NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. PR 17-048

Bankruptcy Case No. 12-05710-ESL

MJS LAS CROABAS PROPERTIES, INC.,
a/k/a Ocean Club at Seven Seas,
Debtor.

WM CAPITAL PARTNERS 54, LLC,
Appellant,

v.

MUNICIPAL REVENUE COLLECTION CENTER,
a/k/a CRIM,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Puerto Rico
(Hon. Enrique S. Lamoutte, U.S. Bankruptcy Judge)

Before
Feeney, Finkle, and Fagone,
United States Bankruptcy Appellate Panel Judges.

Manuel Fernández Bared, Esq., and Brian M. Dick Biascoechea, Esq.,
on brief for Appellant.
Fernando Van Derdys, Esq., on brief for Appellee.

October 18, 2018

Per Curiam.

WM Capital Partners 54, LLC ("WM") appeals from the bankruptcy court's order (the "Order") determining that the court lacked jurisdiction to decide whether the debtor, MJS Las Croabas Properties, Inc. (the "Debtor"), was entitled to a certain property tax exemption under Puerto Rico law. For the reasons set forth below, we **AFFIRM**.

BACKGROUND[1]

The Debtor is a construction company that developed a 300-unit residential condominium in Fajardo, Puerto Rico (the "Development"). Westernbank Puerto Rico ("Westernbank") financed the construction of the Development and obtained liens on all of the Debtor's assets as security for payment of the loan. When Westernbank failed, the Federal Deposit Insurance Corporation (the "FDIC") became the receiver of Westernbank.

The Debtor encountered its own financial difficulties and, in July 2012, filed a chapter 11 petition. About a year later, the case was converted to one under chapter 7. The Municipal Revenue Collection Center (Spanish acronym, "CRIM")—a Puerto Rico agency responsible for collecting property taxes on behalf of Puerto Rico municipalities—filed a proof of claim (the "CRIM POC") for unpaid taxes assessed against the Development. The amount of CRIM's claim was approximately $333,000, and CRIM identified the claim as fully secured.[2] CRIM attached, as supporting documentation, over 200 invoices relating to unsold units.

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[1] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, et seq.

[2] CRIM has a statutory first priority lien that secures its collection of property taxes. Section 2651 of P.R. Laws Ann. tit. 30 provides:

In its capacity as receiver, the FDIC objected to the CRIM POC, asserting that it was owed $61 million, secured by first priority, fully perfected, and otherwise unavoidable liens on the Development and all of the assets of the Debtor. The FDIC also challenged the amount due to CRIM and the sufficiency of CRIM's supporting documentation. Later, the FDIC transferred its claim to WM.

WM and the chapter 7 trustee (the "Trustee") negotiated the sale of most of the units for which CRIM claimed taxes due. Consequently, the prospective purchasers, WM, and the Trustee filed a motion seeking approval of the sale under § 363 (the "Sale Motion"), which provided, in pertinent part:

> If by the date of Closing the Court has issued an order determining the CRIM Debt, [the Trustee] will retain such amount from distribution to creditors and pay off the CRIM Debt. If at Closing, the Court has not [determined the CRIM Debt], then the Trustee will retain the full amount of the CRIM Claim plus any post-petition arrears shown in CRIM's statements of account supplied by the Buyers at closing, as prorated up to the Closing Date. The [Trustee] shall retain such amounts until the Court determines the CRIM Debt or [until] the CRIM and WM reach an agreement therefor. Thereafter, the [Trustee] shall disburse the retained amounts to the CRIM and to WM, pursuant to the Court's determination.

The bankruptcy court granted the Sale Motion, authorizing the Trustee to sell the Property as contemplated in the motion. The closing of the § 363 sale took place on December 26, 2016. The following day, the Trustee filed a Motion for Consignment of Funds, seeking authorization

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> A statutory mortgage is constituted in favor of the Commonwealth of Puerto Rico, the Center for Collection of Municipal Incomes of the Commonwealth of Puerto Rico, and its corresponding municipalities on the taxpayers' property for land taxes pertaining to the last five annual assessments and for current unpaid taxes encumbering it. This statutory mortgage is implicit and specifies a preference in favor of its titleholders above all creditors and over the third acquirer, even though he may have recorded his rights.

