SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

ULYSSES G. AUGER, et al.

Petitioners

v.

DISTRICT OF COLUMBIA,

Respondent

Tax Docket Nos. 6246-94
6247-94
6248-94
6249-94
6250-94
6251-94
6256-94

MEMORANDUM OPINION AND ORDER

These assessment appeals have been consolidated for the purpose of a uniform adjudication of a legal issue that is common to all of the above actions.

In each of these cases, the District of Columbia has filed a Motion to Dismiss, contending that the petitioners failed to exhaust administrative remedies prior to filing their respective Superior Court assessment appeals. The original complaints that were filed with the Board of Real Property Assessment Appeals (formerly known as the Board of Equalization and Review) were admittedly not complete and not in compliance with regulations that require the inclusion of certain financial data with the incoming Board appeal. The appeals were dismissed by the Board because of incompleteness.

The unique issue for the Court to decide is whether the

taxpayers were required to do anything further, in the wake of the dismissals, in order to perfect their right to appeal to the Superior Court. The taxpayers essentially contend that the Board dismissed their administrative appeals in contravention of the Board's own relevant regulation, such that the taxpayers had no remaining avenue of relief before the Board and no way to cure the absence of those missing attachments.

I. UNDISPUTED JURISDICTIONAL FACTS

It is not necessary or appropriate for this Court to delve into the underlying merits of the tax appeals themselves, because the only facts that are relevant are those that pertain to procedural events.

The following jurisdictional facts are not disputed in these cases. The taxpayers are owners of commercial real property (hotel or apartment properties) in the District of Columbia. Each particular taxpayer filed an administrative appeal from their assessment before the Board. The Board convened a hearing at which the petitioners were represented, as was the District of Columbia Department of Finance and Revenue.

All of the Board hearings in these consolidated cases were scheduled for the same date (May 27, 1993), at the same time before a single hearing panel (Panel 3). Each taxpayer herein was represented by Peter J. McLaughlin. He was the person who prepared and filed each of these appeals.

The decisions of the Board were announced orally at the

hearing and memorialized in a written order, copies of which are filed in the respective records of each Superior Court action. The exact reason for the dismissal was identical in each case. No transcript of the hearing was prepared, although a copy of the audio tape has been filed in this court. The Court has listened to this tape.

The operative details of what occurred at the hearing are set forth in writing in an affidavit that was executed by McLaughlin, filed in each case.[1] The District has not sought to contradict the substance of the affidavit.

According to McLaughlin, the following matters transpired at the hearing:

> Attached to the Appeal was a **synopsis** of the income and expense form information.
>
> The Board accepted the Appeal and scheduled a hearing on the matter before Panel 3 at 9:00 A.M. on May 27, 1993 (the "Hearing").
>
> The Board convened and at the Hearing, the assessor's office objected to the Appeal stating that the **information required by Board regulations was not attached to the Appeal upon filing of the Appeal** and requested the Board to dismiss the Appeal.
>
> The Board adjourned to another room to discuss the request made by the assessor.
>
> The Board returned to the Hearing and dismissed the Appeal for failure to submit information required by 9 DCMR 2009.4, 2009.5 and 2009.6 . . . .
>
> Prior to the Board's dismissal of this matter, I advised the Board that I had brought with me

---

[1]The affidavits filed in each of these cases are virtually identical, except for case identification.

> all of the information required pursuant to 9 DCMR 2009.4-2009.6, however the Board appeared uninterested in reviewing the merits of the case.
>
> The Board's notice of dismissal for incompleteness was final and did not provide a time period during which I, on behalf of the Petitioner, may submit the necessary information to the Board or explain why the information cannot be submitted. All of the information was immediately available, and notwithstanding the Board's failure to provide a time period as required by 9 DCMR 2009.9, I offered all of the necessary information at that time.
>
> The Board did not accept the information nor allow me to amend the Petition and summarily dismissed the case.
>
> Having obtained no relief from the excessive assessment from the Board, I requested the law firm of Grossberg, Yochelson, Fox & Beyda to file this lawsuit.

Affidavit of McLaughlin, at paragraphs 6 through 9 and 11 through 14 [emphasis supplied].

