Opinion No. 1223

S ERIOR COURT OF THE DISTRICT (COLUMBIA
Tax Division

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA TAX DIVISION

JUN 26 1984

FILED

HUTCHISON BROTHERS EXCAVATING CO., INC., Petitioner,	:	
v.	:	Tax Docket No. 3202-83
DISTRICT OF COLUMBIA, Respondent.	:	

ORDER

This matter came before the Court for hearing on January 19, 1984, on the parties' cross-Motions for Summary Judgment. Petitioner brought this action to appeal a deficiency assessment requiring payment of motor vehicle fuel taxes pursuant to D.C. Code $47-1910, et seq. (1973).

The Court has jurisdiction of this appeal by authority of D.C. Code $47-3303 and $47-2319 (1981).

I. BACKGROUND

The material facts are not in dispute. Petitioner is an excavating company. Respondent, the District of Columbia, assessed a tax deficiency in the amount of $51,465.17 and a penalty of $10,298.03, covering the period from April 1, 1976, through March 31, 1981. The subject of the tax was the use of fuel, purchased in Maryland, for excavating equipment on construction projects located in the District. Notice of the deficiency was provided by letter from the Department of Finance and Revenue dated April 5, 1982. Petitioner received a notice of final determination on September 1, 1982, by which the penalty was waived and the tax due was established as $51,465.17. This amount was paid on January 3, 1983.

Petitioner initially relied on two contentions to challenge tax liability. First, it was argued that the excavating equipment in which the fuel was used should be classified as "traction engines" and be deemed exempt from

the fuel tax. Exemption was claimed pursuant to D.C. Code §47-1902(1) (1973), §47-2302(1) (1981), which defines "motor vehicle" to exclude "traction engines, road rollers, and vehicles propelled only upon rails and tracks." The petitioner argued that its excavating machinery, specifically its bulldozers, scrapers, graders and loaders, properly were characterized as "traction engines" within the meaning of the statute. The respondent argued that the definitional exemption had the primary purpose of excluding from the tax fuel used in equipment traditionally devoted to agricultural purposes, generally tractors or steam locomotives. At the hearing of the summary judgment motions, the petitioner conceded that it would not claim exemption based on the view that its equipment constituted "traction engines."

Second, petitioner contended that the government violated the District of Columbia Administrative Procedure Act, D.C. Code §1-1501 et seq. (1973 and Supp. 1977), (1981), by failing to engage in proper notice and comment rulemaking during the process of interpreting and implementing congressional amendments to the fuel tax provisions. Petitioner maintains that the government simply ignored required procedure. The government, on the other hand, contends that it did not engage in rulemaking within the meaning of the statute, and therefore did not violate the Act's procedural requirements.

II. ADMINISTRATIVE PROCEDURE

The Administrative Procedure Act ("DC APA") imposes on the District of Columbia government an obligation to provide public notice and a comment period before establishing certain policies. Three key provisions clarify this obligation. Under D.C. Code §1-1506(a) (1981),

> [t]he Mayor and each independent agency shall, prior to the adoption of any rule or the amendment or repeal thereof, publish in the District of Columbia Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice

> thereof in accordance with law) notice of the intended action so as to afford interested persons opportunity to submit data and views either orally or in writing, as may be specified in such notice. The publication or service required by this subsection of any notice shall be made not less than 30 days prior to the effective date of the proposed adoption, amendment, or repeal, as the case may be, except as otherwise provided by the Mayor or the agency upon good cause found and published with the notice.

Specifically, this regulatory process is necessary if government action comes within the definition of a "rule," established by D.C. Code §1-1502(6) (1981), as follows:

> The term "rule" means the whole or any part of any Mayor's or agency's 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 Mayor or any agency.

(Emphasis added.)

The statute further provides,

> The term "rulemaking" means Mayor's or agency's process for the formulation, amendment, or repeal of a rule.

D.C. Code §1-1502(7) (1981).