P.R. Laws Ann. tit. 30, § 2651.

to consign the sum of $411,538.58 in court in accordance with P.R. Laws Ann. tit. 31, § 3182.[3] The bankruptcy court granted the motion and thereafter the Trustee deposited the funds with the clerk of the bankruptcy court.

On the heels of the § 363 sale, CRIM and WM filed a series of motions, each claiming ownership of the consigned funds and seeking an order for distribution of the entire sum on deposit with the bankruptcy court. WM added a new basis for objecting to CRIM's claim: namely, that the "units which make up the totality of the CRIM[ ] POC [ ] owe nothing to CRIM pursuant to the 'New Construction Exemption[.]'" In support, WM asserted that the Debtor was entitled to a "New Construction Exemption" pursuant to a recently enacted statute, P.R. Laws Ann. tit. 21, § 5151(ee).[4] CRIM countered that: (1) WM had agreed to the amount to be consigned for CRIM; and (2) the New Construction Exemption did not apply, as the statute's application is prospective only.

After the Trustee deposited the sale proceeds with the court and while the dispute between CRIM and WM was ongoing, the Trustee filed his final report, in which he stated: "[a]ll scheduled and known assets of the estate have been reduced to cash, released to the debtor as exempt property pursuant to 11 U.S.C. § 522, or have been or will be abandoned pursuant to 11 U.S.C. § 554." No objections to the final report were filed.

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[3] Section 3182 of P.R. Laws Ann. tit. 31 provides, in pertinent part: "Consignation shall be made by depositing the things due at the disposal of the judicial authority before whom the tender shall be proven in a proper case and the notice of the consignation in other cases." P.R. Laws Ann. tit. 31, § 3182.

[4] Section 5151(ee) of P.R. Laws Ann. tit. 21 provides, in part: "Newly-built real properties for residential purposes shall be exempt from the payment of the taxes imposed under §§ 5001 and 5002 of this title until the sale is completed and the housing unit is issued the corresponding use permit." P.R. Laws Ann. tit. 21, § 5151(ee).

At a hearing in June 2017 on CRIM's and WM's respective motions for release of the consigned funds, CRIM asserted for the first time that the bankruptcy court lacked jurisdiction to determine the amount of its claim, as the consigned funds were neither property of the estate nor of the Debtor. The bankruptcy court stated that it was "inclin[ed]" to conclude it had jurisdiction but requested supplemental briefing on the New Construction Exemption issue.

Instead of submitting the supplemental briefs, the parties renewed their requests for the release of the consigned funds. CRIM maintained that: (1) the amount of its claim was "settled"; and (2) the bankruptcy court lacked subject matter jurisdiction to determine whether the Debtor was entitled to a tax exemption. WM countered that the bankruptcy court had jurisdiction under § 505(a)(1) to decide the amount or legality of CRIM's tax claim, and the consigned funds remained property of the estate under § 541(a)(6).

On October 23, 2017, the bankruptcy court entered the Order, now concluding that it lacked jurisdiction to decide whether the Debtor was entitled to the New Construction Exemption. The Order specifically provided:

> [CRIM's motion for order disbursing consigned funds] (docket #782) is hereby granted. After due consideration[ ] of parties' positions, including the arguments by WM . . . , the court agrees with CRIM's position that the court lacks jurisdiction to entertain whether the [D]ebtor . . . is entitled to a tax exemption as alleged by WM . . . . The court's decision is without prejudice to WM . . . litigating the issue before the Puerto Rico state courts.

Several days later, on October 27, 2017, WM filed an "urgent motion" (the "Motion to Clarify") seeking clarification that the bankruptcy court had not yet ruled on the allowance or disallowance of the CRIM POC and that CRIM was, therefore, not permitted to withdraw the consigned funds. CRIM did not timely respond to the Motion to Clarify.

