SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

9E ASSOCIATES LIMITED PARTNERSHIP, Petitioner	)	
v.	)	Tax No. 6707-95
DISTRICT OF COLUMBIA, Respondent	)	

ORDER

This matter is before the Court on the Respondent's Motion to Dismiss. The Petitioner, owner of real property located at 901 E Street, N.W., Lot 40, Square 377, in Washington, D.C, challenges the real property tax assessment against the subject property for Tax Year 1995.

Respondent District of Columbia filed a motion to dismiss the petition on jurisdictional grounds, specifically, that the Petitioner had not exhausted its administrative remedies. The Petitioner filed an Opposition to the Motion to Dismiss and two supplements to its Opposition. This Court heard the arguments of counsel and received testimony of three witnesses. Upon consideration of the Motion to Dismiss, the Oppositions thereto, the representations made before the Court, and the record, the Court makes the following:

Findings of Fact

1. The instant petition was filed by Petitioner 9E Associates Limited Partnership ("9E Associates") on September 30, 1994. 9E Associates, Ninerock Associates, and Quadrangle Development Corporation (Quadrangle), general partners of the limited partnership are owners of the subject property.

2. Petitioner is the owner of the real estate and is obligated to pay all real estate taxes assessed against the subject property.

3. The subject property is located at 901 E Street, N.W., Square 377, Lot 40, in the District of Columbia.

4. For tax year 1995, the valuation date being January 1, 1994, the District's proposed assessment was $53,147,000. The tax in controversy is the amount of $1,142,660.50, which was timely paid by Petitioner. Petitioner filed an appeal with the Board of Real Property Assessments and Appeals ("BORPAA"), herein after referred to as the "Board," on May 2, 1994. The Assessment Appeal Form was date-stamped "received" by the Board of Real Property Assessment and Appeals on May 2, 1994.

5. The assessment appeal form prescribed by the Board requests various information and provides certain instructions necessary for an appeal. The first questions on the form require identifying information, information from the Notice of Proposed Assessment of the subject property, and the taxpayer's basis for appeal. Question 6, as "Property Value Information," poses a series of additional questions. The first subsection of question 6 inquires whether the property has been privately appraised. The Petitioner responded "yes" to the inquiry. The second subsection of question 6 instructs that "If appraised within one year, submit copy to the Board." The third subsection of question 6 inquires about the "Purchase Price of Property," to which Petitioner responded "N/A" (not applicable). The question which inquired of a date of purchase was unanswered by the Petitioner. Finally, question 6 of the Board form seeks the following information: "Outstanding Loans on Property $____ Amount_____Terms_____ Interest Rate." The

Petitioner responded that the "Amount" was $52,882,207, but left the other blanks unanswered.

6. Question number 7 requires that the filer state the justification for appeal. In response to question 7, the Petitioner states that the "Assessment is excessive and unjustified. Market value of the property as of 1/1/94 was no more than $43,350,000."

7. In bold letters, printed immediately above questions 5 and 6, the form instructs the filer to "attach copies of information on value of property, including appraisals, offers to purchase, pictures, etc." The Petitioner filed with the appeal form a copy of an appraisal report by Harry Horstman, appraising the property at $43,350,000. No other appraisal was submitted, nor mentioned. The Petitioner did not communicate to the Board of the District of Columbia that the property had also been privately appraised by the firm of Cushman & Wakefield.

8. The Board scheduled a hearing on the appeal for June 13, 1994. The appeal was heard and the Board sustained the assessment by decision dated July 11, 1994. The Petitioners timely filed the petition for reduction of the assessment and refund of excess taxes paid for Tax Year 1995 with the District of Columbia Superior Court on September 30, 1994. During the course of discovery in the action before the Superior Court, and after a motion to compel filed by the Respondent, the Petitioner produced an appraisal of the subject property prepared by Steven Halbert and Donald Morris of the firm of Cushman & Wakefield.

