SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

TAX DIVISION

PNC BANK, N.A.	:	
	:	
Petitioner	:	
	:	
v.	:	**Tax Docket Nos.** 8772-06
	:	8773-06
DISTRICT OF COLUMBIA	:	8774-06
	:	8776-06
	:	
Respondent	:	

MEMORANDUM AND ORDER

The Court has consolidated these cases for purposes of deciding one issue: whether the petitioner taxpayer may dismiss its petitions without leave of court and the agreement of the District. Judge Long decided the same issue in the taxpayer's favor in 1015 15th Street Associates v. District of Columbia, Tax Docket No. 7853-99 (July 19, 2002). For somewhat different reasons, the Court agrees with Judge Long's conclusion and holds that the taxpayer may dismiss the petitions.

Statement of Proceedings

Petitioner PNC Bank, N.A. owns the four properties involved in these proceedings. The properties are located at 1503 Pennsylvania Avenue, N.W.; 1913 Massachusetts Avenue, N.W.; 808 17th Street, N.W., and 800 17th Street, N.W. For the tax year 2006 (October 1, 2005 through September 30, 2006), the District of Columbia's tax assessor proposed assessments for the properties as follows: 1503 Pennsylvania Avenue, N.W., $13,607,030; 1913 Massachusetts Avenue, N.W., $14,857,000; 808 17th Street, N.W., $40,750,920; and 800 17th Street, N.W, $15,132,420. The taxpayer petitioned for administrative review of the proposed assessment pursuant to D.C. Code § 47-825.01(f-1) and the Office of Tax and Revenue made no change in the assessment of three of the properties, but did reduce the assessment of 1503 Pennsylvania Avenue, N.W. to $11,273.760. The taxpayer further appealed to the District of Columbia Board of Real Property Assessments and Appeals ("the Board"), and it made no changes in the assessments. The Board's decisions were rendered, in the case involving 808 17th Street, N.W., on November 11, 2005,

in the case involving 800 17th Street, N.W., on January 23, 2006, and in the other two cases, on January 28, 2006.

On March 30, 2006, the taxpayer filed with the Office of Tax and Revenue statutorily required annual Commercial Real Estate Income & Expense Reports, for each property for the tax year 2007. These reports reported independent appraisals on the properties in 2005. The appraisal for 1503 Pennsylvania Avenue, N.W., dated March 24, 2005, valued the property at $16,800,000, exceeding the assessment by more that $5,500,000. The appraisal for 1913 Massachusetts Avenue, N.W., dated March 31, 2005, valued the property at $18,400,000, exceeding the assessment by more than $3,500,000. The appraisal for 808 17th Street, N.W., dated March, 2005, valued the property at $50,600,000, exceeding the assessment by more than $9,800,000, and the appraisal for 800 17th Street, N.W., dated March, 2005, valued the property at $18,400,000, exceeding the assessment by more than $3,260,000.

On September 28, 2006, the taxpayer timely filed its appeal from the assessments. In late November,

2006, the District filed answers to each petition, denying the allegations of the petition and filing no claim for affirmative relief. The District filed no counterclaim.

The Court set each case for a status hearing and referred the parties to mediation. Mediation was unsuccessful. The taxpayer then informed the District of its intention to dismiss the petitions. The District took the position that the taxpayer could not dismiss the petition without its agreement. The District refused to agree to a dismissal, and the taxpayer filed in each case a motion to dismiss.

The taxpayer argues that it has the right to file to dismiss its appeal at any time before the trial begins. The District argues that the taxpayer is not entitled to dismiss its appeal without the District's agreement and that the District is "entitled to put on evidence that the assessments should be increased."

Discussion

Analysis of the issue presented begins with an understanding of the nature of a taxpayer appeal. D.C. Code § 47-3303 provides, as is pertinent here, that

> [a]ny person aggrieved by an assessment by the District of any . . . estate . . . may . . . appeal from the assessment to the Superior Court of the District of Columbia . . . . The Court shall hear and determine all questions arising on appeal . . . . The Court may affirm, cancel, reduce or increase the assessment.