The written Board decision in each case states only the following: "The Board dismissed the appeal on the basis that the petitioner failed to submit the information within the appeal as required by DCMR 2009.4, 2009.5 2009.6." The decisions are all dated May 27, 1993.

The above-cited regulations refer to the following types of financial data that must be submitted with each petition before the Board. DCMR 2009.4 provides that "a schedule of income and expenses for each of the two (2) most recent full calendar years shall be submitted with the petition."

DCMR 2009.5 provides that the taxpayer shall submit with the

petition a certified copy of "the rent roll as of December 31st of the preceding calendar year" for hotel properties.

DCMR 2009.6 provides that in the case of a hotel, "a copy of a month-by-month operating statement for the immediately preceding calendar year certified by the hotel manager or owner as being true and correct . . . shall be submitted with the petition."

II. REVIEW OF THE AUDIO TAPE OF THE HEARING

This Court has listened to the audio tape of the Board hearing. It is lodged in the file jacket of Tax No. 6246-94. That tape does reflect certain details that further elucidate some of the matters that are set forth in McLaughlin's affidavit.

First, insofar as McLaughlin states that the Board was "uninterested in reviewing the merits of the case," this was not indicative of any peevish refusal to give the Petitioners a fair hearing. Rather, the tape reveals that the Government's representative (Paul Appelbaum, of the Department of Finance and Revenue) specifically moved that the Petitions be dismissed purely on the ground of being incomplete. After another Government participant (whose name was not clear on the tape) began to address the reasons why the "synopsis" was not credible information, Appelbaum interjected and asked that the Panel not confuse his objection with merits issues. The underlying merits were, of course, not relevant to the incompleteness problem. The chairperson of the Panel agreed that it was not appropriate to delve into the merits.

Second, to the extent that McLaughlin says that he "offered all of the necessary information at that time," the District objected to this attempt to submit this material in an untimely fashion. Appelbaum argued that the whole reason for requiring the financial data to be originally submitted along with the Petition itself was to give the Department of Finance and Revenue a fair opportunity to analyze the case prior to the hearing and to be prepared to address the internal merit of the information.[2]

Third, the tape reveals that the Board's announcement of its decision was strictly based upon the non-compliance with the regulations regarding required financial data. The chairperson observed that the Panel had "no choice" but to dismiss the cases. There was no hint of hostility towards the petitioners. Rather, the Panel merely determined that it was duty-bound to dismiss the cases.[3] Once the chairperson of the Panel learned that all of the petitions in these cases were defective for the same reason, they were dismissed as a group.[4]

---

[2]This is not insignificant because the Board is required to render decisions on the merits of each appeal by a specific date in June of each year. See DCMR 2021.7-9.

[3]The chairperson did remark, however, that this hearing was not the first time that McLaughlin had presented an appeal and that he was "well acquainted" with the Board's "rules and regulations." He did not dispute this characterization, although he vaguely referred to some type of "oversight." It is not clear from the audio tape (due to its quality) whether McLaughlin had asserted that the omission of the required data was purely an innocent oversight -- or whether such omission turned out to have been a tactical choice gone awry.

[4]Apparently, the Panel was in the process of hearing this group of cases one by one, and was alerted to the filing defect when the first case was called on the calendar.

III. THE BOARD DISMISSAL RULE

Where dismissal procedures are concerned, the Board's regulations provide:

> The Board may, in its discretion, dismiss any petition which it deems incomplete or which has otherwise failed to comply with the rules; Provided, that the Board shall notify the petitioner(s) in what respect the petition is incomplete **and** shall allow the petitioner(s) to submit the necessary information **within a prescribed time period**.

DCMR 9.2009.9. [emphasis supplied].

It is undisputed that none of the orders of dismissal contained any reference whatsoever to a time deadline for submitting any supplementation of the petition. On the other hand, no language in the dismissal orders precluded the right to cure the incompleteness. The subject of re-submitting a revised and complete petition was simply not addressed at all.

