Opinion No. 1110

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

TAX DIVISION

SAMUEL F.H. and K.J. SMITH LAWRENCE A. and GRACE ANN MONACO, Petitioners	:	
v.	:	Tax Docket No. 2249
DISTRICT OF COLUMBIA, WALTER E. WASHINGTON, KENNETH BACK, Respondents	:	

FILED

JUN 27 1974

Superior Court of the
District of Columbia
Tax Division

MEMORANDUM OPINION

This matter comes before the Court on respondents' motion to dismiss a taxpayer action to enjoin a reduction of the commercial property tax assessment level and to require assessment of commercial property at 65% in fiscal year 1974.

Contentions of the Parties

Petitioners are District of Columbia taxpayers, exclusive of taxpayers owning commercial property. They allege that on January 18, 1974, after rule-making proceedings, the level of tax assessment (debasement factor) for commercial property was reduced from 65% to 55%. It is their contention that this rule making was invalid because the question of whether 47 D.C. Code § 713 permits more than one level of tax assessment for real estate owners in the District of Columbia was not an issue in the rule making and had been foreclosed or prejudged. They allege:

a. On October 19, 1973, the Corporation Counsel signed a stipulation in Calvin-Humphrey Corp., et al. v. District of Columbia, et al., Tax Docket No. 2221, that:

> Respondents will take all necessary steps in accordance with the District of Columbia Administrative Procedure Act, 1 D.C. Code § 1501, et seq. (1973 ed.) to set a single level of assessment for fiscal years commencing 1974.

Petitioners in Calvin-Humphrey were commercial property owners and respondents included Mr. Kenneth Back, Director of Department of Finance and Revenue, who had the decision making authority in the January 18, 1974 rule making.

b. On November 8, 1973 or December 6, 1973, the Corporation Counsel issued an opinion to Mr. Back in his capacity as Director of the Department of Finance and Revenue setting forth that under 47 D.C. Code § 713, all real estate in the District of Columbia must be assessed at the same level.

c. Respondent Back and the Mayor-Commissioner publicly stated that the single level of assessment as announced in the rule of January 18, 1974 was compelled by the Corporation Counsel's opinion.

d. Respondent Back was legally bound by the Corporation Counsel's opinion under Reorg. Order 50, Part IIA(a), D.C. Code p. 180 (1973 ed.).

Respondents, who are the District of Columbia, the Mayor-Commissioner and the Director of the Department of Finance and Revenue, contend that the opinion of the Corporation Counsel with regard to 47 D.C. Code § 713 is not rule making. They assert that neither the opinion of the Corporation Counsel nor the stipulation in Calvin-Humphrey foreclosed consideration of any relevant issues in the January 18, 1974 rule making. They further assert that the anti-injunction statute, 47 D.C. Code § 2410, bars this action as does certain prior litigation and petitioners' failure to comply with the civil class action rule.

Issues

These pleadings present a number of difficult issues. There are serious questions of administrative law and taxation including the meaning of the rule making provisions of the District of Columbia Administrative Procedure Act, the standing of taxpayers to sue, with or without certification as a class action, and the applicability of the anti-injunction statute.

The dispositive issues, however, revolve around the meaning of 47 D.C. Code § 713. More precisely, must a rule making proceeding be held to determine whether 47 D.C. Code § 713 permits more than one level of tax assessment on real estate in the District of Columbia? Further, can petitioners avoid the bar of the anti-injunction statute by a showing that respondents have no chance of success on their contentions with regard to the meaning of 47 D.C. Code § 713 and the applicability of the rule making provisions of the District of Columbia Administrative Procedure Act?

Summary of Conclusions

For reasons discussed in the next section, the Court concludes that petitioners' action should be dismissed.[1/]

First, petitioners fail to state a claim upon which relief can be granted.

a. As a matter of law, 47 D.C. Code § 713 requires a single level of tax assessment on all real estate in the District of Columbia.

1/ In reaching this conclusion, the Court also concluded that petitioners have standing to sue as taxpayers without certification as a class action under SCR-Civ. 23 and that the action is not barred by prior litigation.

