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**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION**

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SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION**

KENNETH H. MICHAEL)	
)	
Petitioner,)	Tax Docket No. 5490-93
)	Judge Wendell P. Gardner, Jr.
)	
v.)	
)	
DISTRICT OF COLUMBIA)	
)	
Respondent)	

MEMORANDUM OPINION & ORDER

Facts

Petitioner Kenneth Michael was the Vice President of Union Store Contractors, Inc. ("Corporation") incorporated in the District of Columbia. The Corporation failed to pay to the District franchise taxes for 1982 and 1983 and withholding taxes for 12 separate months from July 1981 to April 1984. These taxes remain unpaid.

On June 15, 1984, the District of Columbia issued a Certificate of Delinquent Tax against the Corporation and against all of its officers individually, including the Petitioner,

pursuant to D.C. Code §§47-1812.9 and 1812.15 (Repl. 1990)¹.

This certificate asserted the Government's claim to a lien for the Corporation's unpaid taxes against property belonging to the Corporation and each of its officers, including the Petitioner.

In 1992, Petitioner attempted to sell property encumbered by the lien. As a result, the title company held in escrow between \$30,000 and \$35,000 in March 1992. This amount is still being withheld from the sale of Petitioner's property. The facts that the franchise and withholding taxes are the subjects of the lien and remained outstanding prior to the filing of Petitioner's lawsuit are undisputed.

Petitioner brought suit against the District of Columbia in the Civil Division of this Court in February 1993 alleging that the lien was wrongfully imposed under §§47-1812.9 and 1812.15 (Repl. 1990). Petitioner contended that he was an officer of the Corporation "in name only" and therefore not subject to the imposition of a lien. On August 9, 1993, Judge Robert Richter ordered the case certified to the Tax Division of the Superior Court. On August 27, 1993, the Petitioner filed a Motion for

¹The provisions of D.C. Code §§47-1812.9 and 1812.15 (Repl. 1990) are identical to the same code provisions in 1984.

Summary Judgement. On March 31, 1994, Respondent filed an opposition thereto.

In February 1994, Respondent filed a motion to dismiss for lack of subject matter jurisdiction. The Petitioner filed an opposition thereto on March 30, 1994. This Court held a hearing on these motions on June 6, 1994.

The Government's motion to dismiss presents a threshold jurisdictional question for the Court and is properly addressed first.

The Government challenges this Court's jurisdiction in the instant case on the basis that the Petitioner has failed to pay the disputed tax in compliance with the prerequisite statutory provisions which provide:

Any person aggrieved by any assessment by the District ... may within 6 months after the date of such assessment appeal from the assessment to the Superior Court of the District of Columbia: Provided, that such person shall first pay such tax together with penalties and interest due thereon to the D.C. Treasurer. D.C. Code §47--3303 (Supp. 1995).

The Code defines "Person" as "an officer or employee of a corporation, financial institution, or a member or employee of a partnership, who as such officer, employee, or member is under duty to perform the act in respect to which the violation occurs." D.C. Code §47-1812.15 (Repl. 1990).

Petitioner contends that: 1) the lien was wrongfully imposed on him as he does not come within D.C. Code §47-1812.15 definition of "person."; the "pay-and-sue" requirement of D.C. Code §47-3303 (Supp. 1995) is inapplicable here as he is not challenging an assessment but rather the imposition of a lien against him individually; and, the "pay-and-sue" provision is inapplicable with respect to withholding and franchise taxes.

The issues before the Court are: 1) whether Petitioner is a corporate officer responsible for the payment of franchise and withholding taxes as defined by D.C. Code §47-1812.15; 2) whether a challenge to a tax lien is separable from a challenge to the assessment that is the subject of the lien; and, if so, 3) is such a challenge subject to the D.C. Code § 47-3303 (Repl. 1990) that mandates payment of an assessment prior to the filing of a suit contesting that assessment.

