SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

5335 WISCONSIN ASSOCIATES LIMITED PARTNERSHIP	:	
Petitioner	:	
	:	Tax Docket No. 4921-91
v.	:	Judge Cheryl M. Long
DISTRICT OF COLUMBIA	:	
Respondent	:	

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon petitioner's Motion for Summary Judgment and respondent's opposition thereto. The parties appeared before the Court on April 5, 1995 for oral argument. Upon consideration of the entire record, the Court concludes that petitioner's Motion for Summary Judgment must be denied.

In order to view the legal conflicts in the most practical light, it is necessary to set forth the factual background of the case and to summarize the competing conceptual arguments.

I. BACKGROUND

Petitioner, 5335 Wisconsin Associates Limited Partnership, is the owner of the subject improvements located at 5335 Wisconsin Avenue, N.W. in the District of Columbia, identified as Lot 813 in Square 1661 and known as Chevy Chase Pavilion.

Petitioner challenges the value assessed to the property for Tax Year 1991 (July 1, 1990 through June 30, 1991). The improvements on the lot were placed on the tax rolls as of July 1, 1990 pursuant to a supplemental assessment made for the First Half of Tax Year 1991 pursuant to 47 D.C. § 829(a) (1990 Repl.). The improvements were assessed at $63,256,825. The tax imposed on this valuation of the improvement was $1,360,021.73.

Petitioner timely appealed to the Board of Equalization and Review. The Board sustained the assessment. Petitioner paid the required taxes and timely appealed to this Court.

Tax liability in the instant case turns upon whether the assessed property was "erected and roofed" within the meaning of the statute as of July 1, 1990.

Petitioner asserts that the property was not erected and roofed within the meaning of the statute and should not have been taxed at all. Respondent contends otherwise, claiming that there is an issue of material fact that must be subject to trial.

In arguing that it is entitled to judgment as a matter of law, the petitioner argues that its tax liability was premised upon the assessor's reliance upon a certain change that was made to the District of Columbia Real Property Assessment Manual (hereinafter "Manual"). Petitioner argues that a certain deletion from the Manual

occurred without compliance with the formal rulemaking process. In petitioner's view, this mis-step alone is sufficient to shield the petitioner from any tax liability whatsoever for this particular tax period.

II. SUMMARY OF THE ARGUMENTS

A. Petitioners' Position.

1. "Erected and Roofed" Issue

Petitioner contends that the subject improvements were assessed for tax purposes pursuant to Section 829 of the Code. Under that provision, an improvement is to be placed on the tax rolls for assessment and taxation purposes once it is "erected and roofed but prior to its completion." The petitioner takes the position that, on July 1, 1990, the term "erected and roofed" meant under roof and "sealed from the elements."

Petitioner argues that the assessor who was responsible for the supplemental assessment (Phillip Appelbaum) based his determination upon his opinion that the building was "substantially completed" and that the statutory criterion of "erected and roofed" was ignored as the standard for supplemental assessments.

Petitioner alleges that the assessor interpreted a 1988 memorandum issued by the head of the Standards and Review Division as having the effect of changing the law. Petitioner asserts that neither the memorandum nor the

remaining pertinent provisions of the Manual offer any support for the assessor's decision.

2. Rulemaking Issue

Petitioner argues that an official of the Department of Finance and Revenue decided unilaterally to amend the Department's Manual in violation of the District of Columbia Administrative Procedure Act, 1 D.C. § 1501 (1992). This amendment, according to petitioner, caused the assessor to impose tax liability in this case.

In pertinent part, the Act defines a rulemaking or "regulation" as

> the whole or any part of any . . . [agency's] statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.

1 D.C. § 1502(17).

No such rule "shall become effective until after its publication in the District of Columbia Register." See 1 D.C. §§ 1506, 1538(b).

Petitioner asserts that this official effectively deleted the term "erected and roofed" out of the law (to use petitioner's phrase) and substituted a new standard, "substantial completion," for purposes of assessing properties categorized as "construction in progress."

More specifically, the due process violation allegedly occurred on or about January 8, 1988, when the Chief of the Standards and Review Division, Mr. Robert L.

Klugel, issued a memorandum to users of the Manual, stating in toto:

> In order to adhere more closely to the language of the law as written in the D.C. Code and the D.C. Municipal Regulations, we need to introduce a change to the Real Property Assessment Manual.
>
> Please delete, or scratch out, the second paragraph from the top on page XVII-6, which begins: For the purpose of adding new structures to the tax roll . . . etc. This paragraph is part of chapter XVII - Supplemental Assessments. The rest of the chapter should remain unchanged.