On November 6, 2017, prior to the entry of a ruling on the Motion to Clarify, WM filed this appeal. Thereafter, the bankruptcy court entered an order granting the Motion to Clarify, stating: "Due notice having been given, there being no opposition, and good cause appearing thereof, the motion is hereby granted. CRIM has failed to oppose as ordered by this court." Accordingly, it appears that the funds remain on deposit with the court.[5]

APPELLATE JURISDICTION

The Panel may hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees. See 28 U.S.C. §§ 158(a), (b), and (c); see also Bullard v. Blue Hills Bank, 135 S. Ct. 1686, 1692, 1695 (2015) (discussing the Panel's jurisdiction to hear bankruptcy appeals under 28 U.S.C. § 158(a)). "A decision is final if it ends the [litigation] on the merits and leaves nothing for the court to do but execute the judgment." Fleet Data Processing Corp. v. Branch (In re Bank of New Eng. Corp.), 218 B.R. 643, 646 (B.A.P. 1st Cir. 1998) (citations omitted) (internal quotations omitted). "Ordinarily, a judgment is final . . . only if it conclusively determines all claims of all parties to the action." Raymond C. Green, Inc. v. DeGiacomo (In re Inofin Inc.), 466 B.R. 170, 173-74 (B.A.P. 1st Cir. 2012) (citation omitted) (internal quotations omitted). Here, the Panel previously determined, after

[5] Even after the commencement of this appeal, CRIM continued to request the distribution of the entire amount of consigned funds. The bankruptcy court declined to enter such an order, stating in relevant part: "[T]he disbursement of funds to either the Debtor or CRIM is intertwined with the issue of whether the Debtor is entitled to a tax exemption. Whether the court has jurisdiction to adjudicate the tax exemption is on appeal. Granting CRIM's request to disburse the funds is a manner of circumventing the legal issue before the BAP . . . ."

receiving preliminary briefing, that the Order was a final order. While the Order did not conclusively determine the parties' respective entitlements to the consigned funds, it did conclusively provide that the bankruptcy court would not determine the substantive legal question dividing the creditors. The Order is consistent with the bankruptcy court's expectation that a Commonwealth court would determine the tax exemption question, leaving only the ministerial task for bankruptcy court to direct the disposition of the funds based on a Commonwealth court's final adjudication of the dispute. Although the issue of finality is not free from doubt, in these circumstances, we are persuaded that the Order is final for purposes of appeal.

STANDARD OF REVIEW

The Panel reviews a bankruptcy court's findings of fact for clear error and its conclusions of law de novo. Jeffrey P. White & Assocs., P.C. v. Fessenden (In re Wheaton), 547 B.R. 490, 496 (B.A.P. 1st Cir. 2016) (citing Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 269 (1st Cir. 2010)). The existence of subject matter jurisdiction is a question of law which is reviewed de novo. See Grapentine v. Pawtucket Credit Union, 755 F.3d 29, 31 (1st Cir. 2014) (citation omitted); Corrada Betances v. Sea-Land Serv., Inc., 248 F.3d 40, 44 (1st Cir. 2001) (citation omitted). "De novo review means that the appellate court is not bound by the bankruptcy court's view of the law." Wiscovitch-Rentas v. Villa Blanca VB Plaza LLC (In re PMC Mktg. Corp.) 543 B.R. 345, 354 (B.A.P. 1st Cir. 2016) (citation omitted) (internal quotations omitted).

