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Sixth Circuit Decision Reinforces Need for Clear-Cut Bankruptcy Provisions in Tax-Sharing Agreements

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November 21, 2014 - Courts have continued to rule on the appropriate treatment in bankruptcy of a tax refund pursuant to a tax-sharing agreement (TSA) that is silent on how the refund should be treated in a bankruptcy proceeding. In the most recent case, [FDIC v. AmFin Financial Corp. et al.](#), the 6th Circuit reversed a district court ruling that a TSA was unambiguous, and remanded the issue for consideration of extrinsic evidence to determine the parties' intent.

The district court had held, based on language in the TSA such as "reimbursement" and "payment" that the TSA unambiguously created a debtor-creditor relationship between the members of the consolidated entity, making the refund part of the bankruptcy estate of AmFin Financial Corporation ("AmFin"), the company that received the refund, rather than AmTrust Bank ("AmTrust"), the corporation whose losses had created the \$170 million tax refund. This treatment benefited the creditors of AmFin, which would retain much of the tax refund and pay only a portion to AmTrust as an unsecured general creditor. The 6th Circuit reversed and held that as the TSA was entirely silent on the treatment of refunds the agreement could not be said to be unambiguous, and remanded for further proceedings using extrinsic evidence to determine the parties' intent in drafting the TSA. The 6th Circuit also rejected arguments that federal common-law should apply that would, in the absence of an explicit provision stating otherwise, always direct the refund under a TSA to entity whose losses generated the refund.

This is the latest in a line of similar cases in the past few years that have been covered on this blog (see [here](#) and [here](#)) interpreting the proper allocation of any refunds under a TSA in bankruptcy and further reinforces the need for clarity in the TSA itself as to how the refund should be allocated. This will help provide certainty for the creditors of any conglomerate that uses a TSA how their claims may be treated in bankruptcy, and avoid the potential for costly litigation between the members of the conglomerates that diminishes the assets available for a restructuring or distribution to creditors.

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