See Petitioner's Motion for Summary Judgment Exh. C and D - Applebaum's Deposition transcript at p. 32-33 and Klugel memorandum, respectively.

The paragraph that was thus deleted from the Manual essentially had defined the term "sealed from the elements."[1] This term, in effect, had been regarded as a more precise explanation of what is meant in the statute by the term "erected and roofed."

Petitioner argues that the respondent completely ignored the rulemaking provisions of the Administrative Procedure Act since there was no published notice of a proposed action, no opportunity for comment, and no

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[1] Prior to January 8, 1988, the paragraph provided 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.

publication of the final action itself (i.e. the Klugel memorandum). Ostensibly, the "notice of proposed action" would have been a notice of Klugel's intent to circulate this memorandum suggesting that the staff delete this phrase (and paragraph) from the Manual.

Further, petitioner contends that the assessor admitted to placing the subject property's improvements on the tax rolls on the basis that they were "substantially complete." See Petitioner's Motion for Summary Judgment Exh. C - Applebaum Deposition transcript at 24, 25-26, 28-31. Petitioner argues that the assessor's use of this terminology indicates that he deviated from the statutory standard for determining tax liability.

B. Respondent's Position.

1. "Erected and Roofed" Issue

As a threshold matter, the District argues that summary judgment cannot be granted because there is a triable issue of material fact as to whether the subject property's improvements were an "erected" building despite the deficiencies that were claimed to exist as of July 1, 1990. The District suggests that the property, at an alleged 85 percent completion level, was subject to taxation pursuant to Section 829(a) of the Code.

In describing the level of completion, respondent relies on a report prepared by petitioner's own agents. This report indicated that as of July 1, 1990, both the

roofing and the skylights of the property were "100% complete." Respondent also points to photographs contained in petitioner's report that depict an erected building. Further, petitioner's report presents a bar graph which allegedly represents that the roofing of the property was in place in January 1990 and that the exterior windows were installed by May 1990.

The District contends, therefore, that the subject property was an erected building for Tax Year 1991 and was properly subjected to taxation.

2. Rulemaking Issue

The District responds to petitioner's claim of unlawful rulemaking by denying that the phrase and/or concept of "sealed from the elements" was ever contained in the applicable law and regulation. Consequently, the respondent argues, the deletion of this phrase from the Manual does not in any way alter the pre-existing standards for determining property tax liability for new construction.

According to the Government, the applicable provision of the Manual articulates the same standard **both before and after the deletion** as follows:

> Normal Percentage of Completion When New Buildings Are Considered Under Roof
>
> | Type of Building | Percent Completion (approximate) |
> |---|---|
> | Large Office Bldg./ Hotels and Motels | 40-60% |

Section 829(a) of Title 47 of the Code provides in pertinent part:

> (a) Annually, on or prior to July 1st of each year, the Mayor shall make a list of all real estate which shall have become subject to taxation and which is not then on the tax list, and affix a value thereon, according to the rules prescribed by law for assessing real estate; shall make return of all new structures erected or roofed, and additions to or improvements of old structures, and all construction in progress **after the improvement is erected and roofed but prior to its completion**, specifying the tract or lot of land on which each of such structures has been erected and roofed, is being completed or on which improvements have been made, and the value of such structures or improvements, and shall add such valuation to the annual assessment make on such tract or lot according to its estimated market value, payable in the month of September.

47 D.C. Code § 829(a) (1990 Repl.). The statute itself provides no definitions for the term "erected and roofed".

Title 9 of the District of Columbia Municipal Regulations sets forth definitions for the statutory terms "erected" and "roofed". According to the regulations, the term "erected" means completely built and finished. 9 DCMR 300.5 (1994). The term "roofed" and the phrase "under roof" mean the stage of completion of a structure where the main roof and the roofs of any structures on the main roof are in place. 9 DCMR 300.6 (1994).

In addition to the applicable statute and regulation, the Department of Finance and Revenue for many years has instructed its assessors to consult an internal document

known as the District of Columbia Real Property Assessment Manual (hereinafter "the Manual") when making assessments.

Until January 1988, the Manual provided that "[i]n the case of new construction, the District of Columbia Code provides for a supplemental assessment when the building is considered to be **roofed or 'under roof and sealed from the elements'**."[2] See Exh. B of Petitioner's Motion for Summary Judgment - Manual at XVII-5 (emphasis added).

On or about January 8, 1988, the Chief of the Standards and Review Division, Mr. Robert L. Klugel, issued the memorandum quoted herein above. The Government argues that the purpose of the memorandum was to rectify an internal inconsistency in the Manual and to provide congruity in the statute and the regulations.

