
21 test to calculate reasonably necessary expenses.

22 Debtors argue that this statutory distinction should be ignored and  
23 the amount deducted from current monthly income for a below-median  
24 debtor's expenses should be the same standardized approach as for above-  
25 median debtors, namely the mechanical approach taken using Form 122C-2.  
26 The trustee argues that the means test is not relevant to calculating the

1 amount of expenses used in determining disposable monthly income for  
2 below-median debtors.

3 I agree with the trustee. Congress's silence with respect to how  
4 below-median debtors must determine their reasonably necessary expenses  
5 is deafening. See Hamilton v. Lanning, 560 U.S. 506, 517 (2010) (the  
6 Court does not read the Code as changing pre-BAPCPA practice absent a  
7 clear indication of that intent). The plain reading of the statute  
8 supports the trustee's argument. Congress, for whatever reason, chose to  
9 approach the calculation of disposable income for above-median debtors  
10 with a somewhat mechanical approach, applying IRS standards for many of  
11 the debtor's expenses. Similarly, Congress chose to leave below-median  
12 debtors out of this mechanical, somewhat artificial approach to  
13 determining expenses. Rather, as before the enactment of BAPCPA, the  
14 statute instructs debtors to deduct amounts reasonably necessary to be  
15 expended for maintenance and support. The Supreme Court in Lanning, 560  
16 U.S. at 510, recognized that, for below-median debtors, Congress provided  
17 that they could include "the full amount needed for 'maintenance or  
18 support[.]'" For above-median debtors, however, Congress provided that  
19 they could include "only certain specified expenses." *Id.*<sup>3</sup> In other  
20 words, the expenses are not standardized or artificial for below-median  
21 debtors; the deductions must be *reasonably necessary* and *expended*. The

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22  
23 <sup>3</sup> The Supreme Court in Lanning seemed to think that the standardized  
24 expenses used by above-median debtors are more limiting than a below-  
25 median debtor's "full amount" needed for support. 560 U.S. at 510. As  
26 debtors have ably demonstrated here, and as this court's experience has  
shown, the standardized expenses allowed under the means test for above-  
median debtors often far exceed the reasonable and necessary expenses  
that a below-median debtor can claim.



1 best indication of expenses that are reasonably necessary and anticipated  
2 to be expended is Schedule J.

3 Debtors' argument that the court should not distinguish between  
4 above- and below-median debtors as to how deductions from current monthly  
5 income are calculated is pivotal to their position that below-median  
6 debtors need not turn over their tax refunds. They postulate that, if  
7 the formula for determining the deductions from current monthly income  
8 used for above-median debtors set out in Form 122C-2 were used for below-  
9 median debtors, the end result of calculating the debtor's disposable  
10 income would be a negative number, even with the addition of anticipated  
11 tax refunds. Debtors then argue that, because disposable income will  
12 virtually always be negative, there is no obligation to turn over the  
13 refunds.

14 Debtors are probably correct about the impact of using the means  
15 test to calculate expenses. Unless a debtor is close to having above-  
16 median income, the addition of tax refunds will not create a positive  
17 disposable income if a below-median debtor were to use the formulas  
18 contained in Form 122C-2. The reason for this is that most low-income  
19 debtors live on budgets well below the IRS standards. They also tend to  
20 have less in secured debt payments than do above-median debtors. Thus,  
21 their expenses shown on Schedule J are lower than they would be under the  
22 means test calculation set out in Form 122C-2. The end result is that  
23 below-median debtors may, in fact, show a positive number for disposable  
24 income when an above-median debtor would likely have a negative  
25 disposable income number, despite having a higher income. I acknowledge  
26 the inherent inequity in this distinction, but the result is mandated by

1 the language of the Code, which I am not at liberty to ignore.

2 B. Calculation of Projected Disposable Income

3 Projected disposable income starts with disposable income,  
4 determined by taking current monthly income and reducing it by the  
5 debtor's reasonably necessary expenses. Disposable income is then  
6 projected over the life of the plan.

7 The question then is how to project disposable income looking  
8 forward during the plan period. Although the Code does not define  
9 "projected" disposable income, the Supreme Court in Lanning, 560 U.S.  
10 505, provided guidance as to the interplay between disposable income and  
11 projected disposable income, confirming that there is a difference  
12 between the two. Lanning involved an above-median debtor. The Court  
13 rejected a mechanical approach to projecting disposable income. It said  
14 that, under the forward-looking approach to projecting disposable income,  
15 the calculation of disposable income is generally the end of the  
16 analysis. Because projected disposable income is forward-looking, that  
17 number can vary from disposable income if there are differences in income  
18 or expenses that are known or virtually certain to occur in the future  
19 during the period of the plan. Id. at 524.