Analysis

In the case at bar, Petitioner contends that D.C. Code § 47-3303 (Repl. 1990) is inapplicable because he is challenging the lien and not the underlying assessment. This Court finds, based on the statutory language and the relevant case law, that the lien in question is not separable from the underlying assessment. Consequently, Petitioner's challenge is subject to D.C. Code § 47-3303 requiring that the assessment be paid prior to the initiation of a suit and that such a challenge must be brought within six months of the date of the assessment in question. D.C. Code § 47-3303 (Supp. 1995); See Taylor v. Rigby, 574 S.W.2d 833, 839 (Tex.Civ.App. 1978) (maintaining a debt secured by a lien is an incident of and inseparable from the debt). In addition to the statutory language of the pay and sue requirement, the Court relies upon D.C. Code § 47-3307, which bars suits restraining the collection of taxes.

Petitioner contends that there is no statutory basis for the imposition of the lien. He further argues that the provision does not apply to his suit because the lien imposed on him is

based on the false presumption that he is a responsible corporate officer with respect to the unpaid franchise and withholding taxes. Petitioner argues that he was an officer "in name only." See Mem. in Support of Pl's Mot. for Summ. J. at 2. Petitioner further contends that holding him to the jurisdictional prerequisite would be an unconstitutional bar to his meaningful access to the courts. This Court looks to D.C. Code § 47-1812.9 (Repl. 1990) and finds that there is a statutory basis for the lien on Petitioner's property and that the lien arises as an automatic function of the unpaid taxes. As a consequence, the challenge to the lien is not distinct from a challenge to the assessment which underlies it. Therefore, this Court finds that the statutory prerequisite for the Superior Court's jurisdiction in this case has not been met as the franchise and withholding taxes have not been paid.

I. MOTION TO DISMISS FOR LACK OF JURISDICTION

A. Statutory Basis for the Lien

Petitioner contends that the lien imposed on him is improper with respect to both the withholding and franchise taxes that

remain outstanding. The Court will address Petitioner's arguments in turn.

1) Withholding Taxes

The D.C. Code addresses the issue of an employer's failure to withhold taxes from an employee under § 47-1812.8(f) (Repl. 1990). This provision provides that employers are personally liable for taxes that are not withheld or for taxes that are withheld but are not turned over. "The District of Columbia shall have a lien upon all property of any employer who fails to withhold or pay over to the Mayor sums required to be withheld under this section." D.C. Code § 47-1812.8(f)(2) (Repl. 1990). The provision further provides that the lien shall accrue "on the date the amounts were required to be withheld." *Id.* It is undisputed that the Corporation failed to pay withholding taxes for periods from 1981 through 1984. See Pl.'s Mot. for Summ. J. at 1. By a clear reading of the Code language, failure to pay withholding taxes automatically gives rise to a lien on the employer's property.

2) Franchise Taxes

D.C. Code § 47-1812.9 (Repl. 1990) provides for the imposition of an automatic lien upon failure to pay franchise taxes for all unpaid taxes. "Every tax imposed by this chapter shall constitute a lien from the time it is due. Unsatisfied claims become a personal debt of those liable." D.C. Code § 47-1812.9 (Repl. 1990). Thus, unpaid franchise taxes imposed under this chapter also become a lien on employers' property by operation of law.

Both the unpaid and/or withheld franchise and withholding taxes automatically become liens. Therefore, there is a clear statutory basis for the lien in question.

3) Liability

The crux of Petitioner's argument, namely that the lien imposed on his property is improper, is premised upon the contention that he is not personally liable for either the withholding or franchise deficiencies. Petitioner argues that

because he was an officer in "name only" he did not have the requisite duty to pay the aforementioned taxes.

The District imposed the lien pursuant to D.C. Code § 47-1812.9 (Repl. 1990). However, the provision that gives this effect with respect to the Petitioner is D.C. Code §47-1812.15 (Repl. 1990) which defines "person" and therefore those who are liable under D.C. Code § 47-1812.9 (Repl 1990). As noted previously, "person" for the purposes of this provision include those "under duty to perform the acts with respect to which the violation occurs." D.C. Code § 47-1812.15 (Repl. 1990). Petitioner contends he had no such duty.

As there is no case law interpreting D.C. Code § 47-1812.15, (Repl. 1990), the Court may look to the Federal court's interpretation of 26 U.S.C.A. § 6671(b) (1986 & Supp. 1996), which mirrors the D.C. Code provision at issue. See United States v. Graham, 309 F.2d 210, 212 (9th Cir. 1962), and Lawrence v. United States, 299 F.Supp. 187, 190 (N.D.Tex. 1969). Thus, when the provisions of a federal statute are substantially adopted by the council of the District of Columbia, it is presumed that the council intends to adopt the known and settled

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judicial interpretations of that statute as well. McReady v. Dept. of Consumer and Reg. Affairs, 618 A.2d 609, 615 (D.C. 1992).

