

*Opinion*  
*No. 1137*

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

TAX DIVISION

JOSEPH M. CURTON  
CLERK OF  
SUPERIOR COURT OF THE  
DISTRICT OF COLUMBIA  
TAX DIVISION

JACK MARKS and MARIAN MARKS

JEROME MARKOWITZ and  
SHIRLEY MARKOWITZ,

Petitioners

v.

DISTRICT OF COLUMBIA,

Respondent

DEC 3 1976

FILED

Docket No. 2405

MEMORANDUM OPINION

This matter comes before the Court on respondent's Motion to Dismiss petitioners' complaint seeking injunctive relief and abatement of a lien on realty, i.e., Lot 872 in Square 407, premises formerly known as 1120 - 8th Street, N.W.<sup>1/</sup> This suit arises out of the assessment "as a tax" of the costs incurred by the District of Columbia in causing the demolition and removal of petitioners' building, after proper notice of the order of condemnation, and the threatened advertisement and sale of the realty on which such building was situated, pursuant to D. C. Code 1973, §5-622. For purposes of the motion, the factual allegations set forth in petitioners' pleadings and affidavit will be deemed admitted and true. For reasons which will be discussed herein, the Court finds that it lacks jurisdiction to hear and determine the subject matter of the complaint.

The relevant facts, as derived from the pleadings, affidavits, testimony at the hearing and oral argument, can be briefly summarized. The building in question had been substantially destroyed in the 1968 riots. Thereafter,

<sup>1/</sup> The complaint was originally filed in the Civil Division, but another Judge of this Court determined that the Civil Division is without jurisdiction and certified the case to the Tax Division.

petitioners on August 3, 1970, were ordered to show cause why the building should not be condemned by the Board for the Condemnation of Insanitary Buildings (Board) in accordance with D.C. Code 1973, §5-618. After receiving no response from petitioners, the Board issued an order condemning the building in the latter part of September, 1970, and notified the petitioners in writing on October 2, 1970, of the condemnation, allowing them six months within which to either repair the discovered deficiencies or to have the building demolished. See, D.C. Code, §§5-618, 5-620. On April 3, 1973, petitioners were notified in writing that the period of time allotted them for repair or demolition of the building had elapsed and that the Board would proceed to repair or demolish it pursuant to D.C. Code, §5-622. The Board also informed the petitioners that the cost of repair or demolition and the cost of advertising or publication of the property would be "assessed by the Commissioner as a tax against the premises on which such building \* \* \* was situated." D.C. Code, §5-622.

Between April and November of 1973, there was an exchange of written correspondence between the Board and petitioners concerning the procurement of a contractor to demolish the building through the submission of bids and as to the appropriate cost involved. The initial bidding was opened on September 13, 1973, and the lowest bid submitted was for \$9,500.00. Petitioners were notified of the bid by letter dated October 4, 1973, from the Board (Petitioners' Exh. 3). The petitioners then by letter dated October 9, 1973, requested a short extension of time within which to negotiate their own bids (Government's Exh. 2). The Board acquiesced by letter dated October 25, 1973, and requested

that petitioners notify the Board when they obtained their own contractors so that it could withdraw the contractors from whom it had received bids (Petitioners Exh. 1). The earlier bid of \$9,500.00 was rejected by the Board as being too high. New bids were then sought by the Board and on November 19, 1973, bidding opened. The lowest bid at that time was in the amount of \$2,185.00. The petitioners were advised of the results of the bidding by telephone on that same date (Government's Exh. 3).

According to the affidavit of petitioner Jerome Markowitz, he advised the Board on or about November 19, 1973, that petitioners had obtained a bid to have the work done at a cost of \$2,850.00. Petitioners, however, did not accept this bid allegedly in the expectation that the Board would have the work done at their lower bid. Unfortunately, the Board's lowest bid of \$2,185.00 was withdrawn on December 3, 1973, and the Board ultimately had the building demolished on May 10, 1974, at a cost of \$5,000.00, the next lowest bid. On June 4, 1974, petitioners were notified of the assessment of the costs incurred by the Board for the demolition and removal of the building as a tax against their property. Petitioners did file an official notice of protest on August 2, 1974, contesting the amount and levy of the tax.<sup>2/</sup> The District then notified petitioners on or about August 31, 1976, of its intention to publicly advertise the property in December, 1976, among other parcels of realty being advertised for sale for the collection of delinquent real estate taxes and to sell the property in January, 1977, for the delinquent taxes pursuant to D. C. Code, §5-622.