IV. THE DISTRICT'S MOTION TO DISMISS

The District of Columbia contends that the Superior Court lacks subject matter jurisdiction over all of these cases because the Board petitions that were submitted by McLaughlin did not comply with threshold filing regulations regarding informational attachments. The Government argues that the incoming Board complaints were defective in several respects and that in each case

> [p]etitioner submitted only the pre-printed BER appeal form, and an end-of-year statement of operating results []. These documents do not satisfy the requirements of the applicable regulations cited above, and the Board correctly dismissed the appeal, and did not issue a decision.

Memorandum of Points and Authorities in Support of Respondent's Motion to Dismiss in Augur v. District of Columbia, Tax Docket No. 6246-94, at page two.[5]

The District emphasizes that the Petitioners "failed to comply with the BER regulations applicable to hotels, which led to [each] appeal not being heard by the BER." Id.

The District observes that the "regulations here are not new. They have been in effect since at least 1986. Furthermore, the BER form itself contains a section titled "Instructions For Filing An Appeal" which not only references DCMR Title 9, chapter 20, but gives a specific enumeration of documents to be included by hotels." Id.

Finally, the District stresses the practical side of Board Appeals and the reason for requiring that complaints include all necessary financial information. The District states:

> The point of requiring Petitioners to file this information with their appeals is to give the BER panel members sufficient information to make an intelligent, educated analysis of the estimated market value of the property, rather than to attempt to determine value in a vacuum. It is not merely to construct a procedural trap for the unwary. The BER panel members hear hundreds if not thousands of tax appeals in a roughly three-month period. Requiring specific information from taxpayers is an efficient way to allow the BER to give effective administrative review. This goal is not served by allowing Petitioner[s] to go through the motions of filing an appeal and allowing empty form[s] to prevail over substance." Id. at 3.

---

[5]The District has made this same observation in all of the pending motions.

The upshot of the District's contention is that no petitioner ever perfected its Board appeal at the very outset of that process and that each petitioner should have done so before proceeding to file their Superior Court petitions.

V. APPLICABLE LAW ON EXHAUSTION OF ADMINISTRATIVE REMEDIES

No party herein questions the fundamental requirement of exhaustion of administrative remedies in order to secure the right to appeal a tax assessment. This is a bedrock concept. Case law provides,

> Under the statutory procedure applicable to this case, the recovery of refunds through appeal to the Superior Court requires, as a first step, a complaint to the Board of Equalization and Review. Subject matter jurisdiction of the Superior Court does not attach until that prerequisite has been satisfied, and a refund based on a final determination of the Superior Court presupposes that the taxpayer has complied with the procedure mandated by the legislature. If 'aggrieved' for any reason, the taxpayer must appeal within the permitted time to the Board of Equalization and review.

District of Columbia v. Keys, 362 A.2d 729, 732-33 (D.C. 1976)(footnotes omitted).

Currently, the requirement for filing a Board complaint is found in 47 D.C. § 3305(a) and (b), wherein the taxpayer is directed to "first make a complaint" to the Board. Although the decision in Keys was "based upon the statutory predecessor to the current property tax assessment scheme, [its] reasoning applies with equal force to this case." Customers Parking v. District of Columbia, 562 A.2d 651, 654 (D.C. 1989). Though the sections of

Title 47 may be shifted or realigned from era to era, the fundamental exhaustion requirement of filing a Board petition has never changed.

There are serious policy reasons for enforcing the exhaustion rule, particularly with regulatory matters such as tax assessment. "The rule insures that the agency has an opportunity to develop a factual record and to apply its expertise to the issues. . . . The rule requiring exhaustion also promotes judicial economy by resolving issues within the agency and eliminating the unnecessary intervention of courts. Lastly, were we to allow parties to circumvent agency procedures for appeal, the effectiveness of agency rules might be undermined." C Street Tenants Ass'n. v. Rental Housing Commission, 552 A.2d 524, 525 (D.C. 1989).[6]

The more precise issue for this Court to analyze is whether the taxpayers have complied with the requirement of "making" a Board appeal by filing defective petitions and then failing to cure the defect when they had the opportunity to do so. The Court must also examine the taxpayers' suggestion that the Board itself somehow thwarted their ability to supplement and correct their Board petitions after the defects were discovered at the hearings.