These definitions and procedural requirements for rules have been variously interpreted and applied, as have similar aspects of the federal Administrative Procedure Act, 5 U.S.C. §553 *et seq*. For example, compliance with the DC APA was held to have been required when the District established a policy of raising the debasement factor for computing residential property tax. *District of Columbia v. Green*, 310 A.2d 848 (D.C. 1973). The debasement factor represents the proportion of assessed value that will be subject to tax. *Id*. Similarly, administratively instituting a revised formula for public assistance benefits required prior notice and comment in accordance with the DC APA. *Junghans v. District of Columbia*, 289 A.2d 17 (D.C. 1972).

Each of the above-cited cases involved an administrative agency's interpretation of statutory provisions. In Green, the assessing authorities were attempting to give effect to the requirement in D.C. Code §47-713 (1973) that all real estate be taxed based upon its "full and true value." 310 A.2d at 354. In Junghans, the government was responding to congressional amendments aimed at establishment of public assistance standards that would reflect the cost of living. 289 A.2d at 20. Setting payment formulas was a function of the District's authority under the Public Assistance Act to make necessary rules to carry out the provisions of the Act.[1/]

It is axiomatic that the function of interpreting and implementing statutory provisions is the essence of rulemaking. See District of Columbia v. Jones, 287 A.2d 816, 820 (D.C. 1972) ("The rulemaking power is merely power to fill in the details within the limitations of the statute."), Batterton v. Marshall, 208 U.S.App.D.C. 321, 328 (1980) ("Legislative rules . . . implement congressional intent; they effectuate statutory purposes.").

In contrast, making a statement merely describing the effect of existing rules does not constitute rulemaking. District of Columbia v. North Washington Neighbors, Inc., 367 A.2d 143, 147 (D.C. 1976) (Letter from city to senator, outlining District's view that police regulations required repairs of water pipes by owners, did not constitute "rulemaking" within the meaning of DC APA.). Nor do rulemaking procedural requirements apply when the government acts upon a statute that is plain and needs no interpretation. As was stated in Smith v. District of Columbia,

> 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.

1/ D.C. Code §§402 (83, (84) (Supp IV, 1971), Appendix to Title 7

T... Docket No. 2249 (D.C. Super. .t. June 27, 1974), 102 D.W.L.R. 1509, 1516 (July 26, 1974).

In Smith, the Court (Bacon, J.), relying on the principle that "interpretive rule making is designed to cover . . . interpretations of doubtful and ambiguous statutory language," refused to impose APA requirements on the District's determination that a single level of tax assessments (the same debasement factor applicable across the board) was necessary for all property, whether it has been designated residential or commercial. The Court found that the relevant statute was "clear and unambiguous" in that it could not be said to "delegate discretionary authority to create classes of taxpayers." Id.

The policy in issue here is the District of Columbia's collection of the fuel tax from those whose activity previously fell within the off-road use exemption. By applying the tax to those engaged in off-road, or "non-highway" uses, the District is said to have established a policy interpreting and executing the statute as amended in 1971, a policy petitioner argues would be properly classified as a "rule." Previously, the District took the view that if fuel had not been purchased or used for travel on public roads, there was no requirement to file returns and pay the fuel tax. Petitioner argues that adopting a different view, in reliance upon congressional action, constituted rulemaking.

This contention requires an examination of the legislative history of the Motor Vehicle Fuel Tax Act and the relevant congressional amendment. The statute first was enacted in 1924, imposing a tax on

> all motor-vehicle fuels within the District of Columbia, sold or otherwise disposed of by an importer, or used by him in a motor vehicle operated for hire or for commercial purposes . . . .

43 Stat. 106, codified at D.C. Code §47-1901 (1973), §47-2301 (1981).

The statute defined "importer" as follows:

> The term "importer" means any person who brings into, or who produces, refines, manufactures, or compounds in, the District of Columbia motor-vehicle fuel to be sold or otherwise disposed of by him or to be used by him in a motor vehicle operated for hire or for commercial purposes.

43 Stat. 107, codified at D.C. Code §47-1902 (1973), §47-2302 (1981).

Importers were required to file reports and pay the tax monthly. Id., codified at D.C. Code §§47-1904, -1906 (1973), §§47-2304, -2306 (1981). Thus, the tax was imposed broadly on those who used motor vehicle fuel in the District of Columbia, whether or not purchased in the District.[2/]

Section 10 of the Act, 43 Stat. 108, provided for refunds to those who had purchased fuel in the District of Columbia for use in agricultural and other equipment not "intended to be operated . . . upon any of the public highways of the District of Columbia."[3/] This provision was codified at D.C. Code §47-1910. Other than Section 10, the scheme established by the Act has remained unchanged through and including the 1981 edition of the D.C. Code. See D.C. Code §47-1901 et seq. (1973), §47-2301 et seq. (1981).