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<sup>2/</sup> We note that the condemnation statute in question here, D. C. Code, §5-610 et seq., does not provide any such administrative review.

Congress has given the Tax Division of this Court exclusive jurisdiction "to review the validity and amount of assessments of tax made by the District of Columbia," under D. C. Code 1973, §11-1202. However, D. C. Code 1973, §47-2410 provides that:

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.

On the federal level, the Anti-Injunction Act, 26 U.S.C. §7421(a) (1973), similarly prohibits suits for the purpose of restraining the assessment or collection of any tax. Since Congress enacted both statutes, it is appropriate to look to the judicial decisions interpreting the federal statute in order to determine the relevant standards to be applied with respect to §47-2410.

The Supreme Court recently in Bob Jones University v. Simon, 416 U.S. 725 (1974), and Alexander v. "Americans United," 416 U.S. 752 (1974), reaffirmed its prior interpretation of the federal Anti-Injunction Act and the requirements necessary to avoid its application. The Court held that its earlier decision in Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962), governed the cases and thus the Anti-Injunction Act barred the suits. 416 U.S. at 748; 416 U.S. at 758.

In Williams Packing the Court held that an injunction against the assessment or collection of taxes may be granted only if (1) "it is clear that under no circumstances could the Government ultimately prevail," and (2) "equity jurisdiction otherwise exists." 370 U.S. at 7.

A review of the judicial treatment of the federal Anti-Injunction Act throughout its existence reveals that the Supreme Court has permitted few departures from the literal reading of the Act and these, although corrected soon thereafter, were thought

to be justified due to certain extraordinary and exceptional circumstances. Bob Jones, 416 U.S. at 743 (citations omitted). Following the Court's decision in Miller v. Standard Nut Margarine Co., 284 U.S. 498 (1932), the concept of extraordinary and exceptional circumstances, as interpreted in Standard Nut, was believed to be reduced to the traditional equitable requirements for the issuance of an injunction. Bob Jones, 416 U.S. at 744. See, Allen v. Regents of the University System of Georgia, 304 U.S. 439 (1938). Thus, courts interpreted Standard Nut to hold that §7421(a) did not bar a suit for injunction against the collection of taxes not believed to be due if the legal remedy was inadequate. Williams Packing, 370 U.S. at 6 (citations omitted).

In Bob Jones the Court conceded that "[r]ead literally, the Court's opinion [in Standard Nut] effectively repealed the Act since the Act was viewed as requiring nothing more than equity doctrine had demanded before the Act's passage." 416 U.S. at 744. It also recognized, however, that Williams Packing "switched the focus of the extraordinary and exceptional circumstances test from a showing of the degree of harm to the plaintiff absent an injunction to the requirement that it be established that the [Government's] action is plainly without a legal basis." Id., at 745. The Court in Bob Jones pointed out that, in the Williams Packing decision, the situation presented in the Standard Nut case was viewed not as a case involving irreparable injury but as one in which the Government had no chance of success on the merits. Id. See, Williams Packing, 370 U.S. at 5-6.

We are left after Bob Jones, then, with a better understanding of what need be established by petitioners in order to carry the heavy burden of showing that §7421(a), and by analogy D. C. Code §47-2410, is inapplicable. It is clear that, although

equity jurisdiction must otherwise exist, Williams Packing, supra, the availability of the injunctive relief against the collection of taxes does not depend upon the adequacy of a remedy at law alone. Nor can such a suit be maintained "merely because the collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise." Williams Packing, 370 U.S. at 6. The inadequacy of the legal remedy need be established, however, as part of the necessary showing for equitable jurisdiction, for the taxpayer to ultimately demonstrate that an injunction must be issued. Id. (citations omitted).

The other prong of the two-part test enunciated in Williams Packing, that is, whether the taxpayer can demonstrate that "under no circumstances could the Government ultimately prevail," was again reviewed by the Court at the last term. See, C.I.R. v. Shapiro, 424 U.S. 614, 96 S. Ct. 1062 (1976). In Williams Packing, 370 U.S. at 7, the Court had ruled that whether or not the Government may ultimately prevail is to be determined on the basis of information available to it at the time of the suit. The Court further held "[o]nly if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." Id. In Shapiro, the Court held that the Anti-Injunction Act did not require the dismissal of the taxpayer's complaint where the taxpayer had no opportunity to inquire into the factual basis for the jeopardy assessment by the Government and thus support his claim that the Government had no chance of ultimately prevailing on the merits. 424 U.S. at \_\_\_, 96 S. Ct. at 1073. The Court further held that the submission of affidavits disclosing basic facts from which it would appear that the Government may prevail could be sufficient to provide the taxpayer with knowledge of the basis for the assessment. Id. at 1071, 1074.