---

[6]Unlike most cases involving judicial review of administrative decisions, tax assessment appeals to the Superior Court invoke a de novo determination of tax liability. The Superior Court does not convene a review of the Board's substantive decision as such. The Court's focus is on the original assessment itself, as performed by the Department of Finance and Revenue. Still, it is very clear that the legislature never intended that taxpayers go directly to court without first litigating their claims for refund before the Board. No immediate resort to the courts was ever contemplated in the law.

VI. ANALYSIS OF THE EXHAUSTION ISSUE

A key ingredient to the exhaustion of administrative remedies is the exhaustion of the opportunities for obtaining reconsideration of an adverse decision -- when such an opportunity exists. Only by exhausting the opportunities for reconsideration can a litigant truly claim entitlement to pursue a Superior Court appeal from a tax assessment.

The principle is one of longstanding. For example, in the context of judicial review of a decision of the Federal Trade Commission, the United States Court of Appeals for the District of Columbia Circuit long ago observed, "Petitioners did not seek Commission reconsideration on this issue before perfecting their appeal here and thus failed to exhaust their administrative remedies." W.M.R. Watch Case Corp. v. F.T.C., 120 U.S.App.D.C. 20, 22, 343 F.2d 302, 304, cert. denied, 381 U.S. 936 (1965).

Without doubt, the Board does have a mechanism through which a taxpayer may seek reconsideration of an adverse decision on its petition. The relevant Board regulations state:

> Upon written request by the petitioner or the Director, stating the basis of the request, the Board, in its discretion, may rehear an appeal previously heard; Provided, that a copy of the rehearing request is hand-delivered or mailed to the other party.
>
> Upon receipt of a party's written request for rehearing, the petitioner or Director, whichever is applicable, shall have two (2) business days in which to prepare and file with the Board and the other party a response to the rehearing request.

9 DCMR 2020.2 and 2020.3.

Clearly, in the instant cases, no written request for rehearing was ever submitted by McLaughlin or anyone else on behalf of the petitioners.

The petitioners imply, through McLaughlin's affidavit, that it was not feasible to bother with any such procedure -- evidently because the members of the hearing Panel seemed "uninterested." This comment by McLaughlin in his affidavit was no more than a personal surmise and interpretation. It does not rise to the level of objective proof that the filing of a written request for rehearing would have been futile. Instead, it appears that the representative of the Petitioners became disappointed and dismayed. He gave up the effort.

The setting in which the dismissals were announced is important to note. Many cases were being called for hearing by the same panel on the same date. Board hearings occur in high volume during only one time of year -- colloquially referred to as "Board season" by experienced practitioners. All parties seem to agree that this is regular milieu in which Board hearings are convened. This is the Court's understanding as well. These circumstances, however, only highlight the usefulness of pursuing rehearing in the post-panel hearing phrase. It should not surprise anyone that the Board might overlook important features of a particular tax appeal and, thus, the opportunity to seek rehearing is not a minor matter.

Given the busy and compact nature of the Board proceedings, it was not illogical for the Panel members to decline to halt or delay its scheduled proceedings in order to receive, read, and evaluate

written materials that are tardy. McLaughlin should not have been surprised that he was not permitted to supplement the petitions in an ad hoc manner in the midst of proceedings.

The petitioners now rely on the fact that the orders of dismissal did not contain a deadline by which requests for rehearing could be filed. Yet, the absence of such a date was certainly not a bar to a mere request for rehearing.

The dismissal regulation itself plainly states that the Board "shall allow" supplementation of the incomplete petition. The missing detail is only the deadline for this submission. Since a deadline is nothing more than an outside date by which the action could be taken, the petitioners could have acted on their own -- right away.

The petitioners do not attempt to explain exactly why they sat on their rehearing rights. Petitioners do not adequately confront this issue. In effect, they attempt to shift all blame and responsibility to the Board.

In his affidavit, McLaughlin vaguely implies (though he never says so explicitly) that the Panel's disinterest in permitting him to submit additional financial materials on the spot was interpreted by him to be a silent signal that no rehearing would be permitted. If this is the oblique argument of the petitioners, such an argument is not a justifiable conclusion.