As to standing, petitioners bring this action as taxpayers and/or as representatives of a class of taxpayers which excludes only the commercial property owners. As individual taxpayers, petitioners' claim would not give them standing, but there is an allegation of injury to the taxpayers and damage to the public interest. These taxpayers allege equitable claims in the nature of a class action seeking to prevent diminution of revenue and increase in taxes. Joinder of all similarly situated taxpayers who are not commercial property owners would be impracticable. Further, they allege common questions of law and fact relating to the rule-making proceedings which reduced the level of assessment for commercial property owners. In addition, the respondents are alleged to have acted on grounds which affect all similarly situated persons thereby making appropriate the type of injunctive or declaratory relief which affects a whole class. On these allegations, they have standing. 18 E. McQuillen, Municipal Corporations § 52.20 (3d ed. rev. 1963).

With regard to certification, petitioners' action is not one which requires certification of a class and notice to its members. Superior Court elected to adopt separate rules for civil actions and for tax actions. The rules for tax actions do not provide for certification of a class and do not either adopt or incorporate by reference the civil rules for classes. Green, et al. v. District of Columbia, et al., Tax Docket No. 2212, 101 DWLR 1737 (July 17, 1973), aff'd., 301 A.2d 848 (1973). Further, even if this is deemed to be a class action to which civil rules would apply, the class comes under part (b)(2) and does not require the same precise definition of class and the same notice as do class actions under part (b)(3).

As to prior litigation, taxpayers similar to petitioners sought to enjoin the rule making which is now being litigated. Green, et al. v. District of Columbia, et al., Tax Docket No. 2222. At the time of that action, the Corporation Counsel had not issued the opinion which is key to this case and dismissal was not based on any issues which are dispositive of this case.

In Green, et al. v. District of Columbia, et al., DCCA No. 8131, taxpayers sought judicial review of the Corporation Counsel's opinion under the District of Columbia Administrative Procedure Act in the District of Columbia Court of Appeals. That action was dismissed per curiam.

b. The rule making procedures of the District of Columbia Administrative Procedure Act do not apply to a determination that 47 D.C. Code § 713 requires a single level of tax assessment.

c. If rule making does not apply to this issue, the alleged actions of the Corporation Counsel and respondents are irrelevant and do not deprive petitioner of any rights they might have to be heard under the District of Columbia APA or the due process clause of the Constitution with regard to single versus multiple levels of taxation.

d. The rule making of January 18, 1974 was properly limited to determining "a uniform debasement factor for all real property for years commencing January 1, 1974" and receiving "comments and views on whether legislative changes should be sought to provide for different debasement factors for residential and non-residential properties."

Second, petitioners' action is barred by the anti-injunction statute, 47 D.C. Code § 2410.

a. Petitioners failed to meet the double burden of showing that under no circumstances could the Government ultimately prevail and that equity jurisdiction otherwise exists.

b. The "merits" of this case are essentially questions of law and petitioners have not shown that respondents have "no chance of success on the merits".

Discussion

The Court, as it must, assumes the truth of the facts alleged in the complaint. These facts, however, do not state a cause of action. Further, assuming the truth of these facts, petitioners do not bring themselves within the exceptions to the anti-injunction statute.

1. As a matter of law, 47 D.C. Code § 713 requires a single level of tax assessment on all real estate in the District of Columbia.

Title 47 D.C. Code § 713 provides:

> All real estate in the District of Columbia subject to taxation . . . shall be listed and assessed at not less than the full and true value thereof in lawful money.

The language of Section 713 is not ambiguous. It applies to "<u>all</u> real estate". It sets forth "full and true value" as <u>the</u> level of assessment.

Further, there is no provision in any other section of the District of Columbia Code which authorizes a subdivision of real estate in the District of Columbia into such classes as "residential" property

and "commercial" property for tax purposes. Neither is there any section of the Code which authorizes different percentages of "full and true value" for different classes of real estate owners.

In view of this Court, it seems unnecessary to probe further into the meaning of Section 713. However, in light of the past practice of assessing residential property at 55% and commercial property at 65% and in the absence of District of Columbia case law, the Court examined decisions from the United States Supreme Court and from the various state supreme courts.

Decisions from other courts compel the conclusion that the language of Section 713 and the absence of any authorization for classification of property requires a single level of tax assessment. Briefly stated:

a. If a state provides for reasonable classification of taxpayers and treats all taxpayers within a class uniformly, multiple levels of assessment do not violate the Fourteenth Amendment. E.g., The Kentucky Railroad Cases, 115 U.S. 321, 336-337 (1885) and Nashville, Chattanooga & St. Louis RR v. Browning, 310 U.S. 363, 368-369 (1939).

b. If a state sets a level of taxation at "full value", "actual value", "cash value" or other similar terms and does not create classifications of taxpayers, the quoted words require, under the Fourteenth Amendment, a single level of tax assessment albeit a single percentage of full value or cash value. E.g., Sioux City Bridge Co. v. Dakota Territory, 260 U.S. 441 (1923); Southern Pacific Co. v. Cochise County, 92 Ariz. 395, 377 P.2d 770 (1963); State v. Board of Tax Appeals, 175 Ohio St. 410, 195 N.E.2d 908 (1964); Dulton Realty Inc. v. State, 132 N.W.2d 396 (Minn. 1964).