Having reviewed the standards which petitioners must satisfy, this Court finds, initially, that the complaint here seeking an injunction against the advertisement and sale of petitioners' property at a tax sale and abatement of a lien on the realty is a suit to enjoin the assessment or collection of a tax in contravention of D. C. Code, §47-2410. See, District of Columbia v. Berenter, 151 U.S. App. D.C. 196, 204, 466 F. 2d 367 (1972). See also, Bob Jones, 416 U.S. at 738. We are of the opinion that this is such a suit, even though the underlying controversy involves a debt arising from demolition costs which are "assessed \* \* \* as a tax" against the realty. D. C. Code 1973, §5-622. Cf. D. C. Code 1973, §47-1586h which provides that every income and franchise tax imposed by that subchapter shall become a personal debt.

Petitioners contend that the District's assessment in question against their realty was not for the purpose of the raising and collection of revenue, but rather for the purpose of enforcing the statutory regulations governing condemnation actions. It is true that the condemnation statute, D. C. Code, §5-616 et seq., cannot be considered a general revenue raising statute. However, when the Board pursuant to that statute determines it necessary to expend District funds to demolish and remove a condemned structure, it is, in turn, collecting revenues lawfully due it when it seeks reimbursement of these costs assessed as a tax against the realty upon which the premises were situated. D. C. Code, §5-622. In another sense the District is protecting the revenue by levying such an assessment. Section 2410 is therefore applicable to ensure that the District will collect the tax with a minimum of pre-enforcement interference by the courts. See, Bob Jones, 416 U.S. at 736, 740. The distinction between revenue raising and regulatory taxes has lost much of its

significance since all tax measures can be viewed in one sense as being regulatory. Sonzinsky v. United States, 300 U.S. 506, 513 (1937); See, Bob Jones, 416 U.S. at 741 n. 12. The situations in which the Supreme Court has permitted preenforcement injunctive suits against tax statutes that were viewed as penalties or as adjuncts to the criminal law are considered very narrow in scope and have no application to preenforcement challenges to tax statutes truly involving the protection or collection of revenue. Bob Jones, 416 U.S. at 743 (citations omitted). The fact that §5-622 provides for criminal prosecution if, within the time specified by the Board in the order of condemnation, the owners have not caused the building in question to be put into sanitary condition or to be demolished and removed, does not render the statute any less a revenue-collecting or revenue-protecting one. See e.g., D. C. Code 1973, §47-1589(e).

Applying the principles set forth in Williams Packing and reaffirmed in Bob Jones and "Americans United" to the present case, this Court finds that petitioners have not met the two-pronged test necessary to render the prohibition of §47-2410 inapplicable. First of all, petitioners have not shown that, based upon the record before the Court, under no circumstances can the District of Columbia prevail. Put in other terms, petitioners have not shown, to the satisfaction of this Court, that even under the most liberal view of the law and the facts, the District of Columbia cannot establish its claim.<sup>3/</sup> The case

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<sup>3/</sup> The evidence submitted at oral argument, some of which has already been referred to, clearly shows that whatever in fact occurred in the correspondence and understanding between the petitioners and the Board to cause the ultimate misunderstanding, would have to be resolved by a trier of fact. Counsel for petitioners conceded at oral argument that if §47-2410 applied, as we have held, petitioners could not meet this prong of the Williams Packing test.

before the Court is certainly not indicative of an instance in which the assessment of the tax could under no legal theory have been assessed against the petitioners. Standard Nut, 284 U.S. at 510; Bob Jones, 416 U.S. at 745.<sup>4/</sup> Nor is the present case a situation in which the assessment is void. See, e.g., District of Columbia v. Green, 310 A. 2d 848, 850, 857 (D.C. App. 1973). The cases petitioners cite in support of their contention that under no circumstances could the District ultimately prevail are clearly distinguishable. In Anderson v. Richardson, 354 F. Supp. 363, 366 (S.D. Fl. 1973), the Government admitted that the jeopardy assessment upon which it relied for the liens and attachments could not ultimately succeed. Pizzarello v. United States, 408 F. 2d 579, 582 (2d Cir. 1970), held that the jeopardy assessment was invalid because it was based in substantial part, if not completely, on illegally seized evidence.

