SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

ORLEAN COMPANY,

v. Tax Docket No. 6253-94

DISTRICT OF COLUMBIA,

and

SUPER SALVAGE, INC.

v. Tax Docket No. 6255-94

DISTRICT OF COLUMBIA,

and

SAMUEL A. AND B.S. ULANOW,

v. Tax Docket No. 6257-94

DISTRICT OF COLUMBIA.

MEMORANDUM OPINION AND ORDER

These three cases were consolidated for oral argument as to one matter: the Government's Motion to Dismiss for lack of jurisdiction. A Motion to Dismiss was filed in each of these three cases. The jurisdictional issue is the same in each case, although the facts are unique to each one.

The District essentially contends that each case must be dismissed because the taxpayer failed to file an appeal at the Board of Equalization and Review as a required predicate to filing an action in the Superior Court.

There is no doubt that **none of the three taxpayers filed a Board appeal**. April 15 is the deadline date each year for the filing of such appeals.

The pertinent question in each case is whether the failure to file was a result of the non-receipt of the actual tax assessment bill -- or, as alleged in one case, non-receipt in time to comply with the Board's filing deadline. In each case, the petitioners contend that the non-receipt (or late receipt) of the assessment triggered a statutory right to proceed directly to Superior Court.[1]

In order to establish jurisdictional facts from which to adjudicate the District's motion, this Court convened an evidentiary hearing. The three motions yield mixed results for different reasons. On the basis of the entire record as to each case, the Court makes the following separate findings of fact and conclusions of law.[2]

A. **Farragut Partners** v. **District of Columbia**. On September 30, 1994 Orlean Company, General Partner of Farragut Partners filed a Petition in the Superior Court seeking a reduction of the real property tax assessment involving a property described as Lot 57 in Square 912, with improvements thereon, at the street address of 900

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[1]The Court notes at the outset that all three petitioners have filed tax appeals in the past in a timely fashion. It appears that the factual scenarios in all three of these cases are unique situations and that they are not part of any suspicious pattern of claiming that no assessments were received.

[2]It is useful for this Court to memorialize a decision in writing rather than render a ruling in open court, because the issue of failure to file a Board appeal has been raised and will be raised in other cases.

G Street, N.E., Washington, D.C. As a practical matter, this realty is a multi-family apartment complex known as Capital Hill Towers.

The amount of taxes in controversy is $25,854, plus applicable interest. The tax in dispute is the real property tax owed for fiscal year 1994, payable on September 15, 1993.

In its Amended Motion to Dismiss, filed on March 21, 1995, the District of Columbia contends that the petitioner failed to appeal the challenged assessment to the Board of Equalization and Review prior to filing the instant action.

As part of its original Motion to Dismiss, filed on March 9, 1995, the District provided a copy of the assessment (i.e. the tax bill)[3] as well as two affidavits. The affidavits of David Jackson and Clyde Sisk are summarized in pertinent part as follows.

David Jackson, Chief of the Real Property Assessment Division, Department of Finance and Revenue recapitulated the "routine" that is followed with respect to the preparation and mailing of real property assessments. In this very brief affidavit, he stated:

> At the time the assessments are final, the notices of proposed assessments are printed and delivered to a contractor who physically places each individual notice in a window envelope and places it into the mail.

Affidavit at paragraph 3.[4]

Clyde Sisk, President of Sisk Mailing Service, Inc. (located

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[3]A copy of the assessment is found in the record as Exhibit A to the Motion to Dismiss.

[4]This affidavit is found in the record as Exhibit B to the Motion to Dismiss.

in Stevensville, Maryland) stated that his company has done mailings for the District of Columbia for at least 15 years and that "Sisk mailed 161,983 Notices of Proposed Real Property Assessment for the District of Columbia March 1 and 2, 1993. He elaborated,

> Sisk follows a specific routine regarding the mailing of forms such as these. A delivery person picks up the forms from the Department of Finance and Revenue in the District of Columbia and brings them to the company in Stevensville, Maryland. An inserting machine places the forms in window envelopes. The envelopes are then placed in mail trays which, in the case of the March 1993 mailings, were delivered to the Washington, D.C. post office.

Affidavit at paragraph 3.[5] He offered no other facts concerning the mailing of the notice to this petitioner.