20 Lanning's rejection of a purely mechanical approach to determining  
21 projected disposable monthly income makes sense. Because the calculation  
22 of disposable monthly income is based on an historical calculation of  
23 income, it may not comport with reality. For example, if a debtor  
24 becomes employed or gets new employment at a substantially higher income  
25 level just before the bankruptcy is filed, the current monthly income  
26 shown on Form 122C-1 may be lower than it is known or virtually certain

1 to be going forward. Similarly, the debtor may have received unusual or  
2 non-recurring income during the six-month look-back period, such as a  
3 bonus during the six-month period preceding the filing. In that  
4 instance, the current monthly income may too high and result in a plan  
5 payment that is not sustainable.

6 Therefore, projected disposable income is the debtor's current  
7 monthly income, minus anticipated tax liabilities and other reasonably  
8 necessary amounts to be expended for maintenance and support (whether  
9 calculated by above-median debtors using the means test or by below-  
10 median debtors not using the means test), with any adjustments as  
11 necessary based on known or virtually certain deviations with respect to  
12 income or expenses.

13 C. Tax Refunds as Income

14 For all debtors, the income portion of disposable monthly income is  
15 the current monthly income shown on their Official Form 122C-1, which  
16 requires the debtor to include his or her income from all sources  
17 received over the previous six months to calculate an average monthly  
18 income.<sup>4</sup> Although there are certain exclusions from the "all sources"  
19 definition, tax refunds are not one of those exclusions. See Marshall v.  
20 Blake, 885 F.3d 1065 (7th Cir. 2018) (overruled on other grounds In re  
21

22 <sup>4</sup> The trustee argues that his practice for below-median debtors "is to  
23 use the actual income (per Schedule I), and not the 'current monthly  
24 income,' (per Form 122C-1)" in computing the monthly disposable income  
25 for the plan payment. Trustee's Reply Memorandum (Doc. 24) at p.6:14-17.  
26 Although I recognize the practicality of that approach, it is an  
allowable approach only if it is consistent with starting with the  
current monthly income as defined by the Bankruptcy Code, adjusted as  
necessary pursuant to Lanning.

1 Wade, 926 F.3d 447 (7th Cir. 2019); In re Schiffman, 338 B.R. 422 (Bankr.  
2 D. Or. 2006) (tax refunds are income).<sup>5</sup>

3 Tax refunds come from two sources. First, they can result from  
4 over-withholding of payroll tax. Second, they can result from tax  
5 credits such as the Earned Income Credit (EIC), Child Tax Credit (CTC),  
6 or other tax credits that are available to low-income workers and result  
7 in tax refunds.<sup>6</sup>

8 Tax refunds resulting from over-withholding are not additional  
9 income; they are a portion of the debtor's gross pay, which has been  
10 reported on Form 122C-1. A portion of that gross pay is returned to the  
11 debtor who has withheld more in taxes than is actually owed. It does not  
12 matter whether the refund is received in the six months before  
13 bankruptcy; the gross pay that is reflected on the Form 122C-1 is all  
14 that is required in calculating current monthly income.

15 Refunds that are based on tax credits, on the other hand, are not  
16 derived from a debtor's work income, and so do not show up as part of the  
17 gross pay on the Form 122C-1. Because they are a source of income that  
18 is not excluded from the definition of current monthly income in  
19 § 101(10A), they must somehow be included in the calculation of current  
20 monthly income, if received in the six months before bankruptcy.

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22 <sup>5</sup> I question the public policy behind including tax credits, such as  
23 earned income credit, in income. However, the statutory language clearly  
24 excludes certain types of income such as social security but fails to  
exclude tax credits such as earned income credit.

25 <sup>6</sup> The CTC is not paid out as a tax refund. It is credited against tax  
26 liability. Additional Child Tax Credit (ACTC) may result in a tax  
refund.

1 D. Treatment of Tax Refunds in Chapter 13 Plans

2 Tax refunds must be factored into the calculation of projected  
3 disposable income, whether a result of tax credits or of over-  
4 withholding. If refunds are not included in projected disposable income  
5 and the debtor does not provide for payment of the refund into the plan,  
6 the court cannot confirm the plan over the trustee's objection.

7 The question is how tax refunds should be accounted for in  
8 calculating a chapter 13 debtor's projected disposable income. The  
9 answer depends on whether the tax refunds are a result of over-  
10 withholding or are tax credit refunds.