Petitioners argue, relying on Shapiro, supra, that the present motion is premature since the District has not disclosed the facts underlying its assessment of the tax. However, contrary to the situation in Shapiro where the taxpayer had no knowledge whatsoever of the basis for the alleged income tax deficiencies resulting in the jeopardy assessment and liens filed against him, petitioners here are fully aware of the basis for the assessment of tax against their realty. Moreover, they do not contend that their lack of knowledge of the basis for the assessment impedes their ability to adequately ascertain whether the District could not ultimately prevail under any circumstances. The present case is thus distinguishable from Shapiro in that the Court there was concerned with a construction of the Anti-Injunction Act which

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<sup>4/</sup> Petitioners concede that they owe the District, at a minimum, the reasonable value of the costs of the demolition and removal of the building.

would permit the Government to seize and hold property on mere good faith allegations of an unpaid tax where the jeopardy assessment might cause irreparable injury. That is certainly far from the situation we are faced with here. C.I.R. v. Shapiro, 96 S. Ct. at 1072. Moreover, a further distinction is that this Court had the opportunity at the hearing to be more fully advised of the circumstances surrounding the assessment through the testimony of Joseph Cacciatore, Acting Chief of the Board.

While our finding on this point, standing alone, would preclude petitioners from maintaining their suit for injunctive relief, see "Americans United," 416 U.S. at 758, and Pizzarello v. United States, 408 F. 2d at 582, and thus make it unnecessary for the Court to determine whether equity jurisdiction otherwise exists, that is, whether petitioners would be able to show that they do not have an adequate remedy at law and whether they could demonstrate an irreparable injury as a result of the denial of injunctive relief, "Americans United," 416 U.S. at 762, Wieck v. Sterenbuch, 350 A. 2d 384, 387 (1976), the novelty of the issue as to the availability, at all, of a judicial forum in which to contest the demolition costs assessed as tax, warrants further discussion reflecting this Court's views. A similar concern was also expressed by the Supreme Court in Bob Jones, where it stated that if the aggrieved party had no access at all to judicial review, the conclusion it reached might well have been different. 416 U.S. at 746.

The District of Columbia contends that the tax in question, assessed against the premises upon which the condemned building was situated, was in essence a real estate tax. Under its

theory,<sup>5/</sup> therefore, petitioner had a certain period of time, i.e., six months after October 1st of the year the assessment was made (before April 1, 1975) to appeal to the Superior Court pursuant to D. C. Code, §§47-709, 47-2403 and 47-2405,<sup>6/</sup> provided the assessment had been paid. The District further argues that, because the avenue for judicial review available to petitioners earlier was never utilized by them due to their own inaction, equity should not intervene now because no remedy at law exists, citing Adelman v. Onischuk, 135 N.W. 2d 670, 678 (Minn. 1965).

The Court is of the opinion that, if the absence of a remedy at law at this time is due solely to petitioners' failure to timely pursue a remedy previously available, equity jurisdiction should not intervene and the suit should be dismissed. C.I.R. v. Shapiro, 424 U.S. at \_\_\_\_, 96 S. Ct. at 1074 n. 15; District of Columbia v. Berenter, 151 U.S. App. D.C. 196, 205, 466 F. 2d 367 (1972). However, we cannot agree with the District's position that the provisions applicable to the appeal of any real estate tax assessment, equalization, or valuation, §§47-709, 47-2403 and 47-2405, applied to the "assessment" in this case because we do not believe that the tax here was truly a real estate tax. Section 47-2405 of the D. C. Code provides in part that:

Any person aggrieved by any assessment, equalization, or valuation made pursuant to sections 47-708 and 47-709, may \* \* \* appeal from such assessment \* \* \* in the same manner and to the same extent as provided in sections 47-2403 and 47-2404: Provided, \* \* \* such person shall have first made his complaint to the Board of Equalization and Review \* \* \*.

\* \* \*

5/ The District in its memorandum in support of its motion to dismiss the original complaint in the Civil Division, stated that it would be useless to transfer the case to the Tax Division since the suit there would be untimely. This argument was renewed at the hearing in the present motion to dismiss.

