OPINION NO. 1079

DISTRICT OF COLUMBIA TAX COURT

FILED

JUL 11 1969

District of Columbia
Tax Court

SUSAN E. O. BREAKEFIELD, Petitioner,	)	
v.	)	DOCKET NO. 2074
DISTRICT OF COLUMBIA, Respondent.	)	

OPINION AND DECISION

This is a test case on the issue, whether Congress can subject District of Columbia residents to income taxes while denying them the right to vote. The facts are simple: petitioner from 1964 to date has been qualified to vote and has resided in the District; seeks refund of the amount she paid in D. C. income taxes for the calendar year 1967; has never been allowed to vote except for the "President and Vice President and the D. C. School Board beginning in 1968" -- see agreed-on testimony -- and has complied with the procedural requirements for bringing this lawsuit.

The issue is solely one of law, based on facts of common knowledge and therefore subject to judicial notice. As everyone knows, Washington is a --

> colonial enclave technically named the District of Columbia and known to the locals as "the District." * * * The people of the District -- there are 800,000 of them -- differ from all other Americans in a most curious way. By living in the capital of the world's most powerful democracy, they forfeit the basic democratic right -- the right of self-government.
>
> They have no voice in the levying of taxes, although they pay them. * * * They have no representation in Congress, and no vote in the councils that rule them. 1/

1/ Russel Baker, in Holiday magazine, February, 1967, p. 65; see also, for similar overviews, "A Tale of Two Cities: Washington and its Finances", League of Women Voters of D. C., published June, 1962; "Washington - The Lost Colony", the New Republic magazine, Andrew Kopkind & James Ridgeway, April 23 and April 30, 1966.

Under P.L. 376 Ch. 562 of the 84th Congress, approved August 12, 1955, the officials of D. C. political parties have been chosen by D. C. voter-members of such parties beginning in 1956. In November, 1964, as a result of the 23d Amendment, D. C. citizens for the first time were allowed to vote for the number of electors of the President and Vice-President of the United States "to which the District would be entitled if it were a State, but in no event more than the least populous State." (There are eleven States with less population than the District.) Beginning in November, 1968, they have also been allowed to vote for members of the D. C. Board of Education. These limited voting rights do not answer the question as posed in this case: whether Congress, where petitioner is not represented, can constitutionally levy taxes on her in the face of the "principle that taxation and representation are inseparable." (Pet. Br. 10.)

The contentions as developed by the parties hereto. Petitioner's main argument rests on an inference from Section 2 of the 14th Amendment[2/], providing that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." Petitioner says that this provision "that individuals [i.e. Indians] who are not taxed are not to be counted in determining the weight of each taxed citizen's vote clearly shows that the Constitution recognizes the

---

2/ Effective July 28, 1868, the quoted portion superseded a provision of Article I of the Constitution as originally written: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

principle that taxation and representation are inseparable", citing the "one-man one-vote" decision, Wesberry v. Sanders, 376 U.S. 1 (1964).

Petitioner recognizes the exclusive power of Congress to legislate for the District[3], but "maintains that such power must be carefully exercised in a constitutional manner" (Br. 6 - 7) and in relation to the other provisions of the Constitution preserving the rights of persons and of citizens. Finally, petitioner urges that it is a "fundamental right" (Br. 10) to have representation within the taxing authority; that this right is preserved by the Ninth Amendment provision "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people", and that pre-constitutional precedents in England and the American colonies, from the Magna Charta to the Declaration of Independence, back up her position.

Respondent's argument is based solely on the Article I, Section 8 clause 17 of the Constitution, supra, note 2: "* * * with respect to the District, Congress possesses the combined powers of both a general and a local government * * * such powers are plenary and unqualified." (Br. 2.) The constitutional power of Congress in this regard, under the controlling court decisions, "is as great as the power of a state legislature with respect to the state or any of its subdivisions." (id.) Respondent does not ask that the suit be dismissed on the

---

3/ Article I, Section 8, clause 17: "The Congress shall have Power * * * to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *."

syllogism (1) Congress has exclusive authority over the District, its representation and its taxes, (2) the issues are therefore political, to be addressed to Congress and not to the courts, (3) this court therefore has no jurisdiction. Such a syllogism might run into Wesberry v. Saunders, supra, 376 U.S. at 7, "the right to vote [substitute, "representation in the taxing authority"] is too important in our free society to be stripped of judicial protection by such an interpretation of Article I." Nor does respondent discuss the merits of petitioner's thesis, but contends that because of the "many decisions reciting the authority of the Congress to enact taxing legislation for the District of Columbia", the assessment of taxes against petitioner "is not subject to attack on any constitutional ground." (Br. 4.)

Conclusion and discussion. As stated at the oral argument, this Court is obliged to decide this case for respondent on the basis of the authorities which petitioner claim are "clearly erroneous" and "should be overruled". (Br. 14, 15.) Loughborough v. Blake, 5 Wheat. 317, 5 L.Ed. 98 (1820); Heald v. District of Columbia, 259 U.S. 114 (1922). Petitioner's attorneys, on argument, recognized that the issue is one for the higher courts, on appeal from this decision. But a short discussion of the cases and petitioner's theory is in order, to serve as a point of departure for such appeal.