The Sioux City Bridge case, supra, presents a situation quite similar to the case at bar. Therein the Nebraska State Constitution and its state statute were silent with regard to classification of taxpayers or property. The State statute, however, did provide that:

> All property in this state not expressly exempt therefrom shall be subject to tax and shall be valued at its actual value . . .

The Supreme Court concluded that there was an apparent violation of the Fourteenth Amendment when it appeared that the Bridge Company property had been assessed at 100% of actual value and that other property had been assessed at about 55% of actual value. However, the cause was remanded to the state court to determine if the action was an error of judgment or discrimination.

The Arizona case law is also instructive. The Arizona Constitution allowed classification of taxpayers but a state enactment provided:

> All taxable property shall be assessed at its full cash value.

There was also a practice of assessing the railroads at a higher percentage of cash value than other property.

In Southern Railroad, supra, the Arizona Supreme Court held that the past practice was unlawful and that the language of the statute was "unambiguous" in requiring a single level of tax assessment. The court also held that only the state legislature could establish classification because the delegation of such broad legislative power would be unconstitutional. The court concluded at 377 P.2d 776:

> . . . Hence, unless and until the legislature exercises its authority and establishes the classifications of property which permit an assessment at different percentages of full cash value, the courts have no alternative other than to prohibit officials from assessing appellant's property at different percentages of full cash value from other properties.

In summary, if a legislature specifies assessment for all property at "full value", as it did in the District of Columbia, it compels a single level of assessment. Under such language, anything other than a single level of assessment is a violation of equal protection. Further, absent specific guidelines, only the legislature can provide for more than one tax classification.

2. The rule making provisions of the District of Columbia Administrative Procedure Act do not apply to a determination that 47 D.C. Code § 713 requires a single level of tax assessment.

The District of Columbia Administrative Procedure Act includes within its rule making provisions statements designed to interpret law. The pertinent parts provide:

> (6) the term "rule" means the whole or any part of any Commissioner's, Council's or agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of the Commissioners, Council or of any agency.
>
> (7) the term "rule making" means any Commissioner's, Council's, or agency process for formulation, amendment, or repeal of a rule.

The rule making process includes notice of the proposed rule and opportunity to be heard on it. 1 D.C. Code § 1502(6) and (7) and § 1505 (1973 ed.).

Neither the legislative history of the District of Columbia Administrative Procedure Act nor the case law gives a clear definition of what is included in "statements designed to interpret law". However, this Court concludes that the processes of rule making cannot and should not apply to situations where the statutory language and/or case law is clear. It is a futile act to ask for views on matters which, as a matter of law, are foreclosed.

F. E. Cooper, a leading commentator on state administrative procedure acts, appears to conclude that interpretive rule making is designed to cover (1) interpretations of doubtful and ambiguous statutory language and (2) delegations of discretionary powers. In commenting on interpretive rules, he says:

> Some interpretive rules serve much the same purpose as opinions of general counsel for the agency (and, indeed, are frequently written by him). They state the interpretation of ambiguous or doubtful statutory language which will be followed by the agency unless and until the statute is otherwise authoritatively interpreted by the courts.
>
> Other interpretive rules describe the general discretionary policies to be followed by the agency. For example, an agency given broad discretionary powers . . .

1 F.Cooper, State Administrative Law 175 (1965).

Another authority on administrative law concludes that there are 18 examples of administrative action to which the notice and hearing requirements of rule making should not apply. Kenneth C. Davis includes among his 18 examples two which are particularly applicable to the case at bar. Rule making procedures should not apply where:

> —a rule is amended to conform it to a holding of a court on a question of statutory or constitutional power.
>
> —the Attorney General issues a formal opinion that a rule must be altered in a particular way to render it legal under a statute.