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[2] According to the Manual (prior to January 1988), the term 'under roof and sealed from the elements' merely described a condition, or a stage of completion of a new structure. The term did not, in itself, indicate what percentage of the building had been completed. The Manual instructed the assessor to carefully evaluate the degree of completion of the building. See Exh. B of Petitioner's Motion for Summary Judgment - Manual at XVII-5.

For example, a large high rise hotel which is under roof and sealed from the elements may be only 40% complete, while a one-story warehouse may be considered 80% complete when under roof and sealed from the elements. See Exh. B of Petitioner's Motion for Summary Judgment - Manual at XVII-6.

The Manual also instructed assessors that for purposes 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. See Exh. B of Petitioner's Motion for Summary Judgment - Manual at XVII-6.

The District points out that the language in the Manual prior to January 1988 was vague and somewhat inconsistent. On the one hand, the pre-1988 Manual directed assessors to impose a supplemental assessment when a building is roofed or "under roof and sealed from the elements". Manual at XVII-5. On the other hand, the Manual implied that new structures were only to be added to the tax roll when a building was "sealed from the elements". Manual at XVII-6.

Overall, the District contends that the memorandum served only (1) to clarify that assessors may add a property to the tax rolls when it is "erected and roofed" and (2) to ameliorate any confusion between the governing statute and regulations and the errant language in the Manual.[3]

Finally, the Government stresses that regardless of whether the assessor would have ordered the taxation of this property in the absence of the Klugel memorandum, the Superior Court now has jurisdiction to review the assessment **de novo** as to all factual and legal issues relating to the taxation of this property during this

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[3] The Court notes that Section 829(a) of the Code, in pertinent part, mandates the assessment of tax on improvements when "erected and roofed but prior to completion". Correspondingly, Municipal Regulations 300.5 and 300.6 provide specific definitions of the terms "erected" and "roofed". Neither the applicable statute nor the regulations contain any reference to a supplemental assessment standard that relies on a finding that the structure is "sealed from the elements."

period. Even if the Court were to find that the Klugel memorandum constituted a due process violation, the Superior Court still has the obligation to interpret the applicable law to determine whether the tax liability would still be justified.[4]

III. RESOLUTION OF THE MOTION FOR SUMMARY JUDGMENT

Pursuant to Super.Ct.Civ.R. 56(c), this Court has reviewed the pleadings, depositions, and affidavits submitted by the parties.

The trial court's role in considering summary judgment is not to resolve factual issues, but rather, to determine if the record demonstrates that there is **no** genuine issue of material fact from which the factfinder could render judgment for the nonmoving party. Holland v. Hannan, 456 A.2d 807 (D.C. 1983); Nader v. de Toledano, 408 A.2d 31 (D.C. 1979), cert. denied, 444 U.S. 1078, 100 S.Ct. 1028 (1980).

In essence, this Court is firmly convinced that a grant of summary judgment for the petitioner is not supportable for two reasons.

First, petitioner has failed to persuade the Court that the particular memorandum that was circulated by Mr. Klugel was actually a change in the law or that it was the

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[4]On this subject, the District would contend that the phrase "sealed from the elements" cannot be construed as the existing legal standard in any event.

type of policy directive that should have triggered due process requirements of public notice for comment, pursuant to the Administrative Procedure Act.

As a guide to parsing the due process issue, this Court relies in part on the discussion of rulemaking requirements in the appellate opinion of Acheson v. Sheaffer, 520 A.2d 318 (D.C. 1987). There, the District of Columbia Court of Appeals considered the action of the Acting Surveyor of the District of Columbia in interpreting the word "subdivision" as found in the Historic Landmark and Historic District Protection Act.

In Acheson, the issue was whether the Acting Surveyor's undertaking to interpret a word in a statute constituted a "rulemaking" for purposes of invoking the notice and comment requirement of the Administrative Procedure Act.

The Court of Appeals held that the interpretation of the word was not a rulemaking. Id. at 320-21. The panel observed,

> [t]here are no rigid formulas for determining when an official action results in a 'rule' for purposes of the DCAPA. While many of the standards, interpretations, habits, and ideas by which administrative officials make thousands of daily decisions have widespread generalized and future effect, they do not all come within the DCAPA's definition of formal "rules" requiring notice and comment.

Id. at 320.

The Court of Appeals is Acheson elaborated that a court must considered "'whether in the particular proceeding, the [agency] . . . sits in a legislative capacity, making a policy decision directed toward the general public.'" Id. at 321, quoting Citizens Association of Georgetown v. Washington, 291 A.2d 699, 704 (D.C. 1972).

