Docket #0078 Date Filed: 12/11/2019

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS

In re:	)	Chapter 11
	)	
TELEXFREE, LLC,	)	Case No. 14-40987
TELEXFREE, INC,	)	Case No. 14-40988
TELEXFREE FINANCIAL, INC.	)	Case No. 14-40989
	)	
Debtors.	)	
	)	
STEPHEN DARR,	)	Adv. Proc. No. 18-04091
	)	
Plaintiff and Counterclaim Defendant,	)	Judge Melvin S. Hoffman
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant and Counterclaim Plaintiff.	)	

UNITED STATES OF AMERICA'S RESPONSE TO TRUSTEE'S NOTICE OF SUPPLEMENTAL AUTHORITY [DOC. 72]

In light of the Court's Order Regarding Motions for Summary Judgment (Doc. 75), which vacated the Court's prior orders taking the cross-motions for partial summary judgment as to Counts IV and V under advisement, the United States hereby responds to the Trustee's Notice of Supplemental Authority in Further Support of Motion by Trustee for Partial Summary Judgment (Doc. 72).

In re Affirmative Insurance Holdings, Inc., 607 B.R. 175 (Bankr. D. Del. 2019), is the first post-Bankruptcy Abuse Prevention Consumer Protection Act of 2005 ("BAPCPA") opinion to hold that pre-BAPCPA case law allowing bifurcation of claims arising from "straddle tax years" remains good law, and this Court should decline to follow it. As explained in the United

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States' brief related to the cross-motions, through BAPCPA, Congress amended what is now 11 U.S.C. § 507(a)(8) to clarify that income taxes for post-petition tax years are to be treated as administrative expenses, *i.e.*, bifurcation of so-called "straddle tax years" is no longer permitted. (*See* Doc. 23, at 17–18.) Prior to the recent issuance of *Affirmative Insurance*, the post-BAPCPA case law uniformly (and correctly) recognized that this BAPCPA amendment had the effect of rendering income taxes for post-petition tax years to be administrative expenses, without any bifurcation. *See In re Earl Gaudio & Son, Inc.*, 2017 WL 377918 (Bankr. C.D. Ill. Jan. 25, 2017); *In re FR & S Corp.*, 2011 WL 1261329 (Bankr. D.P.R. Mar. 30, 2011); *cf. 4 Collier on Bankruptcy*, para. 503.07 (16th ed. 2018). In reaching the contrary conclusion, *Affirmative Insurance* relied on Indiana state law regarding when taxes are incurred. 607 B.R. at 187. Indiana state law does not control when federal income taxes are incurred and accrue, however, and under relevant federal law, TelexFree's 2014 income tax liabilities were incurred and accrued on December 31, 2014, months after the petition date. (*See* Doc. 23, at 19–21.) This Court should follow the majority view of the effect of the BAPCPA amendment of § 507(a)(8) on post-petition income taxes, and decline to adopt *Affirmative Insurance*.

The majority rule from *Earl Gaudio* and *FR & S* is consistent with the Final Report of the National Bankruptcy Review Commission. In that report, the Commission acknowledged the existence of case law bifurcating corporate debtors' federal income taxes in the year of filing into § 507(a)(8) priority claims and administrative expenses, and raised three proposals to address the case law: explicitly codifying the case law; eliminating bifurcation and treating such taxes as administrative expenses; or allowing corporations to elect to bifurcate in the same manner as individuals. *See* Nat'l Bankr. Review Comm'n, *Bankruptcy: The Next Twenty Years*, Chapter 4: Taxation and the Bankruptcy Code, § 4.2.33. BAPCPA was motivated in large part by problems

identified in the Commission's report. *See* H.R. Rep. 109-31(I), at *19–21, 54; *In re Greene*, 583 F.3d 614, 619 (9th Cir. 2009). The amendment to § 507(a)(8) adopted in BAPCPA is consistent with the second proposal: eliminating bifurcation and treating post-petition income taxes as administrative expenses. *Affirmative Insurance*, however, relies on pre-BAPCPA case law to retain bifurcation, and interprets BAPCPA's amendment as bifurcating straddle tax years' claims into prepetition general unsecured claims and postpetition administrative expenses. *See* 607 B.R. at 188. *Affirmative Insurance* significantly departs from the priority typically accorded to tax claims, and cannot have been intended by Congress. This Court should decline to adopt such a radical interpretation of § 507(a)(8), and instead should adopt the majority view.

The Court also should not adopt *Affirmative Insurance* because the decision is not final. The United States has appealed the decision to the District Court for the District of Delaware. *See In re Affirmative Insurance Holdings, Inc.*, Case No. 1:19-cv-02034 (D. Del.) (filed Oct. 28, 2019).

WHEREFORE, the United States requests that the Court decline to follow *In re Affirmative Insurance Holdings, Inc.*, 607 B.R. 175 (Bankr. D. Del. 2019).

Dated: December 11, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 2019, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all registered CM/ECF participants. There are no parties that require conventional service.

/s/ Lauren E. Hume
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