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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

TAX DIVISION

PRUDENTIAL INSURANCE COMPANY :

Petitioner :

v. : Tax Docket No. 4097-88

DISTRICT OF COLUMBIA :

Respondent

MEMORANDUM OPINION AND ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court upon petitioner's Motion for Summary Judgment, respondent's opposition thereto and petitioner's reply. Upon consideration of same, and the points and authorities in support of the respective positions of the parties and the record herein, the Court concludes that the motion must be granted.

Petitioner is the owner record of real estate in the District of Columbia known as Lot 80 in Square 218 improved by premises 901 15th Street, N.W. Petitioner challenges the value assessed for the office building on its lot for the second half of tax year 1988. Respondent determined that the subject property was erected and roofed as of December 31, 1987 and therefore, subject to tax pursuant to D.C. Code §47-830 (1987 ed.). Petitioner timely appealed to the Board of Equalization and Review which sustained the assessment. Petitioner paid the required taxes and timely

appealed to this Court. The property was assessed as follows:

Improvement	$19,500,000
Land	13,049,736
	$32,549,736

Petitioner contends that the property was not erected and roofed within the meaning of the statute and should not have been taxed. Respondent contends that it was. The case turns upon whether the assessed property was erected and roofed within the meaning of the statute as of December 31, 1987 such that it was subject to the tax.

The facts bearing upon a resolution of this issue are not in dispute. In support of its position, respondent relies upon the testimony of the assessor, Larry Hovermale, and the testimony of Thomas J. Curry, project superintendent for the building during construction. According to the assessor he made an exterior inspection of the building, took photograhs of the exterior, and walked into the lobby area. As a result of this inspection, it appeared to assessor that the property was under roof and sealed. (Hovermale dep. pp. 4 and 5). The assessor concedes that he did not inspect the roof of this twelve story building, a practice which commenced after the assessment of this building. He also concedes that he could not tell from his inspection whether the roof of the property was completely in place. (Hovermale dep. p.9) He testified that a building is considered sealed from the elements for purposes of adding a new structure to the tax

roll when it is considered under roof, which would include the installation of flashing. (Hovermale dep. p. 10) Photograhs which show the condition of the building after December 31, 1987 were viewed by Mr. Hovermale who indicated that if the building was as it appeared, it would not have been under roof in his opinion. Petitioners can offer no evidence that the property was not in the condition shown in the photographs.

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Petitioner's building was assessed for tax purposes for the second half of tax year 1988 under the provisions of D. C. Code §47-830 (1981). It is undisputed that the building was not complete at that time. However, the provision of the Code under which the property was assessed subjects to assessment certain construction work in progress. The statute includes within its terms "all construction in progress after the improvement is erected and roofed but prior to its completion". Id. The plain meaning of the statute is that the structure must have reached the stage of both having been erected and roofed before construction work in progress may be assessed. The legislative history of the law bears this out. In recommending the changes in the law which allowed construction in progress to be assessed, the Committee on Finance and Revenue reported to the Council of the District

of Columbia:

> Under these changes, construction in progress could only be assessed between the time an improvement is erected and under roof, and its completion. This would enable a property's assessment to reflect the increasing value of the construction that is proceeding on the property, without affecting the timing of the initial assessment of such construction.

Report of the Committee on Finance and Revenue on Bill 5-74, (March 17, 1983).

The statute and the legislative history provide no definitions for the terms "erected and roofed" for incomplete structures which would be subject to the tax. Definitions of the words are contained in 9 DCMR 300.5 and 300.6. These regulations were promulgated pursuant to D. C. Code §47-814 and §47-820. 9 DCMR 300.1. The definitions limit their applicability to the regulations. The definitions read as follows:

> 300.5 When used in this chapter, the word "erected" means completely built and finished.
>
> 300.6 When used in this chapter, the word "roofed" and the phrase "under roof" means the stage of completion of a structure where the main roof and the roofs of any structures on the main roof are in place.

These words are not used in the context of construction in progress in the chapter. The section of the regulations titled," Assessments", excludes changes in assessed value under D. C. Code §§47-829 and 47-830 from the terms assess and assessed. Moreover, any definition of "erected" which would require that the structure be <u>completely</u> built and finished would be contrary to the concept of construction

in progress. Thus, the definitions contained in the regulations could not have been intended to apply to buildings which may be subject to tax prior to completion as construction in progress.