9. The Court held an evidentiary hearing on the Respondent's Motion to Dismiss. The Court heard testimony from three witnesses: Mr. Donald Morris, Mr. Steven Halbert, and Mr. Christopher Gladstone. Donald Morris is Manager and Director of the

Washington, DC Appraisal Services section of Cushman & Wakefield. Mr. Morris testified that he was the supervisor on an appraisal assignment of 901 E Street, the subject property. Mr. Morris assigned Senior Appraiser, Steven Halbert, to conduct the appraisal of the subject property. Christopher Gladstone also testified. Mr. Gladstone is the President of Quadrangle Development Corporation, general partner of Ninerock Associates L.P., the general partner of 9E Associated Limited Partnership, the taxpayer and Petitioner in this matter.

10. Donald Morris of Cushman & Wakefield testified that he met with Christopher Gladstone and Robert Gladstone on October 20, 1993, concerning the appraisal of the subject property. After the meeting, Mr. Morris sent Christopher Gladstone an engagement letter setting forth their agreement. The letter stated that the purpose of the appraisal was to prepare a market value for internal decision making purposes. Christopher Gladstone endorsed the letter sometime later; his endorsement was not dated. The letter of engagement stated that Cushman & Wakefield "anticipated[d] completion of the assignment within 30 days" of signature by the appropriate 9E Associates' representatives and payment of the retainer. The balance of the fee was stated to be due upon delivery of the appraisal report. Pursuant to the letter of engagement, 9E sent a check for one half of the appraisal fee, the retainer, in the amount of $4,750.00 on or about October 21, 1993.

11. Cushman & Wakefield Senior Appraiser Steven Halbert testified that he inspected the subject property and conducted the research and analysis for the appraisal. He began his work shortly after the October 20, 1993 meeting.

12. According to the testimony of Mr. Morris, a preliminary draft of the appraisal report was sent to Christopher Gladstone, 9E Associates, c/o Quadrangle on November 15,

1993, or within a day of that date. He testified that the transmittal letter which accompanied the report was dated November 15, 1993, and that as a matter of office policy, the report routinely would be delivered by courier or Federal Express within a day of the date of the report. He testified that he could not verify receipt by Quadrangle, because records of that nature were not retained by Cushman & Wakefield. He further testified that a copy of the draft was not maintained, but that it was his recollection that the changes to the report to prepare it in final form, if any, were minor. The final appraisal report prepared by Cushman & Wakefield for 9E Associates Limited Partnership bears the date of October 28, 1993.

13. Mr. Morris further testified that the invoice for the Cushman & Wakefield appraisal, invoice no. 93-26001-9072-000, was sent to Mr. Gladstone on November 18, 1993. Invoice No. 93-26001-9072-00, dated November 18, 1993, reflected a "TOTAL BALANCE NOW DUE" of $4,750.00 for the "Full Narrative Report." The invoice indicates that the total fee was $9,500.00 less the retainer of $4,750.00.

14. Mr. Morris testified that the final form of the "Appraisal of Real Property" was sent to Christopher Gladstone, 9E Associates, c/o Quadrangle on March 4, 1994, or within a day of that date. He testifies that the transmittal letter which accompanied the final report was dated March 4, 1994, and that, as a matter of office policy, the report routinely would be delivered by courier or Federal Express within a day of the date of the report. He testified that he could not verify receipt by Quadrangle, because records of that nature were not retained by Cushman and Wakefield. His staff searched internal office records and checked with Federal Express and were unable to locate any records of the delivery of the final report.

15. Mr. Morris presented indicia of payment of the balance-due payment by check dated June 23, 1994. The stub of the check from 9E Associates notes clearly an invoice date of November 18, 1994. Mr. Morris also testified that it was not unusual for clients to pay in an untimely manner.

16. Mr. Christopher Gladstone testified that he is the President of Quadrangle Development Corporation which is a general partner of 9E Associates.