Although the statute calls the proceeding an "appeal," the review of the assessment is actually de novo.

The Court's task is not to conduct a review of the agency's action. Rather, the Court must make an independent valuation of the property on the basis of the evidence presented at trial. District of Columbia v. New York Life Ins. Co., 650 A.2d 671, 672 (D.C. 1994). "'Once the trial court has acquired jurisdiction over a particular valuation . . . the whole case, both facts and law, is open for consideration.'" Rock-Creek Plaza-Woodner Ltd. v. District of Columbia, 466 A.2d 857 n.1 (D.C.

1983)(quoting District of Columbia v. Burlington Apartment House Co., 375 A.2d 1052, 1057 (D.C. 1977)(en banc)(ellipses added).

One consequence of the de novo nature of the proceeding is that the District, as well as the taxpayer, has the right to challenge the assessment. This follows from the plain language of the statute: "The Court may . . . increase the assessment." In District of Columbia v. New York Life Insurance Company, supra, the assessor testified at trial that the "official assessment" was $28,661,887. The taxpayer accepted the "official assessment" and argued that, because of a typographical error, that assessment had been erroneously increased by the Board of Equalization and Review (now the Board of Real Property and Assessments) by $5,000,000. The trial court agreed and lowered the valuation by $5,000,000. The trial court refused to hear the District's expert testimony as to actual value, which under that testimony would have been higher then the value reached by the "official assessment." The Court of Appeals reversed the judgment, holding that "[o]nce the case has come

before the Superior Court the District is entitled to establish that the value of the property is in excess of the assessed value." 650 A.2d at 673.

Given that both a taxpayer and the District have the right, in a taxpayer appeal, to establish the correct valuation in a de novo proceeding, a taxpayer "appeal" is in practice more like a civil action than an appeal, and, as will be seen, the rules governing tax proceedings are in important respects akin to those governing civil actions.

The District argues from New York Life Insurance that the taxpayer cannot dismiss its appeal. But New York Life Insurance says nothing about the taxpayer's right to dismiss an appeal. It holds only that, once the trial has begun, the District cannot be prevented from proving value by the taxpayer's taking the position that the assessed value is accurate. The Court therefore looks to other sources to determine whether the taxpayer may dismiss its petitions.

At common law, a plaintiff had the right to dismiss the complaint without prejudice at any point prior to verdict or judgment. Bernay v. Sales, 435

A.2d 398, 403 (D.C. 1981). This right was deemed "substantial." Bennett v. Virginian R. Co., 250 U.S. 473, 476 (1919). The Court is of the opinion that, since a taxpayer appeal is substantially similar to a civil action, the common law right to dismiss an appeal before verdict of judgment is available to a taxpayer.

Rule 41 of the Superior Court Rules of Civil Procedure, which follows the Federal Rules of Civil Procedure in this respect, abrogated in part the right to dismiss a complaint. A plaintiff now has the right to dismiss the complaint, in the absence of a stipulation signed by all parties that have appeared, only "before service by the adverse party of an answer or a motion for summary judgment, whichever first occurs." Super. Ct. Civ. R. 41(a). If this appeal were governed by Rule 41, the taxpayer would not be able to dismiss its appeal over the District's opposition, as the District has filed answers in each case.

The Superior Court's Tax Rules, however, do not incorporate Rule 41. While Tax Rule 3(a) incorporates numerous other Superior Court Rules of Civil Procedure,

it leaves out Rule 41. Accordingly, the Court is of the opinion that the common law right to dismiss the appeal still is available to the taxpayer, and provides authority for its right to dismiss these appeals.