DISCUSSION

I. Subject Matter Jurisdiction

The general grant of bankruptcy jurisdiction is found in 28 U.S.C. § 1334 which provides, in pertinent part:

> (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.
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> (b) . . . [N]otwithstanding[ ] any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(a) and (b); see also Gupta v. Quincy Med. Ctr., 858 F.3d 657, 661 (1st Cir. 2017). Section 1334(e) also provides a grant of jurisdiction relating to a debtor's property and property of the estate. See 28 U.S.C. § 1334(e)(1). Reading the relevant statutes together yields the following aspects of subject matter jurisdiction: (1) jurisdiction of bankruptcy "cases"; (2) jurisdiction of "civil proceedings arising under" the Bankruptcy Code; (3) jurisdiction of "civil proceeding . . . arising in" bankruptcy cases; (4) jurisdiction of "civil proceedings . . . related to" bankruptcy cases; and (5) jurisdiction of the debtor's property and property of the estate. See 28 U.S.C. § 1334. We cannot determine, based on the record, whether the bankruptcy court systematically considered—and rejected—all five possible bases for subject matter jurisdiction over the contested matter before it. For the reasons set forth below, however, the bankruptcy court's lack of explication does not hinder our analysis and we need not delve into the existence or type of jurisdiction over the parties' dispute.

II. Section 505(a)(1)

WM resisted CRIM's suggestion that jurisdiction was lacking by pointing to § 505. Section 505(a)(1) provides:

> Except as provided in paragraph (2) of this subsection, the court *may* determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

11 U.S.C. § 505(a)(1) (emphasis added). Section 505(a)(1) has a two-fold purpose: (1) "to facilitate the bankruptcy goal of expediting the administration of claims against the estate" by providing "a forum for the speedy resolution of disputed tax claims so as to avoid any delay in the administration of the bankruptcy case"; and (2) "to protect creditors from the dissipation of estate assets which could result if creditors were bound by [a] tax judgment which the debtor, due to his ailing financial condition, did not contest." Kohl v. IRS (In re Kohl), 397 B.R. 840, 845 (Bankr. N.D. Ohio 2008) (citations omitted).

Courts have expressed disagreement concerning the nature of a bankruptcy court's jurisdiction over requests under § 505(a)(1). Several courts view § 505(a)(1) as an independent source of bankruptcy court jurisdiction. See, e.g., IRS v. Luongo (In re Luongo), 259 F.3d 323, 328 (5th Cir. 2001); City of Perth Amboy v. Custom Distrib. Servs., Inc. (In re Custom Distrib. Servs., Inc.), 224 F.3d 235, 239-40 (3d Cir. 2000); United States v. Wilson, 974 F.2d 514, 516-17 (4th Cir. 1992); In re Indianapolis Downs, LLC, 462 B.R. 104, 111 (Bankr. D. Del. 2011); In re Kohl, 397 B.R. at 845; Fyfe v. United States (In re Fyfe), 186 B.R. 290, 291 (Bankr. N.D. Ga. 1995); Anderson v. United States (In re Anderson), 171 B.R. 549, 550-51 (Bankr. W.D. Va. 1994).

Others view § 505(a)(1) determinations as proceedings arising under the Bankruptcy Code. See, e.g., Kennedy v. Miss. Dep't of Revenue (In re Kennedy), 529 B.R. 345, 349 (Bankr. N.D. Ga. 2015); In re UAL Corp., 336 B.R. 370, 371 (Bankr. N.D. Ill. 2006). Still others consider § 505(a)(1) determinations as emanating from proceedings related to bankruptcy cases. See, e.g., In re Bush, No. 1:15-cv-1318-WTL-DKL, 2016 WL 4261867, at *3 (S.D. Ind. Aug. 12, 2016) (suggesting that bankruptcy courts might have related to jurisdiction to determine a debtor's tax liability, but such jurisdiction was lacking under the circumstances presented by that case); Johnston v. City of Middletown (In re Johnston), 484 B.R. 698, 711-12 (Bankr. S.D. Ohio 2012) (same).