17. Mr. Gladstone testified that did not fully recall the specifics of the letter of engagement with Cushman & Wakefield, or whether it had been executed by himself or his father on behalf of 9E Associates.

18. Mr. Gladstone vaguely remembered receipt of the draft appraisal, but he was not certain of the date.

19. Mr. Gladstone could not recall receipt of the final appraisal report, but recalled that the report did not come to his attention until June or July 1994 when he wrote a letter to individual partners of Petitioner. The Court notes that the letter to individual partners, dated July 5, 1994, indicates on page 2 that the petitioner was enclosing a "computation of the Net Capital Proceeds" that would be realized after a sale based on calculations of value based on the independent appraisal. The performance of an "independent appraisal" was promised in an October 5, 1993, letter to the individual partners. The Court notes that the Cushman & Wakefield appraisal was commissioned on October 20, 1993.

20. Mr. Gladstone testified that he was further unable to verify the date of receipt of the appraisal, beyond his recollection of June or July 1994, because the appraisal reports were not, as a matter of routine, time stamped upon receipt, that Quadrangle has no office

protocol to note receipt of documents except for those received by courier of Federal Express, and because the petitioner had not retained a courier/Federal Express log for the time period in question, i.e. March 1994 through June 1994.

CONCLUSIONS OF LAW

The Respondent argues that the Petitioner failed to exhaust its administrative remedy by failing to properly make its administrative complaint to the Board of Real Property Assessments and Appeals. The Respondent thus asserts in its Motion to Dismiss that the Court lacks subject matter jurisdiction in this tax appeal.

District of Columbia statutory law and case law prescribe that there are three requirements which must be met before Superior Court subject matter jurisdiction attaches. First, the tax appeal must be timely.[1] Secondly, the taxpayer must first pay the assessed tax together with penalties and interest due.[2] Third, the taxpayer must have first make a complaint with the administrative board. District of Columbia v. Keyes, 362 A.2d 729 (D.C. 1976). In the instant case, the Court finds that the taxpayer's appeal was timely and that the assessed tax was paid. The third hurdle, whether the taxpayer has satisfied the administrative appeal requirement, is the issue in question.

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[1] D. C. Code §47-3303; First Interstate Credit Alliance, Inc. v. District of Columbia, 604 A.2d 10 (D.C. 1992)(failure to file within the six-month period or failure to pay the tax, penalties, and interest due deprives the Superior court of jurisdiction to consider the taxpayer's appeal).

[2] D. C. Code §47-3303; Wagshal v. District of Columbia, 430 A.2d 524 (D.C. 1981)(where petition was filed before tax was paid, trial court correctly dismissed petition for lack of jurisdiction).

In reference to the administrative appeal requirement, the District of Columbia Court of Appeals has ruled that:

> ...the recovery of [tax] 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 tax payer has complied with the procedure mandated by the legislature.

District of Columbia v. Keyes, 362 A.2d 729, 732-733 (D.C. 1976). In the instant case, the taxpayer filed an appeal with the administrative board, the Board of Real Property Assessments and Appeals, formerly known as the Board of Equalization and Review. The Board considered the taxpayer's appeal and the documentation submitted by the taxpayer. The Board rendered a final decision on the tax assessment of the real property in question.

The Court takes particular note of the language utilized in the Keyes case: "...a refund based on a final determination of the Superior Court presupposes that the tax payer has complied with the procedure mandated by the legislature." 362 A.2d at 733. Thus, the taxpayer must satisfy the requirements of the legislature in advance of any relief from the Superior Court. Compliance with the requirements of the legislature includes not only adherence to D.C. Code §47-3303, which refers to timeliness and pre-payment of tax, but also to the statutory law[3] and municipal regulations, which instruct on Appeals to the administrative board..