2/ The fuel tax in the District of Columbia, as in many jurisdictions, focuses upon importation and use. When petitioner purchased its fuel in Maryland for use in the District, the company was exempt from Maryland's fuel tax, termed a "license tax," Md. Ann. Code art. 56, §151 (1983), but was liable for the District's fuel tax. Any contention that the District has engaged in double taxation therefore would be without merit.

3/ Although there is little elaboration on Section 10 in the floor debate, the provision was described briefly during House discussion. Congressman Thomas D. McKeown of Oklahoma, who had proposed certain penalties for false refund claims, explained that "if any man buys gasoline for cleaning purposes or some other purpose than running an automobile, he may have a refund by filing an affidavit." 65 Cong. Rec. 2277 (1924).

In 1971, Congress repealed Section 10, eliminating the refund procedure. Pub. L. No. 92-196, 85 Stat. 653. The intended result was to abolish the off-road vehicle use exemption afforded by Section 10.[4/] This objective was stated in legislative history. Both the House and Senate committees stated in their reports that the legislation

> repeals the existing motor vehicle fuel tax exemption for "non-highway use." The exemption allows a purchaser of motor vehicle fuel for non-highway use . . . to present . . . a sworn statement in order that the purchaser may receive a refund . . . .

H. Rept. No. 92-598, 92nd Cong., 1st Sess. 44; Sen. Rept. No. 92-489, 92nd Cong., 1st Sess. 15-16 (1924).

Elimination of the exemption was neither explicitly stated in nor apparent from, the text of the statute as amended. Consequently, those newly subject to the fuel tax might not be aware of the obligation by reviewing the plain wording of the remaining provisions. Nonetheless, the Department of Finance and Revenue determined that importers of fuel for off-road uses were obligated after 1971 to file reports and pay taxes monthly, in accordance with the statute. D.C. Code §§47-1904 -1906 (1973), D.C. Code §47-2304, -2306 (1981). Subsequent to the 1971 repeal, the District developed a policy of identifying importation and use to which the tax had not earlier been applied, and assessing tax deficiencies against petitioner and others in similar positions. In the instant case, the taxpayer was faced in 1982 with an assessment covering a period from April, 1976 through March, 1981.

4/ The literal terms of the refund provision addressed only fuel purchased within the District, where the tax is assessed with each purchase. As a matter of practice, the off-road exemption was applied across the board to encompass off-road uses of fuel that had been purchased elsewhere.

The Court finds that the District's policy of assessing such tax deficiencies constituted action interpreting and implementing the amended statute, and therefore was "rulemaking" within the meaning of the DC APA. Consequently, the District was required to proceed by notice and comment rulemaking.[5/] The policy underlying this DC APA requirement is an important one. Members of the public should be made aware of impending government action affecting their rights and responsibilities and given the chance to influence what action is taken. Notice and hearing requirements

> reflect[] a deep-seated conviction that as a matter of sound governmental policy, parties to be affected by administrative action should have a full opportunity to present their views before any official action is taken.

Junghans, 289 A.2d at 24, quoting F. Cooper, State Administrative Law 135 (1965).

In the instant case, the petitioner was deprived of the opportunity to be apprised of the government's interpretation, to voice its views on that policy, and to comply with the tax on an ongoing basis and thus avoid a multiple-year deficiency assessment.

III. CONCLUSIONS

When the government fails to comply with APA procedures, the resulting rule is void, lacking the force of law, and therefore unenforceable. See, e.g., Batterton v. Marshall, 208 U.S.App.D.C. 321, 338 (1980) ("Normally, a judicial determination of procedural defect requires invalidation of the challenged rule."), City of New York v. Diamond, 379

5/ The authority to establish rules is not here in dispute; the city has had such authority from the inception of the motor vehicle fuel tax. See 43 Stat. 110, D.C. Code §47-1916 (1973), §47-2315 (1981).