The District of Columbia Real Property Assessment Manual, which is used as a guide by the Department of Finance and Revenue in making assessments, states that "roofed" means under roof and sealed from the elements. Sealed from the elements is defined in the manual as follows:

> For the purpose of adding new structures to the tax roll, a building is considered sealed from the elements when the entire building (including roof, windows, etc.) is essentially sealed from the elements. That means that the roof has been laid, flashing installed, windows are in place, etc.

The District of Columbia Real Property Assessment Manual, Chapter XVII B. 1. The ordinary meaning of the word, roof, is the exterior upper covering of a building. Funk & Wagnalls New Standard Dictionary of the English Language (1950 ed.). Respondent cites no law or evidence that the term has a meaning other than its ordinary one or the one used in the assessor's manual. On the contrary, its assessor appears to have relied upon this definition. This case turns upon whether the building was under roof and therefore subject to the tax.

Petitioner's motion is supported by affidavits, exhibits and deposition testimony, including that of the respondent's assessor, which demonstrate that there are no

genuine issues of material fact from which the Court could find for respondent. The District's assessor originally determined that the property should be assessed based upon the conclusion that it was under roof and sealed as of December 31, 1987. The assessor admits that he inspected only the exterior and lobby of the building and that he could not tell from the inspection whether the roof was completely in place. The assessor testified that if the roof was in the condition appearing in the photographs of the property provided by petitioner, it would not have been under roof in his opinion. The affidavit of petitioner's witness attests that the unfinished condition of the roof was accurately reflected in the photographs. At deposition, petitioner's witness testified that waterproofing and brick pavers of the roof were not completed until after December 31, 1987, the last date for a return on structures covered by the statute. D.C. Code §47-830. The pavers were piled up awaiting installation according to the deposition testimony of Mr. Curry and as shown in the photographs. The roof was not sealed from the elements, and the project superintendent reported taking temporary measures to keep out the rain. Since assessments on construction in progress can be made only after the improvement is erected and roofed under D. C. Code §47-830, petitioner would be entitled to judgment as a matter of law under these facts.

Movant having made the requisite prima facie showing for the grant of summary judgment, respondent must provide support for its contentions that a factual dispute exists with a specific statment of disputed facts and the identification of specific evidence in support of same. Thompson v. Seton Investments, 533 A.2d 1255, 1257 (D. C. 1987). Respondent has been unable to identify evidence to support its contention that the building was under roof as of December 31, 1987. Respondent's only witnesses for trial will be its assessor and Tom Curry, the Project Superintendent during construction. Respondent can cite no evidence from either that the building was under roof and sealed from the elements. The affidavit and depositions are to the contrary and support petitioner's position.

This case is not like District of Columbia v. Square 254 Limited Partnership, 516 A.2d 907 (D. C. 1986) upon which petitioner relies. In that case, each side disputed in affidavits whether the structure was a new building or an addition to an old one. 516 A.2d at 908. The disputed versions of the facts were required to be resolved by the trier of fact on this issue which was key to the disposition. Whether the structure involved was a new one or an addition depended upon the interpretation of certain empirical evidence identified in the opposing affidavits. 516 A.2d at 909. In this case there is no support for a claim that roofed has a meaning other than its ordinary one or that contained in the assessor's manual. Moreover, the

assessor appears to have relied upon the manual's definition. Having seen photographs of the roof, he concedes factually that the property was not under roof. No other evidence has been identified which would support a different meaning for the word nor a contrary view of the facts. The motion was heard on the eve of trial, after full discovery and the identification of all witnesses. Thus, no unknown evidence bearing upon this issue is anticipated.

For the foregoing reasons, the Court concludes that there are no genuine issues of material fact in dispute and that petitioner is entitled to judgment as a matter of law. Petitioner's building should not have been assessed for the second half of tax year 1988.

It is therefore by the Court this 31st day of January, 1990,

ORDERED, that petitioner's Motion for Summary Judgment be and hereby is granted. It is further

ORDERED, that the assessment of petitioner's real property shall be reduced for the second half of tax year 1988 consistent with the grant of summary judgment. It is further

ORDERED, that petitioner shall submit to the Court a proposed order providing for a refund of the overpayment resulting from the overassessment together with a provision for any allowable statutory interest and adjustment in the assessment record card required as a result of this memorandum opinion. It is further

ORDERED, that this case is set for a status hearing on the 26th day of February 1990 at 9:30 for the filing of the proposed order or for ascertaining when the order will be filed.

JUDGE
Signed In Chambers

Copies mailed this _____ day of January, 1990, to each of the following:

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