Applicable Statutory Law

District of Columbia Code title 47, section 825.1, which governs Board of Real Property Assessments and Appeals, is the current statutory law. The Court finds,

[3] Currently, D.C. Code § 47-825.1.

however, that at the time of the filing of the instant appeal with the Board, the law in effect was D.C. Law 9-241. There is no dispute between the parties that D.C. Law 9-241 is applicable in the instant appeal. A brief history of this law is as follows: D.C. Code section 47-825, titled "Assessments-Board of Equalization and Review," was repealed on March 17, 1993, by D.C. Law 9-241, found at 40 DCR 629. D.C. Law 9-241 became effective on March 17, 1993, and was codified in the District of Columbia Code 1993 Supplement as §47-825.1. At the time of the instant administrative appeal, the version of the law codified at D.C. Code 47.825.1(f), was set out in the language of D.C. Law 9-241, section 2(f). The section reads as follows:

> Sec. 2 (f) On or before April 15th of each year, a taxpayer may file with the Board an appeal of the amount of his or her assessment for the upcoming tax year *on a form prescribed by the Board.*[4]

D. C. Code §47-825.1(f). D.C. Law 9-241, section 2(f)(1993)(emphasis added). Thus, the statutory law states that the Board has the authority and discretion to write its own appeal form and to direct, via that form, what information shall be submitted to the Board for review. Although D.C. Law 9-241 contains no discussion about the specific information to be submitted with the appeal, the Court finds that the Board is not precluded from requesting that appraisals of the subject property be submitted with an appeal of the property tax.

Moreover, the District of Columbia Municipal Regulations on Taxation and Assessments further outline the requirements of a petition for appeal to the Board. Title 9,

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[4] Published in the District of Columbia Register at 40 DCR 629 as D.C. Act 9-375. Section 8 of D.C. Law 9-241 provided that §2 shall apply as of August 1, 1993, except for §2(d) which shall apply as of July 31, 1993. Therefore, section 2(f) was applicable as of August 1, 1993.

section 2009.1 of the Regulations requires as follows: "Each petition shall be submitted in the form prescribed by the Board and shall contain all of the information requested." Section 2009.2 of the Municipal Regulations states that "each petition shall set forth the following *minimum* information...," (emphasis added) then lists types of data such as identification of the property; reasons why the petitioner believes the assessment should be changed; the petitioner's estimate of the full and true value of the property with a detailed statement of the basis for that estimate; and "*any other information that the Board may from time to time deem necessary*" (emphasis added). Since the listed categories are the *minimum* information required, the Board may legitimately require other information under the municipal regulations.

Effect of Municipal Regulations

The Petitioner argues that no municipal regulations were in effect at the time of the filing of the appeal with the Board. The Court notes that the 1994 Municipal Regulations were established in accordance with D.C. Code §47-825. See 9 D.C.M.R. 2000.1. District of Columbia Code §47-825 was repealed on March 17, 1993. Although the statute was repealed and replaced, the municipal regulations were not repealed or abolished. The "intention of the legislature to repeal must be clear and manifest" Speyer v. Barry, 588 A.2d 1147, 1165 (D.C. 1991), citing Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976). The Court finds that the legislature did not intend to repeal these municipal regulations, but intended the regulations to have continued affect.[5] There is no conflict

[5] The Court notes that 9 D.C.M.R. 2000.1 (1996), currently in effect, continues to state that "the provisions of this chapter establish rules for appeals for real property assessments before the Board of Equalization and

between the code and the rules; the municipal rules continue to work in tandem with the language of statutory law in effect at the time of the instant appeal to the Board. There is no substitute for the rules. Furthermore, the Court of Appeals has held that "repeals by implication are not favored." Speyer v. Barry, 588 at 1164. Thus, the municipal regulations continued to be applicable, even though the legislature abolished 825 and replaced it with 825.1.[6]