In Loughborough, Chief Justice Marshall considered the constitutional provision, supra note 3, giving Congress the power, as he phrased it, of "exclusive legislation in all cases whatsoever within this district," in the light of the contention there made (5 Wheat. at 324) --

> that they [these terms] must be limited by that great principle which was asserted in our revolution -- that representation is inseparable from taxation.

According to Chief Justice Marshall this principle applies to the situation in which "a continent, with an immense population" is taxed "by a government having no common interest with it, separated from it by a vast ocean, * * * associated with it by no common feelings * * *." It does not apply to the American Territories "in a state of infancy advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained." Nor does the principle apply to the District of Columbia, "which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government * * *." (5 Wheat. at 324.) In extending his consideration of the District's situation, Chief Justice Marshall said (5 Wheat. at 324 - 325)--

> Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the district, it may be doubted whether, in fact, its interests would be rendered thereby the more secure; and certainly the constitution does not consider their want of a representative in Congress as exempting it from equal taxation.

Whence the third headnote to this famous opinion, presumably by Counsellor at Law Wheaton: "The power of Congress to exercise exclusive jurisdiction of all cases whatsoever within the District of Columbia, includes the power of taxing it."

The idea that the people of the District of Columbia have "voluntarily relinquished" their right to representation in Congress has recurred in several decisions, most recently in Hobson v. Tobriner, 255 F.Supp. 295, 300, pet. for mandamus denied Sept. 29, 1966, CADC, cert. denied 386 U.S. 914 (1967) --

> By choosing to live within the District of Columbia, all citizens, regardless of race, relinquish the right to vote in local elections. * * * their influence on the form of government which exercises jurisdiction over them is limited to the right to vote for the President.

In the context of 1969, rather than 1820, the question occurs: how many citizens have chosen to live in D. C. rather than in, e.g., the Sumner, Kenwood or Belle Haven suburbs, and have "adopted the whole body of Congress", rather than their own representatives, as their legitimate government? Such a question realistically pertains to a consideration of the merits of petitioner's thesis.

In the Heald case, it was "earnestly contended that the act [levying an intangible property tax] is void, because it subjects the residents of the District to taxation without representation."[4]

Mr. Justice Brandeis dealt with the contention summarily (259 U.S. at 124) —

> There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation. And the cases are many in which laws levying taxes for the support of the government of the District have been enforced during the period in which its residents have been without the right of suffrage.

In a footnote, Justice Brandeis cites several cases, none of which take up or discuss the rule, or the reason for the rule.

Nonetheless, the rule is clear and definitely applicable to the case at bar: Congress, where they are not represented, may tax citizens of the District. The "seat of the Nation's government" aspect of the whole situation of the District has often been used to justify its unfavored status vis-a-vis the States. See the language in O'Donaghue v. U. S., 289 U.S. 516, at 538 - 539, and Grether v. Wright, 75 Fed. 742, 757 (opinion by Judge, later Chief Justice Taft). But of course the District, in 1969, is partly what the tourists see -- "the seat of the

---

4/ Note that Mr. Vernon E. West, later the long-time Corporation Counsel of the District of Columbia, appeared for plaintiff in error making this contention.

Nation's government" -- 1 mostly the surrounding met. olis.

Again, the reason for the rule may be avoided by calling the issue political, rather than judicial, thus for Congress, not for the courts. See Hobson, supra, 255 F.Supp. at 299 - 300, citing Ohio v. Akron Park District, 281 U.S. 74, 78. However, the Supreme Court has not used this approach in recent cases, e.g. Powell v. McCormack, decided June 16, 1969, and Walz v. Tax Commission of the City of New York, probable jurisdiction noted in Supreme Court Docket No. 1415, June 16, 1969. There are limits to the plenary power of Congress over the District citizens, although they include "only those rights of citizens which flow from the Constitution to all citizens." 255 F.Supp. at 299.

It may well be that the "great principle which was asserted in our revolution", supra, simply does not inhere in the implications of our Constitution. It may be that we are really dealing with a slogan -- which has been a rallying cry for the use of force in all the precedents cited by petitioner back to and including the Magna Charta -- rather than with fundamental rights of citizens of the District. Another case might be presented if District citizens were taxed at burdensome rates much higher than the rates paid by citizens of, say, Virginia and Maryland. No such claim is made here.

The real purpose of this petition is to obtain some sort of leverage over Congress, by which suffrage for the District can be pried out. The direct effort has failed. Carliner v. Board of Com'rs, 265 F.Supp. 736 (DCDC), affirmed, CADC No. 21,786, June 24, 1969. On the authorities, the present effort must also fail.

Decision will be entered for respondent.

Robert M. Weston
Judge