11 1. Tax Refunds Resulting from Over-Withholding

12 A debtor's current monthly income is reported on Form 122C-1. This  
13 form asks on Line 2 for a debtor's "gross wages, salary, tips, bonuses,  
14 overtime, and commissions (before all payroll deductions)." This amount  
15 should reflect the debtor's gross pay before taxes are withheld.

16 The problem comes in accurately calculating tax liability as an  
17 expense to deduct from gross pay in determining disposable income. Form  
18 122C-1 sets out gross pay, which reflects only the income side of  
19 disposable income. There is no line item on Form 122C-1 to reduce gross  
20 pay by the amount of tax withholding. Because above- and below-median  
21 debtors calculate their disposable income differently, I will address the  
22 two categories separately.

23 (a) Below-median debtors

24 For below-median debtors, the expenses used to reduce their current  
25 monthly income to determine disposable income are generally set out in  
26 Schedule J. That schedule, however, does not include a line item for tax

1 withholding. Payroll deductions, including tax withholding, are reported  
2 on Schedule I.

3 Therefore, in calculating disposable income, below-median debtors  
4 must take their current monthly income from Form 122C-1 and reduce it by  
5 the tax withholding shown in Schedule I and their other reasonably  
6 necessary expenses shown in Schedule J.

7 The practical issue is that withholding reported on Schedule I can  
8 be actual withholding or it can be withholding calculated based on actual  
9 tax liability, which are not necessarily the same thing.

10 If a debtor uses actual tax withholding as an expense to reduce her  
11 gross income, and that withholding has in the past and is likely in the  
12 future to result in a tax refund because it is more than is needed to pay  
13 actual tax liability, reducing gross income by that figure will  
14 artificially inflate the reasonably necessary expense deduction and  
15 consequently artificially reduce the reported disposable income. In that  
16 case, any tax refund would then be income that has not been included in  
17 calculating disposable income, and the debtor would need to provide for  
18 payment of tax refunds into the plan.

19 The correct approach is for a debtor to report tax withholding on  
20 Schedule I based on actual anticipated tax liability. This results in an  
21 accurate expense calculation of the debtor's reasonably necessary  
22 expenses and accurately determines disposable income for purposes of  
23 calculating the amount of a plan payment. Because the disposable income  
24 calculation takes into account actual tax liability, any tax refund based  
25 on over-withholding has been accounted for and need not be paid to the  
26 trustee during the life of the plan.

1 In summary, a debtor's plan payment should be calculated based on  
2 the debtor's best estimate of actual tax liability, reflected in Schedule  
3 I. A plan that accurately reflects anticipated tax liability on Schedule  
4 I as an expense need not provide for payment to the trustee of tax  
5 refunds based on over-withholding, because no such refunds are expected.  
6 If the debtor is over-withholding and instead reports on Schedule I  
7 actual tax withholding, which is known or virtually certain to result in  
8 a tax refund, and then deducts that actual over-withholding in  
9 calculating reasonably necessary expenses, the debtor will need to  
10 provide for payment of the tax refund into the plan, because the debtor's  
11 income has been artificially reduced by over-withholding. Of course, the  
12 debtor can always include a non-standard provision allowing her to retain  
13 any tax refund, with the consent of the trustee.<sup>7</sup>

14 (b) Above-median debtors

15 Unlike below-median debtors, who must look to Schedules I and J to  
16 calculate their reasonably necessary expenses, above-median debtors use  
17 the means test to determine expenses used to calculate their disposable  
18 income. Means test expenses are reported using Form 122C-2.

19 Form 122C-2 expressly includes a line item for taxes. In Line 16 of  
20 the form, debtors are instructed to report taxes:

21 The total monthly amount that you actually pay for federal, state  
22 and local taxes, such as income taxes, self-employment taxes, social  
23 security taxes, and Medicare taxes. You may include the monthly  
24 amount withheld from your pay for these taxes. However, if you  
25 expect to receive a tax refund, you must divide the expected refund  
26 by 12 and subtract that number from the total monthly amount that is  
withheld to pay for taxes. Do not include real estate, sale, or use  
taxes. (Emphasis supplied.)

<sup>7</sup> In fact, the national Chapter 13 Plan form specifically includes a  
check box to allow debtors to retain tax refunds.

1 This calculation provides the mechanism by which a debtor accounts  
2 for the income that is reflected in tax refunds resulting from over-  
3 withholding. If a debtor correctly completes this line item, the tax  
4 refunds based on over-withholding are accounted for in the plan and need  
5 not be paid to the trustee. Of course, if a debtor fails to account for  
6 refunds caused by over-withholding, the plan must provide that those  
7 refunds be paid into the plan.

