SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

ALLIED/(F) STREET CORPORATION,

v. Tax Docket No. 7838-99

DISTRICT OF COLUMBIA

MEMORANDUM OPINION AND ORDER

The instant tax appeal presents a highly unique jurisdictional issue, in a case that is different from a classic assessment dispute. In a Motion to Dismiss that contains a number of arguments, the District of Columbia contends that the Petitioner has no right to seek relief at all. The District contends that the Petition filed in the Superior Court is untimely, as a

threshold matter. The other issues in the Motion to Dismiss are substantive factual and legal arguments that require treatment separately as a summary judgment motion. Here, this Court examines only the jurisdictional issue and concludes as a matter of law that the instant Petition was timely filed.

The analysis that is convincing to the Court requires a detailed consideration of basic principles of due process, as well as a discussion of the relevant tax appeal statute. It is incumbent upon the Court to characterize, accurately, the agency action that is being challenged.

The keystone of the taxpayer's right to maintain this appeal is the taxpayer's right to unambiguous notice of the administrative decision that is the root of the appeal.

Unlike typical Superior Court tax appeals, the instant case is not a debate over intrinsic fair market value, as such. Moreover, this case does not in any way involve a market value decision rendered by the Board of Real Property Assessments. The instant appeal does not present a taxpayer's gripe that its tax liability was overtly increased by the Chief Assessor from the amount owed for Tax Year 1997. Rather, this taxpayer complains that for Tax Year 1998 the District imposed tax liability that otherwise would have been reduced from the previous billing if only the property had been correctly classified.

The classification affected the billing for Tax Year 1998 only because it represents a mathematical component of the overall calculation of the tax bill. The classification invokes the use of a percentage rate that is the multiplier by which the dollar amount of tax liability is calculated. The "assessment" itself (defined as the determination of estimated market value) is yet another element that is involved in the formula for determining the billing. As the taxpayer argues, this is why the traditional jurisdictional analysis for a classic assessment appeal is not relevant to the instant case.

Description of the Property. The taxpayer herein owns property that is known as 20-24 F Street, N.W. in the District of Columbia. The property was originally comprised of three contiguous lots.

In the Petition, the taxpayer describes the property as consisting of Lots 83, 84 and 171, in Square 628. At the taxpayer's request, the lots are now denominated comprehensively as only "Lot 175." The subject property officially became "Lot 175" as of October 1, 1997, the start of Tax Year 1998.

The Allegations in the Petition. The Petitioner seeks a refund of $74,989.20 plus interest. The Petitioner explains its entitlement to the refund through the following contentions. The Petitioner states that the tax bill for Tax Year 1998 was calculated by the application of the percentage

rate that corresponds to a "Class 5" property. The taxpayer contends that the correct classification would have characterized this property as one within "Class 4." Class 4 carries a lower rate.

For ease of understanding, it is useful to pause to recapitulate the statutory differences between these two categories.

The five classes of real property are defined in D.C. Code §47-813 (Repl. 2000). The statute contains different class definitions for several different chronological eras. The period of time that is relevant herein is covered by that portion of the statute that specifically reaches any Tax Year that commenced on October 1, 1994 and for each subsequent Tax Year until the Tax Year that commenced on October 1, 2001. For ease of comparison, the differences between Class 4 and Class 5 are summarized as follows.

Class 4 property embraces "all real property which is not Class 1 Property, Class 2 Property or Class 3 Property." D.C. Code §47-813(c)(4). Both Class 1 and Class 2 both relate exclusively to certain types of residential property. Residential property is totally irrelevant in the instant case. Class 3 "shall be comprised of improved and occupied commercial real property, including hotels, motels, inns, or any other place, which is regularly used for the purpose of furnishing rooms, lodgings, or accommodations to transients." Without question, the subject property

herein does not fall into Class 3.The same type of property, when unoccupied, also falls within Class 4 if it is unoccupied for certain specific reasons, *e.g.* pending litigation concerning title, or damage due to a fire or flood.