As Acheson recognized, all interpretations of language emanating from a statute or regulation are not "rules." This Court has scrutinized the entire record herein, especially the historical context in which Klugel issued his memorandum. Based upon the totality of circumstances, it is clear to this Court that the memorandum is precisely the sort of admonishment or warning that is designed to do nothing more than eliminate confusion and serious misinformation. It was not a policy statement, as such, that purports to expound on what the law actually is or to expand or contract the existing law. It does not legislate a new or different standard of taxation.

If anything, the memorandum was purely a corrective document that was designed to do no more than warn all users of the Manual not to rely upon language that did not in fact conform to what the law actually provides.[5]

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[5]Petitioner seems to suggest that other language still remained in the Manual that referenced the term "sealed from the elements." If so, this only means that Klugel did not isolate or

By its own terms, the deletion of the key phrase "sealed from the elements" was designed to ensure that the Manual would "adhere more closely to the language of the law as written in the D.C. Code and the D.C. Municipal Regulations. . . ." Truly, neither the Code nor the Municipal Regulations contained any standard that shielded newly constructed buildings from tax liability until they are totally "sealed from the elements."

To the extent that the Manual was found by Klugel to be misleading, the aberrant phrase surely had to be removed. The issuance of his memorandum was well within his authority and discretion as a supervisor of assessors. Klugel was not required to publish a proposal of his memorandum for public comment. The petitioner has not been the victim of a constitutional violation.

There are certain additional, conceptual observations that should be noted on this issue. First, the record herein does not address the issue of how the Manual was originally issued and put into use. The record does not reveal whether the Manual itself was ever published for notice and comment purposes. Thus, if the deleted language itself should have been subject to those due process requirements and if this did not occur, then the deleted passage of the Manual would have had no greater

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capture the full extent of the unfortunate and misleading language that should have been eliminated.

legal vitality than the Klugel memorandum that neutralized it. In this event, the allegation concerning the alleged due process defect in the memorandum would be meaningless.[6]

Second, even if this Court were to conclude that the Klugel memorandum constituted a "rulemaking" and that it should have complied with due process requirements, there is no way to escape the necessity of a trial on the merits. This is because a material issue of disputed fact still exists as to tax liability and a trial de novo is mandated.

As a practical matter, it makes no difference how the Court regards the due process issue if the Court is already obligated to determine the facts according to the existing statutory standard.

On page four of its Statement of Material Facts as to Which There is No Genuine Dispute, the petitioner categorically contends that the improvements to the subject property were "not erected and roofed nor sealed from the elements on July 1, 1990 due to the following deficiencies. . . " [emphasis supplied].

At the very least, there is a clear dispute as to whether the Pavilion was "erected and roofed" according to

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[6]In other words, it was incumbent upon the petitioner to show at the very least that the issuance of the original Manual itself had complied with any due process requirements insofar as the petitioner insists that the content of the Manual is tantamount to "rulemaking."

the statutory standard -- without any regard to the additional matter of whether it was "sealed from the elements." The petitioner contends that the improvements "were not 'erected and roofed,' irrespective of the validity of the Directive." Petitioner's Memorandum of Points and Authorities in Support of Motion for Summary Judgment at page 16.[7] The assessor's deposition alone is sufficient to place this factual assertion in issue. See further discussion, infra.

Further, summary judgment cannot be granted because the appeal of an assessment case mandates a trial de novo and the District has proffered documents that present a material issue of fact, from sources related to the petitioner. For example, the District points to a Monthly Report on the Construction Progress of the Project, obtained through discovery.

The Report was published on July 2, 1990, the day after the valuation date of July 1, 1990. The project's agent reported therein that the roofing was 100% complete and that the skylights were 100% complete. While the Report also mentioned that "some roofing and waterproofing" remained to be done, this document clearly creates a triable issue of fact as to whether the degree

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[7]Petitioner has chosen to refer to Klugel's memorandum as a "Directive." The document is not couched in such terms. It is plainly nothing more than a two-paragraph memorandum addressed to "holders of D.C. Real Property Assessment Manual."

of completion satisfies the statutory standard for tax liability.[8] Clearly, for this reason alone, the case must go to trial.

For yet another reason, summary judgment cannot be granted. This Court cannot conclude that the only basis for imposing tax liability was the assessor's realization that the phrase "sealed from the elements" had been deleted from the Manual. To the contrary, Appelbaum indicated repeatedly in his deposition that he took a decidedly comprehensive approach in reviewing the exact condition of the property in order to determine whether the statutory standard for tax liability had been met. The Court notes the following passage from his deposition as an example of what he had to say:

> Q. So that was the determining factor in your opinion to put it on tax rolls for first half '91?
>
> A. The substantial completion in terms of the amount -- correct, the construction costs as well as my visual inspection of the property.