The Petitioner has the burden of proving that he is not a "person" as covered by § 47-1812.15. Lawrence at 191. After an examination of the evidence presented to this Court, Petitioner has not proven that the duty to pay franchise and withholding taxes have in fact been delegated in advance of the period for which the taxes are owed. Therefore, by virtue of the corporate records stating that Petitioner is an officer of the Corporation, Petitioner is required to meet the jurisdictional prerequisite outlined in D.C. Code § 47-3303.

B. Lien is Not Separable from Assessment

As noted above, the lien on Petitioner's property arises automatically pursuant to D.C. Code §§ 47-1812.8(f)(2), 1812.9 (Repl. 1990). This jurisdiction has held that taxes are liens when made so by statute. D.C. v. Hechinger Properties, 197 A.2d 157, 160 (D.C. 1964).

Petitioner relies on Osborne v. Comptroller, 508 A.2d 538 (Md. 1986) as support for his proposition that an assessment and a lien are separable. In that case the Court defined the assessment as "merely the Comptroller's ascertainment of what is due ... and while it is prerequisite to recovery of the tax it is not itself directed at recovery." Id. at 543. Petitioner's reliance on this distinction is misplaced. At issue in Osborne was a taxpayer's appeal of a decision by the Comptroller imposing liability for retail sales tax. The Court in Osborne only addressed whether an assessment constitutes an "action" for purposes of the statute of limitations of the Retail Sales Act. Id. at 543. The Court did not address itself to the question of whether an assessment is separable from a lien.

The weight of authority indicates that liens which arise by operation of law are inseparable from the debt giving rise to it. See Goldberg v. R.J. Long Constr. Co., 54 F.3d 243, 246 (5th Cir. 1995, and Univ. Sav. & Loan Ass'n v. Sec. Lumber, 423 S.W.2d 287, 292 (Tex. 1967). In Pippola v. Chico, 169 F. Supp. 229, 231-232 (S.D.N.Y. 1959) the Court held that assessments are judgments for taxes due and such are given force of judgment and

a lien is the means utilized to protect the Government's position as creditor to enforce collection of taxes.

C) §47-3303's Pay First Then Sue Requirement Applies to Withholding and Franchise Taxes

The lien against Petitioner's property found to be automatic and inseparable from the assessment which is its subject, we now turn to Petitioner's contention that the pay and sue provision does not apply to the withholding and franchise taxes. This Court finds that the provision's requirement does in fact apply to both withholding and franchise taxes.

With regard to the District's efforts to collect unpaid withholding taxes, Petitioner argues that withholding taxes are not among the taxes enumerated in D.C. Code § 47-3303 (Supp. 1995) and therefore the section's pay and sue requirement is inapplicable.

The District of Columbia Court of Appeals held in Malakoff v. Washington, 434 A.2d 432, 436 (D.C. 1981) that Title 47 of D.C. Code makes the methods available for the collection of personal property taxes available for the enforcement of all

other taxes except real property taxes. While the issue in Malakoff centered on lien priority, in footnote 9 of the opinion the Court noted:

We think it strains language to regard withholding tax as a distinct tax "imposed" on the employer by virtue of §1586's requirement that employers deduct income tax from their employee's wages and pay the same over to the District. Malakoff at 438.

The pay and sue requirement of D.C. Code § 47-3303 (Supp. 1995) also applies to the District's efforts to collect unpaid franchise taxes as franchise taxes are specifically included in the enumerated taxes covered by § 47-3303. Petitioner argues that, while franchise is among the provision's enumerated taxes, the section is inapplicable in this case because "the Petitioner has never been assessed franchise taxes" and only learned of the lien when he attempted to sell the encumbered property. Pet'r Opp'n to Resp't Mot. to Dismiss for Lack of Juris. at 12. However, it is undisputed that the District mailed a certificate of delinquent tax to the Corporation and the officers, including Petitioner by name, on June 15, 1984.² See Pet'r Ex. D. Under

² The notice requirement in 1984, as provided in D.C. Code §47-2403 (1982), states that the mailing to the taxpayer of a statement of

D.C. Code § 47-3303 (Supp. 1995), "[t]he mailing to the taxpayer of a statement of taxes due shall be considered notice of assessment with respect to the taxes." D.C. Code § 47-3303 (Supp. 1995). The District's mailing of the Certificate satisfies the notice requirement.