The District argues, however, that procedural rules "cannot contravene Congressionally enacted statutes regarding rights of [the District]." It maintains that since D.C. Code § 47-3303 gives it a right to establish a valuation higher than the agency's assessment, the Court cannot deprive it of that right by allowing dismissal of the appeal. But the taxpayer's dismissal of the appeal would not defeat the District's right to establish an increased valuation had the District availed itself of the procedures for proving a valuation different from the assessor's.

A taxpayer appeal is a "civil proceeding . . . initiated by filing . . . a petition." Super. Ct. Tax R. 6(a). Rule 6(b) prescribes the contents of the petition. Tax Rule 7(a) requires the District to file an answer to a petition. That answer must provide the "nature of the defense," answer each of the allegations in the petition, and, importantly for purposes of this

case, "include a statement of any facts upon which the respondent relies for defense or for affirmative relief." Super. Ct. Tax R. 7(b). "[A]ffirmative relief" means relief that would establish a valuation higher than the assessment and therefore require the taxpayer to pay more tax than the assessment called for. When affirmative relief is requested, Rule 8(a) requires the taxpayer to serve a reply, and Rule 8(b) prescribes the form and content of the reply.

In addition, Tax Rule 3 incorporates Civil Rule 13, relating to counterclaims and cross claims. Rule 13(a) states that

> [a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of 3rd parties of whom the Court cannot acquire jurisdiction.

The equivalent Federal Rule has been construed to require the service of compulsory counterclaims along with the answer, Finney v. Royal Sun Alliance Ins. Co., 2005 U.S. Dist. LEXIS 18413 *12 (D. Pa. 2005), but even

if it need not be filed with the answer, a compulsory counterclaim is required to be filed. Here, the District's claim for an increased valuation obviously arises out of the same transaction as forms the basis for the taxpayer's appeal and Rule 13 therefore applied to the District.

The District, however, filed neither an answer asking for affirmative relief nor a counterclaim. It failed to do so even though it knew well before the appeals were filed that independent appraisals of the properties were substantially higher than the assessment. Accordingly, the District cannot persuasively argue that dismissal of the taxpayer's appeal has unfairly prejudiced its right to present evidence that warrants a valuation higher than the agency's.

The District's argument that procedural rules cannot deprive it of its statutory right to present its claim is unfounded. There is no doubt that the Superior Court may not enact a rule that abridges a substantive right. This is the principle enunciated in the case on which the District relies, In the Matter of

C.A.P., 356 A.2d 335, 344 (D.C. 1976). There the court invalidated a rule that allowed termination of parental rights outside the context of an adoption proceeding, when no statute then existed allowing such a termination. In the present case, the Court's holding allowing dismissal of the appeal does no violence to the District's statutory right to establish valuation when a taxpayer appeals. The District can avail itself of that right so long as it follows procedural rules. That a party can forfeit substantive rights if it does not follow procedural rules almost goes without saying, but it might be useful to reiterate this point with the following from Englehardt v. Bell & Howell Co., 299 F.2d 480, 485 (8th Cir. 1962), answering the plaintiff's challenge to the "two-dismissal" rule of Rule 41(a) stating that a second voluntary dismissal operates as an adjudication on the merits. The plaintiff argued that the rule violated his Seventh Amendment right to a jury trial on his claim. The court answered:

> The Federal Rules of Civil Procedure are exactly what they are termed -- rules of procedure. They regulate, guide and control the commencement,

> trial and disposition of actions based upon substantive rights. Without them, or some similar rules guides, our courts would be in constant chaos.

Quoting Yakus v. United States, 321 U.S. 414, 444 (U.S. 1944), the Court went on: "'No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" Id.

Accordingly, the Court holds that the taxpayer may voluntarily dismiss these appeals and orders that the, in each of the captioned cases, the Petitioner's Motion to Dismiss the Petition is **GRANTED.**

SIGNED IN CHAMBERS

December 14, 2007

A. Franklin Burgess, Jr.
Judge

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