F.Supp. 503, 518 (S.D.N.Y. 1974) (A rule "invalidly promulgated" is "void and without legal effect.")[6/]

The District's failure to use notice and comment rulemaking before assessing deficiencies against the petitioner and others in its position made its policy, or "rule," invalid. This result, however, does not mean that petitioner is not liable for the fuel tax. The relevant principle was articulated by the Supreme Court in a 1936 tax case, in the following manner:

> The statute defines the rights of the taxpayer and fixes a standard by which such rights are to be measured. The regulation constitutes only a step in the administrative process. It does not, and could not, alter the statute.

Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 135 (1936).

In the Manhattan General case, the Supreme Court determined that tax regulations, as amended to conform with earlier statutory amendments, were applicable even though the regulations were not amended until after the transaction in issue.

The statute, not the regulation, is the controlling authority. With respect to criminal violations of administrative rules, the same principle has been applied. In United States v. Hark, 320 U.S. 531, 536 (1944) (federal price control regulations), the Court concluded:

> We hold that revocation of the regulation did not prevent indictment and conviction for violation of its provisions at a time when it remained in force. The reason for the common law rule that the repeal of a statute ends the power to prosecute for prior violations is absent in the case of a prosecution for violation of a regulation issued pursuant to an

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6/ Thus for example in District of Columbia v. Green, 310 A.2d 848 (D.C. 1973), the District's failure to comply with the DC APA to institute changes in property assessment levels in part led to the Court's finding that the rule was without force. The Court also concluded that equal protection had been violated by a step approach, raising assessment levels of a portion of owners at a time to achieve a higher level for all properties eventually. Id.

> existing statute which expresses a continuing policy, to enforce which the regulation was authorized. Revocation of the regulation does not repeal the statute; and though the regulation calls the statutory penalties into play, the statute, not the regulation, creates the offense and imposes punishment for its violation.

Id.[7/]

The government may, in appropriate cases, make retroactive rules. If a rule is necessary to effecutate the statutory design, it logically meets the requirement that retroactive laws or rules must be reasonable. See K. Davis Administrative Law Text §5.05 (1972) ("the test is whether rules are unreasonably retroactive"), citing, e.g., Addison v. Holly Hill Co., 322 U.S. 596, 620 (1944) (agency ordered by Court to make retroactive rules to avoid "a result contrary to the statutory design").

The Court concludes that the rule involved in the instant case was necessary to implementing the statutory design. While the rule must be held void, as urged in the petitioner's Motion for Summary Judgment, this invalidation in no way affects the requirements established by the statute. Therefore, no refund of taxes to the petitioner is warranted. In light of the inherent reasonableness of the policy, no challenge having been pursued with respect to the validity of the underlying statute, the Court finds that the District may and should proceed by rulemaking having a retroactive effect.

Wherefore, it is by the Court this 26th day of June, 1984,

7/ Accord, Pickus v. United States Board of Parole, 165 U.S. App. D.C. 284 (1974) (Determination that Board improperly failed to use notice and comment "does not have the effect of invalidating past determinations of the Board upon the merits of particular cases.").

ORDERED that the Petitioner's Motion for Summary Judgment is partially granted only insofar as it requests invalidation of the policy in issue based upon the District's non-compliance with the District of Columbia Administrative Procedure Act, D.C. Code §1-1501 et seq. (1973 and Supp. 1977), (1981); and it is

FURTHER ORDERED that the Respondent's Motion for Summary Judgment is partially granted only insofar as it seeks to hold petitioner liable for the taxes in issue; and it is

FURTHER ORDERED that the Respondent shall initiate a rulemaking proceeding in accordance with the requirements of the District of Columbia Administrative Procedure Act, D.C. Code §1-1501 et seq. (1973 and Supp. 1977), (1981), for the interpretation and implementation of the Motor Vehicle Fuel Tax Act, as amended, D.C. Code §47-1901 et seq. (1973), §47-2301 et seq. (1981), and that the rule or rules thus established shall be retroactive as to tax liability under the statute for the uses of motor vehicle fuel removed from exempt status in accordance with Pub. L. No. 92-196, 85 Stat. 653.

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