1 K.Davis, Administrative Law Treatise § 6.04 at 373, 374 (1958).

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FILED

JUN 27 1974

Superior Court of the
District of Columbia
Tax Division

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

For the reasons set forth in the memorandum opinion filed herein on June 27, 1974, it is by the Court, this 27th day of June, 1974,

ORDERED that respondents' motion to dismiss, be and the same, hereby is granted, and it is

FURTHER ORDERED that petitioners' motion for preliminary injunction, be and the same, hereby is denied as moot, and it is

FURTHER ORDERED that petitioners' oral motion for stay pending appeal, be and the same, hereby is denied.

Sylvia Bacon

SYLVIA BACON
ASSOCIATE JUDGE
D.C. SUPERIOR COURT

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Granting Respondents' Motion to Dismiss were handed to Gilbert Hahn, Jr., Esq., and mailed to Richard L. Aguglia, Esq., Assistant Corporation Counsel, Washington, D. C., this 27th day of June, 1974,

Guy F. Harris Jr.

DEPUTY CLERK

Herein the Corporation Counsel was dealing with a statute which is clear and unambiguous and one which did not delegate discretionary authority to create classes of taxpayers. Further, his opinion to the Director of the Department of Finance and Revenue was like an attorney general's opinion. It concluded that a long standing practice of multiple assessments had to be modified to render it legal under the statute and to conform it to court decisions and the Constitution. Finally, his stipulation in Calvin-Humphrey was a commitment to conform his position to the law.

This is not to suggest that all opinions or actions of the Corporation Counsel are exempt from the rule making provisions of the District of Columbia Administrative Procedure Act. Rather, the Court makes a distinction between matters of law and matters appropriate to the administrative process.[2/]

In sum, the question on which petitioners seek rule making is not a proper subject for rule making. Therefore, as a matter of law, they were not deprived of Due Process or rights under the District of Columbia Administrative Procedure Act by the rule making of January 18, 1974.

3. Petitioners' action is barred by the anti-injunction statute 47 D.C. Code § 2410.

The anti-injunction statute, 47 D.C. Code § 2410 provides:

> No suit shall be filed to enjoin the assessment or collection by the District of Columbia, or any of its officers, agents or employees of any tax.

Despite the literal wording of the statute, courts have recognized exceptions. The circumstances in which an exception can be made are most succinctly outlined by the Supreme Court in Enochs v. Williams-Packing & Navigation Co., 370 U.S. 1 (1962). In that case, the Court construed the Federal anti-injunction statute which is similar to the District of Columbia statute and concluded that an exception could be made only if:

a. it is clear that under no circumstances can the government ultimately prevail, and

b. equity jurisdiction otherwise exists.

In the more recent case of Bob Jones University v. Simon, 42 U.S.L.W. 4721, 4727 (May 14, 1974), the Supreme Court reviewed both the Williams-Packing

case and another anti-injunction case, Miller v. Standard Nut Margarine Co., 284 U.S. 498 (1932). The Court concluded that after Williams-Packing, Standard Nut must be read "not as an instance of irreparable injury but as a case where the Service had no chance of success on the merits".

Thus, in order to determine the applicability of the anti-injunction statute, the Court had to consider matters relating to the merits. In doing so, however, it was not necessary to hold an evidentiary hearing. The issues on the merits were issues of law, not of fact as in Shapiro v. Secretary of State, #73-2260 (D.C. Cir. May 15, 1974), Slip Op. at 15.

For the reasons set forth in items 1 and 2 of this discussion, petitioners are not able to discharge their burden of showing that respondents have no chance of success on the merits. Respondents do have a chance of success on the merits. At the very least, it is respectably arguable that rule making should not apply to a determination that 47 D.C. Code § 713 requires a single level of tax assessment.

In these circumstances, despite allegations of irreparable harm or inadequacy of remedy at law, petitioners are barred by the anti-injunction statute. The fact that they might win their case is not enough to halt the taxing process. Trent v. United States, 442 F.2d 405 (6th Cir. 1971); Botta v. Scanlon, 314 F.2d 392 (2d Cir. 1963).

An order granting respondents' motion to dismiss and denying petitioners' motion for preliminary injunction as moot shall be entered.

June 27, 1974
DATE

Sylvia Bacon
SYLVIA BACON
ASSOCIATE JUDGE
D.C. SUPERIOR COURT

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Memorandum Opinion were handed to ~~a messenger of~~ Gilbert Hahn, Jr., Esq. and mailed to Richard L. Aguglia, Esq., Assistant Corporation Counsel, this _____ day of June, 1974.