The one common thread among these cases is the idea that the bankruptcy court has the statutory authority to determine a debtor's tax liability in accordance with § 505(a)(1). It is undisputed that bankruptcy courts have authority to consider tax issues to the extent provided in § 505(a)(1). See, e.g., In re Luongo, 259 F.3d at 329; Sarfani, Inc. v. Miss. Dep't of Revenue (In re Sarfani, Inc.), 527 B.R. 241, 247 (Bankr. N.D. Miss. 2015); In re Hunt, 95 B.R. 442, 445 (Bankr. N.D. Tex. 1989). But even if we were to construe the matter before the bankruptcy court as a request under § 505(a)(1), a further question would still loom in this case: was the bankruptcy court required to resolve the dispute where the outcome would have no impact whatsoever on the Debtor's estate or its other creditors?

III. Abstention under 28 U.S.C. § 1334(c)(1)

Regardless of the nature of the bankruptcy court's potential jurisdiction to make a § 505(a)(1) determination, "a bankruptcy court's authority to determine a debtor's tax liability is purely discretionary." Cody, Inc. v. Cnty. of Orange (In re Cody, Inc.), 281 B.R. 182, 192

(S.D.N.Y. 2002), aff'd in part and dismissed in part on other grounds, 338 F.3d 89 (2d Cir. 2003). "The bankruptcy court's ability to abstain is premised on Congress' use of the word '*may*' in § 505." In re Luongo, 259 at 330 (citing In re Beisel, 195 B.R. 378, 379 (Bankr. S.D. Ohio 1996) ("Section 505(a)(1) allows but does not require the Bankruptcy Court to determine a debtor's tax liabilities.")).

The statutory standard that bankruptcy courts must employ when evaluating a motion for discretionary abstention is set forth in 28 U.S.C. § 1334(c)(1), which provides:

> Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1334(c)(1).[6] "This statute codifies the permissive abstention doctrine and demonstrate[s] the intent of Congress that concerns of comity and judicial convenience should be met, not by rigid limitations on the jurisdiction of federal courts, but by the discretionary exercise of abstention when appropriate in a particular case." In re Cody, 281 B.R. at 190 (citation omitted) (internal quotations omitted).

Under 28 U.S.C. § 1334(c), "three criteria exist: 'the interests of justice, comity and respect for State law.'" Capitol BC Rests., LLC v. Comm'r (In re Capitol BC Rests., LLC), 568 B.R. 574, 590 (Bankr. D. Mass. 2017) (quoting New Eng. Power & Marine, Inc. v. Town of Tyngsborough (In re Middlesex Power Equip. & Marine, Inc.), 292 F.3d 61, 69 (1st Cir. 2002)).

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[6] "[B]y implication, a bankruptcy court may permissively abstain *sua sponte*." Bricker v. Martin, 348 B.R. 28, 33 (W.D. Pa. 2006) (citations omitted).

Courts have also considered: "the extent to which state law issues predominate over bankruptcy issues; the presence of a related proceeding commenced in state court or other nonbankruptcy court; and the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties." Id. (citations omitted) (internal quotations omitted). Some courts have identified additional factors to consider when specifically deciding whether to abstain from determining a debtor's tax liability under § 505(a)(1). In re Fyfe, 186 B.R. at 292. Those factors include:

> the debtor's assets and debt structure, the need for prompt and orderly administration of the estate, and the delay occasioned by abstention, the burden on the court's docket, the prejudice to the parties, the complexity of the issues presented, and the need to refrain from becoming a second tax court thereby providing an alternate forum to taxpayers who could contest their tax debt in tax court.

Id. (citing Starnes v. United States (In re Starnes), 159 B.R. 748, 751 (Bankr. W.D.N.C. 1993); In re Am. Motor Club, Inc., 139 B.R. 578 (Bankr. E.D.N.Y. 1992); In re Hunt, 95 B.R. 442, 445 (Bankr. N.D. Tex. 1989)); cf. Williams v. United States (In re Williams), 190 B.R. 225, 229 (Bankr. W.D. Pa. 1995) (noting "[c]ourts appear to be in universal agreement that abstention [from making a § 505(a)(1) determination] is warranted" in a no-asset case).