Class 5 property includes two sub-categories. Class 5(A) is comprised of "all real property which is not Class 1 Property, Class 2 Property, Class 3 Property, or Class 4 Property." D.C. Code §47-813(c-3)(5)(A).

Sub-Class 5(B) is comprised of "Unimproved real property that abuts and has common ownership with real property subject to the apportionment provision of subsection (f) of this section and cannot be classified as Class 1, Class 2, Class 3, or Class 4.

It is uncontested that the subject property herein is paved and improved land.

The gist of the Petitioner's dispute is that, at some point before the issuance and receipt of the tax bill for Tax Year 1998, a series of physical changes on the subject property converted it from Class 5 to Class 4. The Petitioner argues that the District should have modified the classification to correspond to the physical changes and circumstances of the property.

The Petitioner has emphasized that the correct classification for the subject property was Class 4, due to the fact that "parts of it (Lots 83 and 84) were paved and thus, by definition improved lots subject to Class 4 tax treatment for Tax Year 1998" (emphasis added).[1] To illustrate the unoccupied nature of the "improved" lots, the taxpayer asserts that a building permit had been issued for said lot on August 29, 1997 and was in effect as of September 30, 1997. A copy of Building Permit B410462 is attached to the Opposition as Exhibit 3 and is incorporated herein by reference.[2] Thus, the taxpayer has proffered the specific basis for its claim of a classification that had remained in effect improperly and was not revised downward for purposes of the tax bill issued in 1998.[3]

The Petitioner filed the instant "appeal" on September 30, 1999, the year following the point of six months from the date on which the Petitioner received the tax bill of March, 1998. Petitioner avers that the receipt of the March, 1998 tax bill was the time when Petitioner first became aware of the faulty or unsubstantiated classification.

---

[1] *Petitioner's Opposition to Respondent's Motion to Dismiss, at 5.*

[2] The face of the permit indicates that the purpose of the permit was the authorization for the construction of a temporary parking lot.

[3] The merits of whether the property should have been reclassified is not part of the dismissal analysis, but is recapitulated only to set forth the historical context in which this litigation arose.

The District's Contentions as to Timeliness. For purposes of the jurisdictional issue, the Court focuses upon the District's specific argument as to the timeliness of the filing of the Petition. The District's argument on this point is found in numbered Paragraph 3 of the Motion to Dismiss.

The District relies upon a specific statute that erects a clear deadline for filing a Superior Court appeal petition from an assessment that is allegedly erroneous. The Code states that such an appeal must be filed before September 30th following the calendar year in which the classification is "made." D.C. Code §47-825.1(k)(1) (Rep. 1997). In order to prevail on the Motion to Dismiss, the District must demonstrate that somehow the refusal or failure to reclassify the property was a decision "made" in 1997.

Indeed, the entire question of the timeliness of this appeal turns on how the Court should interpret the term "made" and how the taxpayer's obligation to perfect its appeal is triggered.

In contending that this deadline was not met, the District states,

> On notice in 1997 the property was still class 5, petitioner had until September 30, 1998, not September 30, 1999, to file a petition, correctly identifying the real property whose classification was being challenged, in order for the court to obtain jurisdiction. Petitioner did not do this.

Memorandum to Motion to Dismiss at 4.

In the Court's view, use of the term "made" only logically implies that the basis of the appeal is the taxpayer's disagreement with the accuracy or legal validity of a pro-active, discrete decision that arose on a date certain.

The District contends that the decision to classify the property as Class 4 occurred at some point in 1997, based upon the following theory. The District emphasizes that all taxpayers had been informed that the assessments for Tax Year 1998 would be identical to those for Tax Year 1997, for a unique one-time only reason. The reason was the statutory reconfiguration of the definition of Tax Year. Under the new scheme, the Tax Year would commence on October 1 rather than January 1. The Tax Year 1998 billings to all owners of real property were subject to a moratorium on assessments. The District implies that since taxpayers were told that the assessment would remain the same for Tax Year 1998, taxpayers should have presumed that the classification likewise would remain untouched for Tax Year 1998. See Memorandum to Motion to Dismiss at 1.