At a hearing before this Court on June 1, 1995 counsel for the petitioner introduced into evidence, without objection, a copy of the 1994 Real Property assessment that bears a date stamp of March 4, 1995 of USGI, Inc., the petitioner's mortgagee. The mortgagee is located in Darien, Connecticut. Counsel proffered that he obtained this document directly from the mortgagee. The Court inquired of counsel whether the taxpayer had designated the mortgagee as the entity to which real property tax bills should be sent. He answered in the negative and stated that the taxpayer had not received any assessment at all and that this copy was sent to the mortgagee only because the financing documents required this procedure. The Government did not challenge this proffer and the

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[5]This affidavit is found in the record as Exhibit C to the Motion to Dismiss.

Court accepted it.[6]

Here, the issue is whether there is <u>any</u> proof that the taxpayer did indeed receive the assessment at any time prior to April 15, 1993 and, if so, that there is no legally cognizable excuse for failing to file a Board Appeal.

The Court finds that there is no credible evidence, or any evidence at all, that the taxpayer received the assessment prior to April 15, 1993. The Court makes this finding for the following reasons.

First, the petitioner's proffer is not substantively disputed, except through the circumstantial information in the affidavits, which the Government urges this Court to use in order to draw inferences that are adverse to the petitioners.

Second, the mere fact that the mortgagee received the copy of the assessment on March 4, 1993 certainly is not proof that the original was successfully mailed to the taxpayer.

Third, the affidavits offered by the Government are insufficient to convince this Court that petitioner's assessment was in fact mailed to the petitioner.

The Sisk affidavit is too conclusory and devoid of factual detail that would truly enlighten the Court as to the lag time that might be built into the process that is used by this company. To

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[6]Indeed, if anyone had ever been designated as an agent to receive tax bills, the Department of Finance and Revenue itself would know this. The District of Columbia has never asserted that any such agent had been designated or that such an agent failed to insure timely filing of a Board appeal. Thus, the Government did not insist that the mortgagee had any legal responsibility of responding to the assessment or relaying it to the taxpayer.

boot, the Sisk affidavit does not even venture a claim as to the alacrity with which bulk mail is actually deposited into the United States Postal system.

The crux of the problem with the Government's evidence is that it does not come close to establishing reliable proof, even circumstantially, that the assessment was ever placed in the **United States** postal system.

Once it can be established that the item reached the Postal Service, the Court may indulge in a presumption of regularity and may, in its discretion, presume that first class mail reaches a customer within a few days.[7] This, at least, could establish some factual boundaries within which the Court can weigh the likelihood that the mail was indeed delivered to the customer but was lost or ignored thereafter. However, on the factual record at hand, there is not enough evidence on which to draw such inferences. Sisk, for example, says nothing about the real workings of his private mailing system. He does not elaborate on whether an **entire** batch of Finance and Revenue mail is taken to the Postal Service at the same time -- or whether individual "trays," as he describes them, are deposited at the Postal Service intermittently.[8] Moreover, Sisk provides no information as to internal company time standards for completing a customer bulk mailing.

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[7]Average mail receipt times certainly may be the subject of other testimony and might be disputed.

[8]His affidavit contains no internal company logs that might reconstruct when a certain batch was picked up from the Department of Finance and Revenue. Perhaps the company does not even keep such records.

There is simply no way to gauge how long anyone's bulk mailing could linger at Sisk before it is **actually placed in the custody and control of the United States Government mail system**. This is the weakest link in the District's evidence. It remains a matter of pure speculation.

The Court finds as a matter of law that, because of the failure of proof by the District, there is no factual basis upon which to find that petitioner ever received the assessment. Accordingly, no lack of jurisdiction can be found on the theory of failing to appeal the missing assessment to the BER. The Motion to Dismiss is denied as to this petitioner.

B. **Super Salvage, Inc. v. District of Columbia**.

This particular case is in a different posture because the petitioner does not claim, categorically, that it never received the assessment. Rather, the petitioner opposes the Motion to Dismiss by stating that the assessment was received so close in time to the deadline for filing the Board appeal that the petitioner did not have sufficient time to prepare the appeal.

Here, the tax in issue is the real property tax for Tax Year 1994, payable on September 15, 1993 on a property described as Lot 802 in Square 605. This property is located at 1711 First Street, S.W. The petitioner seeks a reduction of the tax that was assessed.

