

BY PATRICIA B. TOMASCO AND JENNIFER F. WERTZ

To Caesar,¹ Only What Is Due

An Opportunity under § 505(a)(2)(C) for Ad Valorem Taxes?

Plagued with financial uncertainty and inadequate resources, debtors often fail to take the steps that are needed to minimize property taxes in the period leading up to bankruptcy. Tax protests go unfiled and valuations go unchecked. Faced with large, priority, and secured tax claims, § 505 of the Bankruptcy Code provides both the authority and procedure for debtors to attempt to reduce their taxes or penalties, without regard to whether the tax has been assessed, paid, contested before, or previously adjudicated.² Congress added § 505(a)(2)(C) of the Bankruptcy Code as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) to severely restrict the ability of a bankruptcy court to revisit valuation issues for *ad valorem* taxes.³ On its face, § 505(a)(2)(C) appears to close the applicable window of opportunity for a debtor to request a determination of taxes with respect to *ad valorem* taxes, as it limits the court's authority if the "applicable period for contesting or redetermining" an *ad valorem* tax has expired under nonbankruptcy law.⁴ Section 505(a)(2)(C) provides as follows:

(a)(2) The court may not so determine —
(C) the amount or legality of any amount arising in connection with an ad valorem tax on real or personal property of the estate, if the applicable period for *contesting* or *redetermining* that amount under applicable nonbankruptcy law has expired.⁵

The relatively few courts tackling § 505(a)(2)(C) address the threshold issue of whether an applicable period for contesting an amount due for *ad valorem* taxes under state law has expired.⁶ When the

clock under applicable nonbankruptcy law strikes midnight, does § 108 affect the calculation of time under § 505(a)(2)(C)?⁷

Courts have yet to wrestle with another related issue bubbling under § 505(a)(2)(C): What constitutes a "redetermination" of *ad valorem* taxes? Courts have not readily addressed what constitutes a "contest" or "redetermination" for purposes of § 505(a)(2)(C) or evaluated the interplay between certain state procedures that may in fact not fall within the claws of § 505(a)(2)(C).⁸ Certain state procedures may offer avenues for a debtor to argue against the method of determination of an *ad valorem* tax and request to have such valuation recalculated, likely resulting in reduced tax burdens on the estate. However, it is unclear whether a debtor's pursuit or non-pursuit of such avenues could prevent the debtor from pursuing § 505 relief in bankruptcy court and what procedures under applicable state law constitute a "contest" or "redetermination" that is sufficient to trigger the application of the exception of § 505(a)(2)(C).

For example, Texas law provides an opportunity through which a taxpayer may request that the valuation of either real or personal property be "changed" for *ad valorem* tax purposes. Section 25.25(d) of the Texas Tax Code provides as follows:

At any time prior to the date [that] the taxes become delinquent, a property owner or the chief appraiser may file a motion with the appraisal review board to *change* the appraisal roll to *correct* an error that resulted in an incorrect appraised value for the owner's property.⁹

In simple terms, § 25.25(d) permits a taxpayer to contest valuation of property subject to *ad valorem* taxes, as long as the taxes have not already become delinquent, but such a procedure does not appear to constitute either a "contest" or "determination" under Texas law.¹⁰ Notably, § 25.25(d) characterizes



Patricia B. Tomasco
Jackson Walker LLP
Austin, Texas



Jennifer F. Wertz
Jackson Walker LLP
Austin, Texas

Patty Tomasco is a partner and Jennifer Wertz is an associate with Jackson Walker LLP in Austin, Texas.

1 See Mark 12:13-17 (NIV): "(13) Later they sent some of the Pharisees and Herodians to Jesus to catch him in his words. (14) They came to him and said, 'Teacher, we know that you are a man of integrity. You aren't swayed by others, because you pay no attention to who they are; but you teach the way of God in accordance with the truth. Is it right to pay the imperial tax to Caesar or not? (15) Should we pay or shouldn't we?' But Jesus knew their hypocrisy. 'Why are you trying to trap me?' he asked. 'Bring me a denarius and let me look at it.' (16) They brought the coin, and he asked them, 'Whose image is this? And whose inscription?' 'Caesar's,' they replied. (17) Then Jesus said to them, 'Give back to Caesar what is Caesar's and to God what is God's.' And they were amazed at him." Biblegateway.com, available at www.biblegateway.com/passage/?search=Mark+12:13-17 (last visited Aug. 5, 2014).