8 2. Tax Refunds Based on Tax Credits

9 Tax credit refunds are income in addition to income from wages or  
10 salary. Form 122C-1 does not include a line specifically for tax credit  
11 refunds. Therefore, a debtor must include tax credit refunds that were  
12 received within six months before bankruptcy on Form 122C-1 in Line 10,  
13 which asks for "[i]ncome from all other sources not listed above." If  
14 the refund was not received within the six-month look-back period, it is  
15 not required to be included in the Form 122C-1 current monthly income  
16 calculation.

17 If the debtor did not receive a refund within the six-month look-  
18 back period, but it is known or virtually certain that the debtor will  
19 receive tax credit refunds during the life of the plan, a reasonable  
20 estimate of the amount of anticipated tax credit refunds must be included  
21 as income on Schedule I and used to project disposable income over the  
22 life of the plan. For debtors who did receive their refund within the  
23 six months before bankruptcy, the full amount of the refund was pro-rated  
24 over six months to calculate current monthly income. Any known or  
25 virtually certain future tax credit refunds will need to be pro-rated  
26 over the full calendar year. All debtors can make that adjustment on



1 their Schedule I to show that an adjustment to current monthly income is  
2 necessary because of future differences that are known or virtually  
3 certain to occur.

4 Realistically, it is unlikely that including the pro-rated amount of  
5 the refunds will increase a debtor's plan payment, at least for below-  
6 median debtors. Along with the increased net income, the below-median  
7 debtor will be able to claim reasonable expenses on Schedule J. The  
8 reality is that most of the refunds received by below-median debtors are  
9 tax credits such as the EIC. These debtors typically live on very tight  
10 budgets, with little or no room for error and well below the IRS  
11 standards. It will not be difficult or unreasonable in most cases to  
12 show expenses that absorb any additional income listed on Schedule I from  
13 tax refunds.

14 If a debtor accurately reports refunds based on tax credits on  
15 Schedule I, she need not provide for payment of those refunds in the  
16 plan, because they have already been accounted for in determining  
17 projected disposable income.

18 In summary, debtors have three choices of how to treat tax refunds  
19 based on tax credits. First, the correct approach is to include any  
20 refunds based on tax credits on Form 122C-1, Line 10, if those refunds  
21 were received in the six months before bankruptcy, or on Schedule I if a  
22 refund was not received in the six months leading up to bankruptcy but it  
23 is known or virtually certain that the debtor will receive tax credit  
24 refunds during the life of the plan. If that is done, the debtor need  
25 not pay tax credit refunds into the plan.

26 Second, if the debtor fails to account for those refunds on Form

1 122C-1 or Schedule I, and it is known or virtually certain that the  
2 debtor will receive tax credit refunds during the life of the plan, the  
3 debtor must provide for payment of the refunds into the plan in order to  
4 obtain confirmation over the trustee's objection.

5 Third, debtors may, with the trustee's agreement, include a non-  
6 standard provision that they may retain all or part of the refunds  
7 received.<sup>8</sup>

#### 8 CONCLUSION

9 If the trustee objects to confirmation of a debtor's chapter 13  
10 plan, the debtor must pay his or her projected disposable income to the  
11 trustee for payment to unsecured creditors. Tax credit refunds are  
12 included in projected disposable income. Deductions from income for tax  
13 withholding must accurately reflect actual tax liability. Absent a  
14 showing that refunds have been adequately accounted for in calculating  
15 projected disposable income, and in the absence of a plan provision  
16 requiring payment of refunds over to the trustee, a plan cannot be  
17 confirmed over the trustee's objection.

18 It is true that debtors may receive tax refunds during the life of  
19 their plans that are in excess of projected amounts, whether a result of  
20 over-withholding or of tax credits. However, a debtor's obligation under  
21 the Code is to commit his or her projected disposable income to the plan.  
22 Income may vary, as may expenses. If the projection is reasonable, the  
23 fact that actual refunds vary from the amounts projected does not  
24 necessarily mean that the refunds must be paid into the plan.

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25 <sup>8</sup> The chapter 13 trustee in the Portland Division has a form non-  
26 standard provision he allows debtors to include in their plans that  
allows them to retain EIC refunds without further analysis.

1 Debtors have failed to show that they adequately accounted for their  
2 tax refunds, nor have they provided that the refunds will be turned over  
3 to the trustee. Therefore, they have failed to meet their burden to show  
4 that their anticipated tax refunds are already included in projected  
5 disposable income, and the plan in each case cannot be confirmed.

6 The court will enter an order denying confirmation in both cases and  
7 providing debtors 28 days to file an amended plan.

8 ###

9 cc: Rex Daines  
10 Paul Garrick

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