The decision not to permit tardy submission of the required documents during the hearing itself was a legitimate, discretionary call on the part of the Panel. The Board (through its panels) is

entitled to manage the orderly conduct of previously-scheduled hearings. The Government, for its part, raised the issue of being ambushed by a last-minute submission of detailed, financial documentation that could be easily correlated to the arguments in the Petition itself. Notably, the petitioners have not argued to this Court that the Panel did not have the discretion to refuse to receive any further documentation during the hearing.

The mere fact that the Panel did not want to interrupt its schedule in order to accommodate McLaughlin did not necessarily mean that the Board would later refuse to allow supplementation of the petitions if a written request were made. McLaughlin, however, jumped to the opposite conclusion.

In this jurisdiction, courts have recognized that exhaustion of administrative remedies will be excused if the facts demonstrate that "the attempt to exhaust would be futile." Apartment & Office Building Ass'n. of Metropolitan Washington v. Washington, 343 A.2d 323, 332 (D.C. 1975); see also, Bufford v. D.C. Public Schools, 611 A.2d 519, 523-24 (D.C. 1992); Dano Resource v. District of Columbia, 566 A.2d 483, 484 (D.C. 1989). The facts in the instant cases do not demonstrate that it would have been futile to file a written request for rehearing.

"The duty to exhaust all available administrative remedies is placed on the aggrieved party, not the agency itself." Malcolm Price, Inc. v. District Unemployment Compensation Board, 350 A.2d 730, 733-34 (D.C. 1976); Williams v. District of Columbia, 467 A.2d 140, 141 n. 3 (D.C. 1983). This Court is fully in accord with that

principle.

If these taxpayers had sought reconsideration of the dismissals, they could have proffered complete petitions and could have explained more precisely why they had been incomplete and why the incompleteness should be excused.

Even if the Petitioners had indeed pursued requests for rehearing and even if such requests had been denied, the Board record would still reflect that defective Board petitions had been filed. Thus, there is a broader, lingering question as to whether an admittedly defective Board appeal can ever be a lawful basis for proof of exhaustion of administrative remedies. This is the heart of the matter and the Government emphasizes this point.

This Court concludes that the filing of a defective petition at the Board level is not sufficient proof that administrative remedies have been exhausted.

The requirement of "making a complaint" to the Board means filing a petition that has been properly perfected in the first instance. It would make no sense to deem an administrative appeal to be exhausted through the filing of a defective appeal on the front end of the process. To do so would be to open the floodgates for taxpayers to file virtually [redacted] for a Board appeal.

With no enforceable standards for perfecting an administrative appeal, the whole exercise of pursuing a Board assessment appeal would become a farce. This kind of situation is certainly not what the legislature contemplated when it erected the requirement of

principle.

If these taxpayers had sought reconsideration of the dismissals, they could have proffered complete petitions and could have explained more precisely why they had been incomplete and why the incompleteness should be excused.

Even if the Petitioners had indeed pursued requests for rehearing and even if such requests had been denied, the Board record would still reflect that defective Board petitions had been filed. Thus, there is a broader, lingering question as to whether an admittedly defective Board appeal can ever be a lawful basis for proof of exhaustion of administrative remedies. This is the heart of the matter and the Government emphasizes this point.

This Court concludes that the filing of a defective petition at the Board level is not sufficient proof that administrative remedies have been exhausted.

The requirement of "making a complaint" to the Board means filing a petition that has been properly perfected in the first instance. It would make no sense to deem an administrative appeal to be exhausted through the filing of a defective appeal on the front end of the process. To do so would be to open the floodgates for taxpayers to file virtually any piece of paper as a masquerade for a Board appeal.

With no enforceable standards for perfecting an administrative appeal, the whole exercise of pursuing a Board assessment appeal would become a farce. This kind of situation is certainly not what the legislature contemplated when it erected the requirement of

filing a Board appeal.