Taxpayer's Contentions as to Timeliness. The taxpayer's position is derived from principles of due process, *i.e.* that its obligation to file a

Petition can only be calculated from the date on which it received notice of the particular classification that was the basis for the Tax Year 1998 liability. Allied contends that no such notice was issued until the taxpayer literally received in the mail the specific billing for Tax Year 1998, in March 1998.

The jurisdiction issue dissolves into the question of how a taxpayer (and the Court) can ever discern when the District has actually "made" a classification decision that is not rendered in public or in writing as a specific decision memorialized with a date certain. This is all the more difficult to unravel where the decision is not subject to any statutory timetable, entirely unlike Board decisions on estimated market value.

The taxpayer argues that this question of when a classification is "made" is impossible to answer when the root of the Superior Court petition is a passive act, *i.e.* the agency's failure to make an adjustment or change in classification. This is distinguished from an affirmative act, such as issuing a Board decision or denying a request for refund in a dated letter from an appropriate agency official.

Petitioner argues that a failure to act does not necessarily occur on a date certain, but may evolve over time. Consequently, the failure to change a classification because of the evolution of several events is a proverbial

slippery eel. The date of the agency's "failure" to change a classification may be idiosyncratic to almost every piece of real property. Here, according to the taxpayer, the reasons why the District should have reclassified the property are all linked to physical changes that were being made to the property at various times that only began in 1997.

The Petitioner explains that, where a passive failure to change a classification is concerned, the only way to know that the taxpayer is being harmed (or overcharged for taxes) is to receive a particular tax bill that contains a designation of classification or an explicit percentage rate that conforms to a specific classification. A billing to the taxpayer does have a date certain from which to calculate a deadline for pursuing an appeal. That is exactly what the taxpayer did in the instant case.

Petitioner reports that when it bought the property, it did learn that at least one of the three lots was a "Class 5" property. The taxpayer desired to obtain a "Class 4" designation for the total property, however, irrespective of any possible mixture of classes among the three lots that were originally purchased. In order to achieve this, and to achieve a lower tax liability, the present owner made certain changes to the property that resulted in

obtaining a certain building permit on August 29, 1997.[4] This permit was in effect as of September 30, 1997.

The taxpayer argues that obtaining this particular building permit statutorily entitled the taxpayer to be shielded from further assessments that would be calculated using the old Class 5 classification. In the context of this Motion to Dismiss, the Court will not delve into the underlying merits of whether the classification should have been changed in light of the issuance of this permit.

It was only upon receiving the billing of March, 1998 that the District first revealed to the taxpayer that the Class 5 rate was being applied – and that no reclassification had been concluded after the issuance of the building permit. The taxpayer states – and the District does not deny – that the face of the Tax Year 1998 tax bill itself included a reference to the tax rate of $5.00, which obviously applied to Class 5 properties. Both parties concede that the multiplier for Class 4 properties was then $2.15.

Importantly, the District does not deny that previous tax bills sent to this Petitioner did not include any mention of the particular rate that was being applied. The taxpayer seizes upon this fact as proof that it had not

[4] A copy is found in the record attached as Exhibit 3 to the Petitioner's Opposition to the Motion to Dismiss.

been notified of any discrete decision not to reduce the classification despite the City's own action of issuing the building permit. The taxpayer essentially argues that the District's own internal action was sufficient to trigger the necessity of adjusting the tax classification.

Analysis of Defining the Deadline for the Superior Court Appeal. There is a bedrock conceptual difference between how the District and the Petitioner each define the timeline for perfecting a classification appeal.

The District asserts that the historical date on which the classification was "made" can be reconstructed by implication and that the taxpayer should have been able to predict this date by drawing inferences from the statute that applied to the "carry-over year."

The Petitioner, on the other hand, relies upon fundamental concepts of due process, based upon the right to rely on unambiguous notice.

It is very important to remember that the decision-making process for formulating classifications and for formulating assessments are very different. Yet, they are not treated identically by the Code, where deadlines are concerned.