Exhaustion of Administrative Appeal

At the core of the arguments is the issue of whether the Petitioner exhausted its administrative remedy in accordance with statutory law. The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. McKart v. United States, 395 U.S. 185, 193 (1969). This doctrine provides that "no one is entitled to judicial relief...*until the prescribed administrative remedy has been exhausted.* Id. (emphasis added). The points of reasoning behind the rule of exhaustion of administrative remedies are several. First, the rule insures that the administrative agency has an opportunity to develop a factual record and to apply its expertise to the issues. C Street Tenants Assoc. v. Rental Housing Comm'n, 552 A.2d 524, 525 (D.C. 1989); O'Neill v. Starobin, 364 A.2d 149, 153 (D.C. 1976). Secondly, the rule promotes judicial economy by resolving issues within the agency and eliminating the unnecessary intervention of courts. C Street Tenants, 552 A.2d at 525; McKart, 395 U.S. at 195. Third, where the

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Review for the District of Columbia... in accordance with the provisions of D.C. Code §47-825, even though 825 has been replaced by 825.1.

[6] The Court finds that the Municipal Regulations in effect at the time of the instant petition were those certified and published January 1994.

parties are allowed to circumvent agency procedures, the effectiveness of the administrative process would be undermined. C Street Tenants, 552 A.2d at 525. Furthermore, flouting the administrative process would encourage people to ignore its procedures. McKart, 395 U.S. at 195.

In the District of Columbia, the prescribed administrative remedy for property tax assessment disputes is found in the statutory law and the municipal regulations as discussed above. Both the current statutory law[7] and the statutory law in effect at the time of the appeal to the Board[8] authorize the administrative board prescribe its own appeal form. The municipal regulations state that "Each petition shall be submitted in the form prescribed by the Board and shall contain all of the information requested." 9 D.C.M.R.2009.1. Thus, the petition of appeal to the administrative board must include the requested documentation.

The Court now returns to the elements of the exhaustion doctrine as outlined in McKart and recognized in the District of Columbia. See Malcolm Price, Inc., v. District Unemployment Compensation Board, 350 A.2d 730 (D.C. 1976). First, the Court finds that in the instant case, the Board of Real Property Assessments and Appeals did not have full opportunity to develop a factual record, in accordance with the provision of 9 D.C.M.R. 2009.1, due to the taxpayer's failure to submit documentation as requested by the Board's form. The taxpayer submitted the Horstman appraisal in support of a lower value of $43,350,000. On the appeal form, the taxpayer indicated that the "Assessment is excessive and unjustified," and "Market value of property as of 1/1/94 was no more than

[7] D.C. Code §47-825.1 (1997 Repl.)
[8] D.C. Code §47-825.1 (1993 Supp.)(D.C. Law 9-241).

$43,350,000," as its justification for appeal.[9] The taxpayer, however, did not submit the Cushman & Wakefield appraisal. In light of the revelation of the Cushman & Wakefield appraisal through discovery in connection with proceedings before this Court, it appears that the taxpayer sought to limit the scope of what appraisals were necessary for submission to the administrative board. In making and supporting its statement that the "market value of the property as of 1/1/94" was less than the tax appraisal, it appears that the taxpayer was selective in its submission of private appraisals for that self-designated time frame. The realm of documents necessary for the support of an appeal before the administrative board, their nature, or date of generation, is within the purview of the Board and is not the prerogative of the petitioner.

Secondly, the Court finds that where the administrative board was impeded, the promotion of judicial economy is thwarted in principal, if not in effect. If the statutory law and rules are not adhered to at the administrative level, then the tax appeal process cannot function as the legislature intended. The legislature intended that the Board of Real Property Assessments and Appeals have authority to develop the record, apply its expertise, and render a decision. The taxpayer cannot treat an administrative appeal as a mere hoop to jump before landing before the Superior Court.

Notwithstanding the analysis that principal may require and hindsight affords[10], this Court recognizes the authority of the Board to make a decision based on the record before it. It is well established that "the court's task is not to conduct a review of agency action."

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[9] The Court notes that the January 1 date is the statutory valuation date in accordance with D.C. Code.