6/ Section 47-709 and, by implication, the first paragraph of §47-2405 were first repealed by Congress, effective June 30, 1975, in the Act of September 3, 1974, Pub. L. No. 93-407, §474 (g), 88 Stat. 1065. See, D. C. Code 1973 (Supp. II), §§47-709 and 47-2405. However, they were in force on the date of the assessment in this case.

Section 47-2403 merely provides for an appeal to the Superior Court by an aggrieved individual from certain specified assessments, none of which are applicable here. Likewise, §47-709 and other sections in that chapter are concerned with the assessment, equalization, or valuation of real property and provide for an administrative review to the Board of Equalization and Review prior to any judicial review.

Section 5-622 of the D. C. Code, on the other hand, provides that the property against which the tax was levied in order to recoup the costs incurred by the District in the demolition of a structure, may be sold for such tax or unpaid portion thereof at an annual tax sale "in the same manner and under the same conditions as property sold for delinquent general real estate taxes." We do not believe that such language alone transforms what is admittedly a tax assessed against premises into a true real property tax. Section 5-622 makes no reference to the provisions in Title 47, chapter 24 of the Code for the appeal of real estate tax assessments; nor do the latter provisions refer back to the condemnation statute. In fact, as noted above, §47-2405 refers to only certain specified sections of Title 47. A further basis for our belief that the real estate assessment appeal provisions are not applicable to the assessment here is that, in a typical real estate assessment or valuation case, the Board of Equalization and Review necessarily becomes involved. §§47-2405, 47-709. In the present case there would have been no reason for petitioners to seek such review with that Board since no equalization or valuation question was present.<sup>7/</sup>

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<sup>7/</sup> Counsel for the District admitted at the hearing that it would be a useless act to file a complaint with the Board in this type of assessment since no valuation question exists.

The Court, however, rejects the suggestion that no remedy at law was available to the petitioners after the assessment of the tax in this case, other than the present suit for injunctive relief, or one for a declaratory judgment. Rather, we believe that a routine suit for refund, considered under the common law as a suit for monies had and received, would have been appropriate after the assessment of the tax. D. C. Code, §47-2413(a).<sup>8/</sup> Under the provisions of that section, relief in the form of a refund suit would still be available to petitioners for a period of two years from the date the assessment is paid. The Supreme Court has held that the purpose of the federal Anti-Injunction Act is to protect the Government's need to collect taxes expeditiously, "and to require that the legal right to the disputed sums be determined in a suit for refund." Williams Packing, 370 U.S. at 7. It also stated in C.I.R. v. Shapiro, that a taxpayer still must plead and prove facts establishing that his remedy in a refund suit is inadequate to prevent irreparable injury before an injunction would issue. 424 U.S. at \_\_\_, 96 S. Ct. at 1072. In the same manner, nothing has been brought to our attention to lead us to conclude that a refund suit is now unavailable. In fact, as we said earlier, we believe that such a remedy is still available, albeit, delayed. See, e.g., Bob Jones, 416 U.S. at 746.

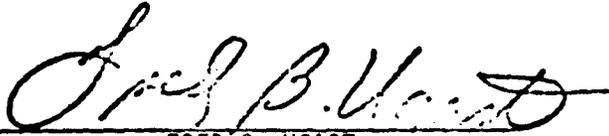
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<sup>8/</sup> Congress, in the District of Columbia Court Reform and Criminal Procedure Act of July 29, 1970, §161(a)(7), Pub. L. No. 91-358, 84 Stat. 500, amended D. C. Code 1957, §47-2413(c), by abolishing the availability of common law remedies. District of Columbia v. Berenter, 151 U.S. App. D.C. 108, 102 n. 9 (1972). If the District's position that the present assessment is a real estate tax were correct, which argument we have rejected, §47-2413(a) would not be applicable by its own terms.

As a result of the Court's decision, petitioners' property will be subject to advertisement and sale by the District of Columbia as previously planned. However, the District has assured the Court, through counsel, that the property in question will not be publicly advertised until December 10, 1976. Accordingly, petitioners will have sufficient time within which to seek appropriate relief. We might also point out that, if petitioners take no further action and the property is sold, they would nevertheless have the right to redeem their property within two years after the tax sale. D. C. Code, §§5-622, 47-1005.

It is, therefore, this 2nd day of December, 1976,

ORDERED that respondent's Motion to Dismiss is granted and the complaint is hereby dismissed.

  
FRED B. UGAST  
Judge

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