In conclusion, while the Board did commit an error in failing to include in the dismissal orders a filing deadline for re-submission of complete petitions, this error created no genuine barrier to exhaustion of remedies. The filing of defective petitions herein effectively doomed all of these Superior Court appeals. Thus, the Superior Court lacks subject matter jurisdiction over these actions.

WHEREFORE, it is by the Court this 11th day of February, 1997

ORDERED that the Motion to Dismiss is hereby granted in each of the consolidated cases herein:

Augur v. District of Columbia	Tax No. 6246-94
Augur v. District of Columbia	Tax No. 6247-94
Augur v. District of Columbia	Tax No. 6248-94
Augur v. District of Columbia	Tax No. 6249-94
Barcelo Hotels v. Dist. of Col.	Tax No. 6250-94
Cataloubee, Inc. v. Dist. of Col.	Tax No. 6251-94
T & L Hospitality v. Dist. of Col.	Tax No. 6256-94

Cheryl M. Long
Judge

Copies mailed to:

Nancy Smith, Esq.
Assistant Corporation Counsel
441 Fourth Street, N.W.
Suite 6 North
Washington, D.C. 20001

Brett D. Orlove, Esq.
Grossberg, Yochelson, Fox & Beyda
2100 Pennsylvania Avenue, N.W.
Suite 770
Washington, D.C. 20037

Claudette Fluckus [FYI]
Tax Officer

[illegible] E. [illegible] AUBER,
Petitioners

v.

DISTRICT OF COLUMBIA,
Respondent

Tax Docket Nos. 6246-94
6247-94
6248-94
6249-94
6250-94
6251-94
6256-94

ORDER

[illegible] to the Superior Court, following appellate disposition.

Originally, these assessment appeals were consolidated for the purpose of a uniform adjudication of a legal issue that is common to all of the above actions.

In each of these cases, the District of Columbia filed a Motion to Dismiss, contending that the petitioners failed to exhaust administrative remedies prior to filing their respective Superior Court assessment appeals.

The original complaints that were filed with the Board of Real Property Assessments and Appeals (formerly known as the Board of Equalization and Review) were admittedly not complete and not in

[illegible] with regulations that require the inclusion of certain [illegible] with the underlying Board appeal. The appeals were [illegible] by the Board because of incompleteness.

This Court issued a Memorandum Opinion, granting the Motions to Dismiss.

In a published opinion, the District of Columbia Court of Appeals reversed this Court. Augur v. District of Columbia, 756 A.2d 900 (D.C. 2000).

In the initial, slip opinion form of the appellate decision, these cases were all remanded to the Superior Court "with directions to vacate its order and remand the matter to the Board with instructions to provide Auger with a date by which any supplemental filings must be made in order to perfect his appeals." However, pursuant to a Petition for Rehearing, the Court of Appeals [illegible].

Whereas the Superior Court first had been instructed to remand the cases back to the Board, the Court of Appeals remanded these cases "to the trial court for a trial de novo on appellants' challenge to their 1994 property tax assessments." This amended language is set forth in the order of the Court of Appeals filed on September 29, 2000.

The purpose of the instant order in all of these cases is to schedule the cases for trial proceedings.

It is logical to schedule all of these cases for a status hearing, wherein various preliminary matters may be addressed. For example, the new calendar judge will need an opportunity to refer

[illegible] cases for mediation in the normal course of business. Then, if mediation fails to produce a settlement, the cases may be scheduled for trial.

WHEREFORE, it is by the Court this [illegible] day of December, 2000

ORDERED that counsel in the instant consolidated cases shall appear before the Hon. Jose M. Lopez for a status hearing on **Monday, February 26, 2001 at 9:30 a.m. in courtroom 312.**

Cheryl M. Long
Judge

Copies mailed to:

Nancy Smith, Esq.
Assistant Corporation Counsel
441 Fourth Street, N.W. Suite 6 North
Washington, D.C. 20001

[illegible] Esq. [FYI only]

James A. Barker, Jr. Esq.
1333 New Hampshire Avenue, N.W.
Suite 400
Washington, D.C. 20037

Brett D. Orlove, Esq.
2000 L Street, N.W. Suite 675
Washington, D.C. 20036

Claudette Fluckus [FYI]
Tax Officer