2 See 11 U.S.C. § 505(a)(1).

3 *In re Read*, 692 F.3d 1185, 1187 (11th Cir. 2012) (reversing bankruptcy court ruling and concluding that Congress amended § 505(a) to include § 505(a)(2)(C) to create an exception to general time limits for contesting *ad valorem* tax assessments).

4 *In re Cartenera Quebradilla Inc.*, No. 11-07996, 2014 Bankr. LEXIS 1058, at *8 (Bankr. D.P.R. March 17, 2014) (observing that § 505(a)(2)(C) prohibits bankruptcy judge from determining amount or legality of *ad valorem* taxes under certain instances).

5 See § 505(a)(2)(C) (emphasis added).

6 *In re Breakwater Shores Partners LP*, No. 10-61254, 2012 Bankr. LEXIS 1454, at *8 (Bankr. E.D. Tex. April 5, 2012) (observing that although § 505(a)(2)(C) seems clear on its face, courts have struggled with statute's failure to delineate specific point in time that delineates expiration of applicable period).

7 *Id.* (marking that point in time in which "expiration" under § 505(a)(2)(C) occurs could range from commencement of case, filing of § 505 motion, date of § 505 hearing or date of entry of order regarding valuation); *In re Village at Oakwell Farms Ltd.*, 428 B.R. 372, 376-77 (Bankr. W.D. Tex. 2010) (concluding that § 108(a) applies if action commenced under applicable nonbankruptcy law is "new action," but § 108(b) applies if action is only an appeal); *In re Read*, 692 F.3d at 1192 (concluding that specific provisions of § 505 prevail over general provision of § 108 because "[t]he intent of Congress in enacting § 505(a)(2)(C) was to prevent bankruptcy abuse by debtors and ensure that debtors pay the amount they owe as soon as possible").

8 Definitions of the terms "correct" and "determine" suggest a meaningful distinction. *Black's Law Dictionary* defines "correction" or "correct" to mean "generally, the act or an instance of making right what is wrong," and in turn, defines "determine" or "determination" to mean "[a] final decision by a court or administrative agency." *Black's Law Dictionary* 396 & 514 (9th ed. 2009).

9 Texas Tax Code § 25.25(d) (2014) (emphasis added).

10 The alleged error in valuation must be more than one-third higher than the taxpayer's proposed valuation under § 25.25(d).

the taxpayer's request as a request to "change" the appraisal roll, not to "contest" or seek a "determination" with respect to valuation.¹¹ Indeed, under Texas law, even if the time limits for initiating an administrative protest have expired, a taxpayer may still move to correct errors in the appraisal record by filing a correction motion under § 25.25(d).¹²

If the taxpayer and the appraiser do not agree to the correction after the filing of the § 25.25(d) motion, the taxpayer can request a hearing and "determination" by the appraisal review board.¹³ If a debtor attempts to avail itself of the § 25.25(d) procedure and receives an unfavorable result from the applicable state authority, it likewise seems that § 505(a)(2)(C) should not operate to bar the debtor's attempt to request that the bankruptcy court determine valuation if the § 25.25(d) valuation did not or would not constitute either a "contest" or a "determination," notwithstanding whether there is a distinction between taking action to "correct" valuation and "determine" valuation.

Hon. Bill Parker's opinion in *In re Breakwater Shores Partners LP* impliedly bootstraps Texas's § 25.25(d) procedure to allow for "redetermination" of the tax valuation.¹⁴ In this case, the debtor, who was the owner of a residential real estate development, sought a determination under § 505 that its real property had not been properly valued by the Kaufman County Appraisal District (KCAD), resulting in alleged inflated tax liability.¹⁵ The court characterized the debtor's § 505 motion as a "determination motion" and stated that the debtor was invoking § 25.25(d) to correct the purported valuation errors made by KCAD.¹⁶ In turn, Kaufman County¹⁷ argued that the debtor did not meet the pre-condition of invoking § 25.25(d) because the debtor had not paid taxes for 2010 and 2011.¹⁸ The bankruptcy court rejected that argument, reasoning that § 505 permits a determination of the amount of any tax whether or not it had been paid and that payment of pre-petition taxes by the debtor would have violated the priority scheme of the Bankruptcy Code.¹⁹ Despite the absence of KCAD from the proceedings, the bankruptcy court proceeded to determine the value of the property at issue.²⁰