D. The Court Has No Jurisdiction Absent Payment

Having established that the lien imposed does indeed have a statutory basis and that it is inseparable from the underlying assessment which is its subject, we reach the question before the Court. Does Petitioner's claim that he does not fall within the statute's definition of "person" exempt his suit from the pay and sue jurisdictional requirement? Based upon D.C. Code §47-1812.15 (Repl. 1990) and relevant case law, this Court finds that Petitioner's claim is subject to the pay and sue jurisdictional requirement of D.C. Code § 47-3303 (Supp. 1995). Further, the

taxes due shall be considered notice of the assessment with respect to the taxes.

Petitioner's suit is barred by the Anti-Injunction Act, which prohibits any suits which restrain the collection of taxes.

1) Petitioner's Suit is Barred by Anti-Injunction Statute

Under D.C. Code § 47-3307, Petitioner's suit is barred as it would have the effect of restraining the collection of taxes in contravention of the statute. In Barry v. American Tel. & Tel. Co., 563 A.2d 1069 (D.C. 1989), the District of Columbia Court of Appeals held "the generally recognized purpose of an anti-injunction statute is to prevent disruptions in the flow of tax dollars to the state treasury for government operations and the provision of essential public services." Id. at 1073.

Federal courts interpreting 26 U.S.C.A. § 7421 (1986 & Supp. 1996), which is the federal equivalent of D.C.'s Anti-Injunction statute, have also found that the statute's purpose is to protect the government's need to assess and collect taxes as expeditiously as possible with minimum preenforcement judicial interference. Thus disruptions in the flow of government revenue is prevented. See Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 7 (1962), and Allen v. Regents, 304 U.S. 439, 456 (1938)

(holding "[t]he prompt collection of revenue is essential to good government...Any departure from the principle 'pay first and litigate later' threatens an essential safeguard to the orderly functioning of government"). A taxpayer can not test the merits of an assessment through a suit to quiet title. Batts v. U.S., 228 F. Supp. 272 (E.D.N.C. 1964). To permit this action would hamper collection of taxes. Id. at 274. Moreover, unless it appears that under no circumstances could the government prevail, the collection can not be restrained. Leves v. Internal Revenue Serv. Comm'r., 796 F.2d 1433, 1434 (11th Cir. 1986).

Therefore, the goal of facilitating the collection of taxes which underlies the pay and sue provision and the prohibition on suits that restrain the collection of taxes weigh in favor of bringing Petitioner's challenge within the pay and sue provision.

2) *Pay and Sue Applies to Questions of Liability*

The pay and sue jurisdictional requirement is applicable in the instant case despite Petitioner's argument that he is not personally liable for the deficiencies.

As the District of Columbia Court of Appeals unambiguously stated in D.C. v. Hechinger Properties, 197 A.2d 161, the policy behind the tax laws is to ensure the collection of all taxes. Whenever possible, therefore, courts will construe statutes with this goal in mind.

While District case law interpreting the pay and sue provision is sparse, that provision mirrors the related Federal provisions and we again look to Federal case law on this issue.

As stated above, this Court must be guided by the established principle that laws for the collection of taxes must be construed strictly in favor of the government. "It is...an important principle of law that the legal machinery set up by the Legislature for the collection of taxes due the state is favored by the Courts as in aid of the most important governmental function, that of raising revenue necessary to maintain and carry on the government." Colby v. Himes, 17 P.2d 606, 608 (Wash. 1932). This Court must give effect to the longstanding policy articulated by the Supreme Court in Bull v. U.S., 295 U.S. 247 (1935) "[t]he usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and

the burden of proof, normally on the claimant, is shifted to the taxpayer." Id. at 260.