Deposition Transcript at page 38.[9]

It is also important to note that, for trial purposes, the District will not be confined to testimony

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[8]The District also recognizes the existence of certain photographic evidence suggesting that the building was complete as of the valuation date.

[9]At his deposition, the assessor noted in retrospect that the entire Pavilion complex (including a hotel) was open to the public and in full operation only three months after the date of valuation. Appelbaum Deposition at 39.

solely from the assessor. As a legitimate trial strategy, the Government might choose to rely upon one or more expert witnesses (and fact witnesses) who can attest to the condition of the building and the relationship between those facts and the applicable standard for taxation.

In the end, the real crux of the case is whether the Court can conclude that the statutory standard for tax liability has been met, based upon the preponderance of the trial evidence.

The fact that this case is not in a posture for summary disposition is a conclusion that is also compelled by the analogous case of District of Columbia v. Square 254 Ltd. Partner, 516 A.2d 907 (D.C. 1986). There, a taxpayer appealed an assessment after construction of a hotel. The factual issue was whether the hotel, which was assertedly added to a theater, was an "addition" to the theater and therefore subject only to supplemental annual assessment, or whether it was a "new building", which would be subject to supplemental second-half assessment. Id.

The Court of Appeals reversed the trial court's grant of summary judgment in favor of the taxpayer and held that the lower court erroneously concluded as a matter of law that the assessed property was not a "new building" but an "addition." The trial court was criticized and reversed because it granted summary judgment with an inadequate

showing of the absence of a genuine issue of material fact. Id. at 909.

The Court of Appeals in Square 254 Ltd. Partner. specifically stated that the trial court's responsibility was to review the proceeding **de novo**. The lower court was required to hear and determine "all questions" arising on the appeal and "make separate findings of fact and conclusions of law." 47 D.C. § 3303 (1981).

The Court of Appeals also observed that "the absence of an applicable conclusive regulatory definition leaves open the factual question." Square 254 Ltd. Partner., supra, 516 A.2d at 909. Further, the Court specifically ruled that "it is not conclusive on the question that for other purposes an administrator has chosen one characterization over another." Id.

In District of Columbia v. New York Life Insurance Co., 650 A.2d 671 (D.C. 1994), the Court of Appeals addressed the role of the Superior Court in deciding tax appeals. The Court stated, "Tax Division proceedings are entirely de novo. The Court's task is not to conduct a review of agency action. Id. at 672.

The trial court must make an independent valuation of the property on the basis of the evidence presented at trial. Id. In support of this proposition, the Court of Appeals relied on Rock Creek Plaza-Woodner Ltd. v.

District of Columbia, 466 A.2d 857, 859 n.1 (D.C. 1983), which held that

> [w]hen a taxpayer appeals to the Superior Court, the case is subject to de novo evaluation. D.C. Code 47-3303 . . . . [O]nce the trial court has acquired jurisdiction over a particular valuation, ... the whole case, both facts and law, is open for consideration.

Id. (citations omitted); see also Wolf v. District of Columbia, 611 A.2d 44, 47 (D.C. 1992)(Wolf II); Washington Post Co. v. District of Columbia, 596 A.2d 517, 521 n.2 (D.C. 1991). There are several reasons for requiring the trial court to make its valuation on the basis of record evidence rather than merely reviewing the Board of Equalization and Review's decision. Such reasons are summarized in detail in New York Life and need not be repeated here.

The Court of Appeals has reiterated that both petitioner and the District are entitled to their day in court.[10] The record as a whole demonstrates that this case must proceed to trial.

WHEREFORE, it is by the Court this 24th day of August, 1995

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[10] Once a case has come before the Superior Court, the District is even entitled to attempt to establish that the value of the property is in excess of the original assessment. Id. at 673. See Super. Ct. Tax R. 11(d); Wolf v. District of Columbia, 597 A.2d 1303, 1312 (D.C. 1991) (Wolf I).

ORDERED that petitioner's Motion for Summary Judgment with regard to tax year 1991 is denied; and it is

FURTHER ORDERED that parties shall appear before the Court on **October 16, 1995 at 9:30 a.m.** for a status hearing at which time the Court will set a discovery schedule and pretrial date before the judge who would be assigned to try this case in the normal course of business.

Cheryl M. Long
Judge

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