IV. Analysis

WM and CRIM dispute whether the consigned funds are property of the estate. Arguing that the funds have ceased to be property of the estate, CRIM insists that the bankruptcy court lacks jurisdiction to determine whether the Debtor is entitled to a property tax exemption. WM, on the other hand, maintains that the consigned funds remain property of the estate and that

the bankruptcy court should have exercised its jurisdiction to determine the Debtor's tax liability under § 505(a)(1).

The nature of the bankruptcy court's jurisdiction under § 505(a)(1) is a difficult question. The First Circuit appears to have acknowledged as much. See United States v. Paolo (In re Paolo), 619 F.3d 100, 104 (1st Cir. 2010) (observing that the jurisdictional issue presented by § 505 "is one of some difficulty" and declining to pursue the issue). We need not resolve whether, at the moment the bankruptcy court issued the Order, the sale proceeds were property of the estate. Likewise, we need not resolve any questions regarding the existence of subject matter jurisdiction over this dispute, which appears to be only a two-creditor dispute. Even if we accept WM's assertions that the funds are property of the estate and that the bankruptcy court had jurisdiction to determine the Debtor's entitlement to a tax exemption under Puerto Rico law, the bankruptcy court would have been well within its discretion to abstain from rendering a determination. "Section 505(a)(1) allows but does not require the Bankruptcy Court to determine a debtor's tax liabilities." In re Beisel, 195 B.R. at 379.

Because the issue here is clearly dominated by Puerto Rico law, the dispute involves nondebtors, the determination of the tax liability will not affect any other creditors, and there is no threat of dissipation of the challenged funds as they have been consigned with the bankruptcy court, abstention would have been warranted. The overarching consideration of comity also weighs heavily in favor of abstention. Indeed, courts frequently exercise their discretion to abstain from making a § 505(a)(1) determination of a debtor's tax liability. See, e.g., In re Cody, 281 B.R. at 194; In re Ryckman Creek Res., LLC, 570 B.R. 483, 487-88 (Bankr. D. Del. 2017); In re Altegrity, Inc., 544 B.R. 772, 779-81 (Bankr. D. Del. 2016); In re Sarfani, Inc.,

527 B.R. at 251-52; In re Johnston, 484 B.R. at 719; In re Kohl, 397 B.R. at 846; ANC Rental Corp. v. Dallas Cnty. (In re ANC Rental Corp.), 316 B.R. 153, 159 (Bankr. D. Del. 2004); In re Starnes, 159 B.R. at 750-51. As one court stated, "where the aims of § 505 would not be furthered, discretionary abstention under 28 U.S.C. § 1334(c)(1) is particularly appropriate." In re Kohl, 397 B.R. at 845 (citation omitted). Here, the delay, if any, resulting from a Commonwealth court determination would not interfere with the administration of the estate, and creditors are not at risk of an unchallenged claim by a taxing authority. Also, WM has not articulated any unfair prejudice that will result if the Commonwealth courts, rather than the bankruptcy court, determine the unique Puerto Rico tax law question to resolve the parties' dispute.

Accordingly, even if WM's position is correct (which we decline to decide), we conclude that any asserted error was harmless—the record would have fully supported a decision by the bankruptcy court to abstain from deciding the issue. See Harutyunyan v. Gonzales, 421 F.3d 64, 70 (1st Cir. 2005) (explaining, in an immigration case, that a harmless error is one "that would likely [not] have made a dispositive difference in the outcome of the proceeding"). For these reasons, we affirm the Order, notwithstanding that the bankruptcy court did not invoke 28 U.S.C. § 1334(c) when it issued the Order. See Keach v. Wheeling & Lake Erie Ry. Co. (In re Montreal, Me. & Atl. Ry, Ltd.), 888 F.3d 1, 8 n.4 (1st Cir. 2018) (stating appellate court may affirm "on any ground made manifest by the record, whether or not that particular ground was raised below") (citations omitted) (internal quotations omitted).

CONCLUSION

For the reasons set forth above, we **AFFIRM**.