[10] It would appear to the Court that the solution to the question of "exhaustion" in terms of submissions of documentation, as raised in the Motion to Dismiss, is in the hands of the District. A simple change in the

District of Columbia v. New York Life Ins., 650 A.2d 671, 672 (D.C. 1994). Rather, the proceedings before the Tax Division are *de novo* where the administrative board has rendered a final decision.

In the instance case, the Board rendered a final decision on the tax assessment of the subject property. The case presently before the Court is distinguishable from *Ulysses G. Auger, et al. v. District of Columbia*, Tax Docket 6246-94, and factually similar cases decided as a group by Judge Long, Tax Division of the District of Columbia Superior Court. In the *Auger* case, Judge Long ruled that the Court did not have subject matter jurisdiction over the tax appeal because the taxpayer had failed to exhaust its administrative remedy before the Board. The Board had dismissed the appeal for failure to submit information required by specific municipal regulations. This deficiency was evident at the time the appeal was submitted to the Board. The Board did not make a determination on the substance of the appeal. Thus, Judge Long ruled that the taxpayer should have asked the Board to reconsider its dismissal so that the taxpayer might submit its missing documents to the Board. Since there was no administrative decision on the merits of the of the appeal, Judge Long found that the Superior Court did not have subject matter jurisdiction.

In the case presently before this Court, the Board has ruled on the merits of the appeal. The District of Columbia Court of Appeals has stated that

> Final agency action, for purposes of triggering a petitioner's obligation to seek judicial review within the prescribed time, is a definitive statement of the agency's position, having the force of the law, such that it will have a direct and immediate effect on one's

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wording of the appeal form, and enforcement of that directive at the administrative level, would further the administrative board's ability to develop a factual record and apply its expertise.

day-to-day business and the affected party will learn that immediate compliance is expected.

Auger v. D.C. Board of Appeals and Review, 477 A.2d 196 (D.C. 1984). Likewise, the United States Court of Appeals, District of Columbia Circuit has held stated

> As a general rule, a court may only review... orders that are final... For purposes of review, an agency action is final if it (1) represents "a terminal, complete resolution of the case before the agency" and (2) "determine[s] rights or obligations, or ha[s] some legal consequence.

Capital Network System, Inc. v. F.C.C., 3 F.3d 1526 (D.C. Cir. 1993). This Court finds that, in the instant case, the administrative Board made a definitive and final statement in that it found the real property tax assessment of $53,147,000 to be valid. The Board's determination of a valid tax assessment has the force of the law in that the tax due remained at the amount of $1,142,660.50. The Board's final decision determined the obligation of this taxpayer.

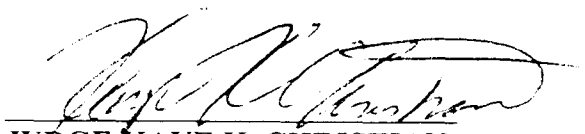
Upon consideration that the taxpayer petitioner has timely filed the appeal and pre-paid the payment of tax in accordance with D.C.Code §47-3303; and since a complaint to the Board was filed, as required by case law; and since a final decision was rendered by the administrative board on the subject of the appeal, it is on this 21st day of December, 1998, it is hereby

ORDERED, that the Motion to Dismiss is **DENIED**; and it is further

ORDERED, that the Superior Court of the District of Columbia has subject matter jurisdiction over the appeal of the tax assessment of the subject commercial real property; and it is further:

ORDERED, that a scheduling date to resume proceedings on the merits of the appeal shall be determined and set before this Court on January 4, 1999, at 9:00 a.m. in Courtroom 215.

SO ORDERED.



JUDGE KAYE K. CHRISTIAN

Copies to:

Gilbert Hahn, Jr., Esq.
Tanja H. Castro, Esq.
Amram and Hahn, P.C.
815 Connecticut Avenue, NW
Suite 601
Washington, DC 20006

Nancy Smith
Assistant Corporation Counsel
441 4th Street, NW, 6 North
Washington, DC 20001