Where the Motion to Dismiss is concerned, it suffices to say that it is supported with affidavits from David Jackson and Clyde Sisk. With changes made only to account for identifying

information as to the taxpayer and the tax periods, these affidavits are otherwise identical to those filed in Farragut Partners v. District of Columbia.

While this Court finds that the District's affidavits are afflicted with the same weaknesses noted above in the findings as to Farragut, the critical issue is not one of non-receipt of the assessment. Thus, the Court need not struggle with the evidentiary question of whether the assessment was ever mailed. Plainly, it was. This was acknowledged by Joel D. Kaplan, Vice President of Super Salvage, in testimony before this Court.

Mr. Kaplan stated, in essence, that he recalled receiving the assessment on or about April 2, 1993. He has not been able to locate the original assessment itself. For present purposes, he only has a copy of the assessment that was FAXed to him from his attorney more recently. His counsel argues to the Court that there was insufficient time, in their view, to prepare a Board appeal. Thus, this petitioner simply did not file an appeal at all.

Considering the totality of circumstances, the failure to file a Board appeal was a decision made either by the taxpayer or taxpayer's counsel -- or both. The fact that no Board appeal was filed is clearly not the fault of the District of Columbia or its contractor, Sisk. Instead, this is a classic situation in which the taxpayer ultimately declined to do something at its own peril. The petitioner implies that its own inconvenience or that of its counsel is an acceptable reason to ignore the requirement of filing a Board appeal as a prerequisite to seeking relief in the courts.

This is not a meritorious position because individual taxpayers (commercial or otherwise) cannot be permitted to determine whether to comply with legal requirements based upon their own agenda or their own timetable. If this were permitted or excused, there would be no way to police such decisionmaking on the part of taxpayers -- and the requirement of the filing of a Board Appeals would be meaningless and totally unenforceable. The real remedy for a taxpayer who is caught with little time is simply to make the preparation of a Board appeal a priority over other things.

The District's motion must granted as to this particular petitioner.

C. **Samuel A. and B.S. Ulanow v. District of Columbia.**

The tax in controversy is the real property tax for fiscal year 1994 and the tax payable on September 15, 1993. The subject property is Lots 7, 165, 809, and 810 in Square 701, with improvements thereon, known by the street address of 50-68 N Street, S.E. and Half Street, S.E., Washington, D.C. The petitioners conduct business as "ABC Salvage."

As part of its Amended Motion to Dismiss, the District of Columbia includes affidavits of Clyde Sisk and David Jackson. In substance, the are identical to the affidavits filed in Farragut Partners v. District of Columbia. The Court's analysis of these affidavits remains the same. Here, the taxpayer does make the assertion that the assessment was not received at all. This

assertion was made by Mr. Samuel A. Ulanow, who owns the company and the property where the company operates. He states that he received the assessment at the "end of the summer" in 1993 -- a point that is well past the June 15, 1993 deadline for filing a Board appeal.

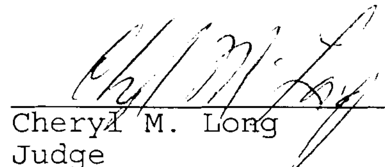
For the reasons set forth by this Court herein with respect to the government affidavits, the District's factual presentation is not sufficient to provide a basis for dismissal.[9] The Court finds that Mr. Ulanow is a credible witness and the affidavits do not diminish the worth of his testimony. Thus, the Motion to Dismiss will be denied as to this petitioner's case.

WHEREFORE, it is by the Court this 26th day of June, 1995

ORDERED that the District's Motion to Dismiss in Farragut Partners v. District of Columbia, Tax Docket No. 6253-94 is hereby denied; and it is

FURTHER ORDERED that the District's Motion to Dismiss in Super Salvage, Inc. v. District of Columbia, Tax Docket No. 6255-94 is hereby granted; and it is

FURTHER ORDERED that the District's Motion to Dismiss in Samuel A. and B.S. Ulanow v. District of Columbia, Tax Docket No. 6257-94 is hereby denied.



Cheryl M. Long
Judge

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[9]The Court's examination of the affidavits in Farragut is incorporated herein by reference.

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