Indeed, in this jurisdiction, the Court has held that the pay and sue requirement must be met even when the challenge is to an assessment alleged to be void and not merely excessive. George Hyman Constr. Co. v. Dist. of Columbia, 315 A.2d 175 (D.C. 1974). In the instant case, Petitioner argues that the lien is void because he is not an officer within the statutory definition responsible for paying the taxes. Hyman reveals that challenges to the validity of assessments do not escape the pay and sue requirement.

3) **Requirement Is Jurisdictional**

This Court has long followed the established rule that judicial review of a disputed tax assessment is improper until the disputed tax, penalties and interest are paid. First Interstate Credit Alliance, Inc. v. Dist. of Columbia, 604 A.2d 10, 11 (D.C. 1992); Perry v. D.C., 314 A.2d 766, 767 (D.C.1974), cert. denied 419 U.S. 836 (1974). See also George Hyman Constr.

Co. v. Dist. of Columbia, 315 A.2d at 175; Wagshal v. Dist. of Columbia, 430 A.2d 524, 527 (D.C. 1981).

4) Application of §47-3303 Meets Constitutional Muster

Finally, Petitioner contends that the application of the pay and sue requirement to his challenge is violative of his due process rights by barring meaningful access to the courts, and therefore is unconstitutional. This Court finds that the pay and sue provision has withstood repeated due process challenges at both the local and Federal level and does so again here.

The application of the pay and sue provision to this case does not pose due process concerns nor does it bar Petitioner's access to the Courts. In Cohn v. United States, 399 F. Supp 168, 171 (E.D.N.Y. 1975), the court held that the procedure for contesting liabilities for failure to pay withholding taxes is not violative of due process.

Petitioner cites Lee v. Habib, 424 F.2d 891 (D.C. Cir. 1970) to support his contention that the pay and sue provision prevents meaningful access to the Courts. Petitioner's reliance on this

case is unpersuasive because the Court in that case did not address the question of the pay and sue provision. Rather, in Lee the Court addressed the right of indigent defendants to a free transcript, holding that denial of such impeded meaningful access to the courts.

Petitioner also suggests that Respondent's reliance on D.C. v. Berenter, 466 F.2d 367 (D.C. Cir. 1972) is misplaced as that case dealt with an assessment of real estate taxes. Petitioner once again attempts to make the distinction between a challenge to an assessment and a challenge to lien. This issue is disposed of above. The Court also notes that in Perry v. D.C., 314 A.2d 766 (D.C. 1974), cert. denied 419 U.S. 836 (1974) the D.C. Court of Appeals cites with approval the Berenter court's incorporation of the "pay first then sue" jurisdictional requirement in §47-3303 as it relates to real estate taxes.

5) **Statute of Limitations Has Expired.**

The Court is aware that even if the Petitioner were to satisfy the jurisdictional requirement, the applicable time

period for the appeal procedures has long since expired. The Court is also mindful, however, that Petitioner may bring himself within the recognized exceptions to the pay and sue requirement by demonstrating that the government could not possibly prevail and that irreparable harm would result from barring suit. Barry v. Am. Tel & Tel Co. 563 A.2d at 1076. Petitioner, however, has not addressed these issues. Thus as has been stated previously, "[A]lthough the [pay and sue] provision appears to be harsh we do not see how we can avoid giving it effect." D.C. v. McFall, 188 F.2d 991, 993 (D.C. Cir. 1951).

II. MOTION FOR SUMMARY JUDGMENT

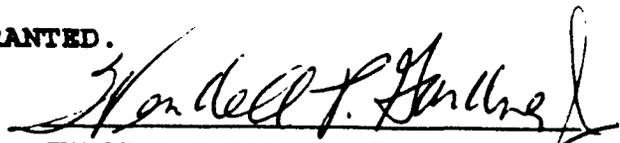
Based on the Court's disposition of Respondent's Motion to Dismiss it is not here necessary to address the Petitioner's Motion for Summary Judgment.

Conclusion

Based on the statutory language and the relevant case law, it is clear that this Court lacks jurisdiction over this matter.

Therefore, it is on this 30th day of December, 1997,

ORDERED that the Respondent's Motion to Dismiss for lack of Subject Matter Jurisdiction is **GRANTED**.


JUDGE WENDELL P. GARDNER, JR.
Signed in Chambers

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