In the assessment system, all parties are clearly warned by the applicable statute as to when decisions are made by certain entities, and the Code dictates precisely when a taxpayer must go forward in order to

complain about the assessment. This system of deadlines was revised when the District adopted a new triennial system that replaced the old annual system of assessments. In any event, it is fair to say that all deadlines flow from deadlines that are first imposed on the Executive Branch. The time-line obligations of the aggrieved taxpayers flow from the District's own obligation to take timely action. Under this system, the responsibilities of all concerned were established so as to occur during a very explicit window of time. Notably, there is no such statutory system where classifications are concerned.

As to the classification process, the Code did not then (and does not now) require the District to re-evaluate classifications by any particular date or on any particular schedule or by any interval. The Court should be clear to distinguish what the District normally does when a taxpayer formally demands a reclassification. There is a method for seeking an administrative review of a classification, and for seeking a review of an unsatisfactory decision.[5] That is not the scenario in the instant case.

If the Office of Tax and Revenue does not elect to focus its attention on the classification of a particular property (in the absence of a formal

[5] Examples are illustrated in material attached as Exhibits 2A-D to the Petitioner's Opposition to the Motion to Dismiss.

demand for reclassification), there is no mechanism by which the taxpayer can force the agency to do so.

Plainly, the taxpayer has no way to force the agency to make a decision in time to allow the taxpayer to comply with any particular court filing deadline. The agency is in total control of the sweep of events (or the slow creep of events).

This one time-only moratorium was enacted into law solely to accommodate a change in the definition of "Tax Year." In order to minimize confusion and, ostensibly, to be reasonable, the District of Columbia Council enacted a law to require that all assessments for Tax Year 1997 would "carry over," *i.e.* remain the same, for Tax Year 1998. The District argues that the "carryover" statute applies to classifications and that Petitioner should have known that whatever classification was in effect for Tax Year 1997 would necessarily remain unchanged for Tax Year 1998. This Court has closely examined this statute. It does not apply to classifications and speaks only to assessments. In context, this term "assessment" can mean only the determination of estimated market value.

The taxpayer suggests that it is not difficult to understand why the carryover statute does not address classifications. First, it would have been strange for the Council to mandate that no changes would occur in

classifications during this brief moratorium period, since there had never been a statutory timetable for classification decisions. Moreover, there had not been any pre-existing expectation by taxpayers that classifications would be reviewed on an automatic or structured basis. The change in the definition of "Tax Year" had no genuine meaning where classification was concerned, because no statutory schedule of decision-making was being disrupted.

Indeed, the need for the carryover of the estimates of market value (*i.e.* the assessments) was quite obviously tied to the impossibility of completing two different sets of assessments for all pieces of realty in the District of Columbia. As a practical matter, the shifting of the definition of tax year would have created total havoc without a common sense transition. It made perfect sense to simply preserve the status quo as to fair market value because of the strictures of the statutory timetable for rendering assessments and for appealing them. For whatever reasons, the Council of the District of Columbia did not take similar steps to mandate a "status quo" for classifications.[6] The Court has no power to invent such rules. The Legislative Branch ignored classifications as a transition issue.

[6] It is impossible to confirm whether this was done by design or as a result of inattention to the issue.

Analysis of the Due Process Issues. Having parsed the important concepts that are found in the arguments of both parties, the Court must determine whether the taxpayer is properly before the Superior Court. In order to determine whether the Superior Court petition was timely filed, the Court must be able to pinpoint the occurrence which would have signaled the taxpayer's obligation to meet the filing deadline of September 30, 1999 – or September 30, 1998. On this subject, this Court finds that the arguments of the taxpayer are vastly more convincing than those of the District. The District does not adequately confront the core issue of proper notice.

In order for the taxpayer to know that its filing deadline was September 30, 1998, the taxpayer would have to know the date on which the offending "decision" was made as to the classification that was used for its Tax Year 1998 calculation of liability. In point of fact, the taxpayer did not learn that the District was ignoring the issue until it received its Tax Year 1998 bill. On its face, this document recited for the first time the rate that was being applied to the assessment.