In *DeLafield 246 Corp. v. City of New York (In re DeLafield 246 Corp.)*, the bankruptcy court tackled the issue of what constitutes an adjudication of *ad valorem* taxes within the purview of § 505(a)(2)(A) that could implicate the bar of § 505(a)(2)(C).²¹ A 15-year dispute had ensued between the debtor, a single-asset real estate corporation, and the city of New York concerning taxes.²² The debtor was frequently on the losing end of those battles and faced a war with a homeowner's association that also included tax issues.²³ The debtor filed its bankruptcy petition, accompanied with a complaint to determine the validity and extent of the tax liens, and sought declaratory relief.²⁴ There was no dispute that by the time the issues made their way to Hon. **Allan L. Gropper**, the taxes assessed in 1988 and 1989 had ballooned to approximately \$7.3 million.²⁵

The city of New York argued that a prior decision of the state court had adjudicated all of the tax issues in 2004; the debtor asserted that such did not constitute an adjudication within the meaning of § 505(a).²⁶ Notably, the bankruptcy court examined the issue through the lens of *res judicata*, concluding that the issues it would resolve in its § 505 determination were raised in the prior litigation, precluding it from exercising authority under § 505.²⁷ Whether a court examining state court procedures, such as § 25.25(d) or similar procedures or statutes in other jurisdictions, would apply *res judicata* principles in the vein of *DeLaField* could potentially affect a debtor's success in convincing the bankruptcy court to exercise jurisdiction under § 505(a) for *ad valorem* taxes.

The opinion from *Breakwater Shores Partners*, however, at least suggests that the § 25.25(d) procedure could be viewed as a gateway for determination under § 505 not precluded by § 505(a)(2)(C). The bankruptcy court in *Breakwater Shores Partners* took no apparent issue with the debtor's request that it determine valuation as provided under the Texas procedure, even over the county's objection that the debtor would otherwise be precluded from pursuing such procedure because of nonpayment of past-due tax liabilities.²⁸

Although not discussed in the opinion, § 505(a)(2)(C) only restricts a bankruptcy court from determining *ad valorem* taxes if the period for *contesting* or *redetermining* the amount of *ad valorem* taxes has expired. The § 25.25(d) procedure appears to function similarly to a redetermination, and courts appear to support this proposition. For debtors facing claims by local taxing authorities, and if a reasonable basis to contest valuation exists, § 25.25(d), or similar provisions in other jurisdictions, may provide a pathway to beneficial *ad valorem* tax results that may have initially seemed blocked. **abi**

11 See § 25.25(d). Texas courts reviewing § 25.25(d) issues refer to § 25.25(d) as procedure to correct errors in appraised value of property. See *Harris County Appraisal Dist. v. Tex. Gas Transmission Corp.*, 105 S.W.3d 88, 98 (Tex. App. Houston [1st Dist.] 2003, pet. denied).

12 *JR Wellness Servs. LLC v. Harris County Appraisal Dist.*, No. 01-13-00272-CV, 2014 Tex. App. LEXIS 3362, at *7-8 (Tex. App. Houston [1st Dist.] March 27, 2014, no pet.).

13 Texas Tax Code § 25.25(e) ("If the chief appraiser and the property owner do not agree to the correction before the 15th day after the date the motion is filed, a party bringing a motion ... is entitled on request to a hearing on and a determination by the appraisal review board.").

14 *In re Breakwater Shores Partners LP*, No. 10-61254, 2012 Bankr. LEXIS 1454, *supra*.

15 *Id.* at *6.

16 *Id.* at *4, 17-18.

17 *Id.* The *Breakwater Shores Partners* court noted that despite proper notice, KCAD did not contest the debtor's § 505 motion or appear at the hearing, even though under Texas law, KCAD is the entity authorized to value property for taxation purposes. *Id.* at *1, fn.1 (providing that appraisal district is established in each county and "is responsible for appraising property in the district for *ad valorem* tax purposes of each taxing unit that imposes *ad valorem* taxes on property in district"). Kaufman County, the entity that calculates that amount of tax due based on tax rates and the valuation from the appraisal district, objected to the debtor's motion. *Id.* at *1-2. Notably, § 505(b)(1)(A) sets the method for establishing service on a federal, state or local governmental unit responsible for the collection of taxes within the district.

18 *Id.* at *18-19, fn. 11.

19 *Id.* at *19-20, fn. 11.

20 *Id.*

21 *In re DeLafield 246 Corp.*, 368 B.R. 285 (Bankr. S.D.N.Y. 2007).

22 *Id.* at 287.

23 *Id.* at 288.

24 *Id.*

25 *Id.* at 291, fn.5.

26 *Id.*

27 *Id.* at 293 (observing that "*res judicata* is 'closely related, if not identical' to issues regarding the Bankruptcy Court's authority under Section 505").

28 See *Breakwater Shores Partners LP*, 2012 Bankr. LEXIS 1454, at *19, fn.11.