What is more important to recognize is the fact that the taxpayer herein had no mechanism for forcing the District to initiate or conclude a review of the classification by any particular date. The whole notion of

whether the Office of Tax and Revenue was going to revisit the classification of this property (or any of its component parts) was utterly discretionary and totally unpredictable. This would have been true even if the Petitioner had aggressively filed formal demands for administrative reclassification well before the end of 1997.

The Court must consider instructive case law that addresses how one knows when an action must be filed, in order to seek relief from an administrative decision.

The District of Columbia Court of Appeals has observed, "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 law, such that it will have a direct and immediate effect on one's day-to-day business and the affected party will learn that immediate compliance is expected." *Auger v. D.C. Bd. of Appeals and Review*, 477 A.2d 196, 213 (D.C. 1984) (emphasis added); *Carter/Mondale Presidential Committee, Inc. v. Federal Election Comm.*, 711 F.2d 279, 286 (1983).

Here, the Petitioner got no "definitive statement of the agency's position" until it received the billing in March, 1998. For this reason, the

taxpayer acted in a timely and permissible manner when it filed the instant Petition on September 30, 1999.

This case does not fit easily into the familiar pigeonhole of traditional assessment appeals. The whole statutory timetable for those proceedings clearly pivots on the need for a decision to be rendered by a time certain by the Board of Real Property Assessment. Where, as here, that Board is not involved at all in "making" a classification, the deadline for filing a Superior Court appeal simply does not apply. The whole Board-driven jurisdiction model is irrelevant in the instant case.

The only logical starting point from which to calculate the deadline for filing an appeal is the date of actual notice of the tax billing that "aggrieves" the taxpayer. This makes sense, because the Code itself uses this concept of actual notice where all kinds of non-realty tax appeals are concerned, such as sales tax, inheritance tax, etc. The current Code provides that as to the full panoply of all tax appeals not related to real property, the aggrieved person

> may within 6 months after the date of such assessment appeal from the assessment to the Superior Court of the District of Columbia . . . The 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 (Repl. 2000).

Herein, the taxpayer simply seeks the same due process rights of those other taxpayers who already have the right to seek an appeal after receiving actual notice of disputed taxes.

The "actual notice" standard as set forth in Section 3303 is the only fair way of determining the filing deadline herein. The District has not provided a good reason for discriminatory treatment of taxpayers as to the quality of notice that must be provided (as between citizens aggrieved by real property taxes and those aggrieved by other kinds of taxes). The Court cannot discern the justification for such discrimination.

The other merits issues in this case should be subject to full briefing after the completion of any discovery that the parties may deem necessary. Because the District's Motion to Dismiss contained issues that should be treated under the summary judgment model, the parties may wish to submit those issues as they were already briefed if no further discovery is required. This case will be certified to the regularly assigned calendar judge in the Tax Division, for a status hearing and for the establishment of a further litigation schedule.

WHEREFORE, it is by the Court this 21st day of December, 2001

ORDERED that the District's Motion to Dismiss on jurisdictional grounds is denied; and it is

FURTHER ORDERED that the balance of the arguments presented by the District in its Motion to Dismiss are held in abeyance, pending the filing of a Motion for Summary Judgment by the District; and it is

FURTHER ORDERED that this case is hereby certified to the **Hon. José M. López, Deputy Presiding Judge of the Tax Division, for a status hearing on January 28, 2002 at 9:30 a.m. in courtroom 312**. At that time, Judge Lopez can establish a deadline for the filing of any further dispositive motions on the substantive issues of this appeal.

Cheryl M. Long
Judge

Copies mailed to:

Joseph F. Ferguson, Jr., Esq.
Assistant Corporation Counsel
441 4th Street, N.W. 6th Floor North
Washington, D.C. 20001

David A. Fuss, Esq.
Counsel for Petitioner
Wilkes, Artis, Chartered
1150 18th Street, N.W. Suite 400
Washington, D.C. 20036

Hon. José M. López [FYI]
Deputy Presiding Judge, Tax Division

Claudette Fluckus [FYI]
Tax Officer