Opinion No. 1106

SUPERI COURT OF THE DISTRICT OF CO. BIA

TAX DIVISION

1106

CLARZELL GREEN, et al., Petitioners	:	
v.	:	Docket No. 2213
DISTRICT OF COLUMBIA, et al., Respondents	:	

FILED

JUL 18 1973

Superior Court of the District of Columbia Tax Division

OPINION AND ORDER

This Opinion and Order includes and supplements the Conclusions of Law and Orders entered June 29, 1973.

This matter comes before the Court pursuant to Petitioners' consolidated complaints (petitions) for injunctive relief alleging, in substance, violation by Respondents of the Fifth Amendment of the Constitution of the United States as it applies to the Petitioners individually and on behalf of all other similarly situated, and further alleging that the Respondents have violated the District of Columbia Administrative Procedure Act in its tax assessments as applied and to be applied on July 1, 1973 for fiscal year 1974. This matter is further before the Court pursuant to Respondents' answer to the consolidated petitions and to the other pleadings filed herein. The evidence has been adduced during a five-day trial, and the Court has had the opportunity to hear final argument of counsel, in addition to the review of their excellent trial briefs.

Petitioners allege: (1) That the level of assessment used to determine the assessed value of single family residential real properties in the District of Columbia was increased from 55 percent of estimated market value to 60

percent of estimated market value in violation of the "rule-making" provisions of the Administrative Procedure Act; (2) That unequal levels of assessment (55 and 60 percent of estimated market value) were used for single family residential properties, in the same tax year, in violation of the Fifth Amendment to the U. S. Constitution; (3) That the facts and circumstances involved in this case are "extraordinary and exceptional"; (4) That the exhaustion of administrative remedies is not necessary; (5) That there is a right to equitable relief against tax assessments in this case; (6) That the relief sought for Petitioners should be granted for the benefit of all owners of single family residential real property in the District of Columbia; and (7) That the denial of relief in this case would be a denial of the constitutional rights of the Petitioners.

Respondents contend: (1) That this Court is without jurisdiction to hear and determine this case since Petitioners have not exhausted their administrative remedies and have not yet paid the taxes which they allege are illegal; (2) That the Rules of the Tax Division do not provide either for a class action or injunctive relief; (3) That, assuming arguendo that a "class action" could be brought in the Tax Division of the Superior Court under Civil Rule 23 of the Rules of the Civil Division, the requisite elements of a class action are not present and that District of Columbia law as well as Federal law preclude class actions when claims for refund have not preliminarily been filed; (4) That the general rules of equity do not allow for injunctive relief in this case since Petitioners have or had both adequate administrative and legal remedies which preclude equitable

relief and that Petitioners have failed to allege extraordinary circumstances which merit equitable relief; that Petitioners claim of money damages does not constitute irreparable injury entitled to equitable relief; and that [among other of their complaints] Petitioners are asking the Court to perform a function which is exclusively legislative; (5) That Respondents have fairly assessed and equalized single family residential property in the District of Columbia for fiscal year 1974 under the provisions provided for by Congress in the codification of real property taxation law and in a "stair-step" approach generated by the Director of the Department of Finance and Revenue; and (6) That notice was not required by the District of Columbia Administrative Procedure Act of the increase in the level of assessment from 55 to 60 percent of estimated market value.

By D.C. Code 1967, Supp. V, §11-1202, 1/ 1202, 2/ exclusive jurisdiction over this action was conferred on the Tax Division of the Superior Court of the District of

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1/ "The Tax Division of the Superior Court shall be assigned exclusive jurisdiction of--(1) all appeals from and petitions for review of assessments of tax (and civil penalties thereon) made by the District of Columbia. . ."

2/ "Notwithstanding any other provisions of law, the jurisdiction of the Tax Division of the Superior Court to review the validity and amount of all assessments of tax made by the District of Columbia is exclusive. Effective on and after the effective date of the District of Columbia Court Reorganization Act of 1970, any common-law remedy with respect to assessments of tax in the District of Columbia and any equitable action to enjoin such assessments available in a court other than the former District of Columbia Tax Court is abolished. . . ."

Columbia.[3/] Under these sections the Petitions invoke the injunctive relief sought, and the District of Columbia, in its Answer (¶1) has admitted jurisdiction.

Eleven named Petitioners[4/] remain[5/] in these petitions for injunctive relief. Petitioners have maintained, and proved, that three of the named Petitioners, and other persons similarly situated, who timely appealed[6/] the increase in their fiscal year 1974 real property tax assessment to the Board of Equalization and Review, did not

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3/ The background on the civil jurisdiction of the tax court is given at SCR-425 of the Rules of the Tax Division of the Superior Court:

* * * *

"In respect of its civil jurisdiction, the Tax Division is the successor to the D.C. Tax Court, which in turn succeeded to the D.C. Board of Tax Appeals. The D.C. Tax Court and the D.C. Board of Tax Appeals did not have exclusive jurisdiction over civil proceedings. Prior to February 1, 1971, such proceedings could have been, and often were, instituted in other courts with concurrent jurisdiction---the United States District Court for the District of Columbia and the D.C. Court of General Sessions. Under Section 11-1202 of the Code, such concurrent jurisdiction has been eliminated, and all remedies in other courts have been abolished."

4/ For only the purpose of this Opinion and Order each "team" of husband and wife Petitioners representing a single family residential property owner(s) will be considered a unity, referred to and counted as "Petitioner" in the singular.

5/ Lawrence and Mary Connell withdrew from the proceedings on June 25, 1973.

6/ D.C. Code 1967, Supp. V, §47-709 provides:

". . . Any person aggrieved by any assessment, equalization or valuation made may within six months after October 1 of the year in which such assessment, equalization, or valuation is made, appeal from such assessment, equalization, or valuation in the same manner and to the same extent as provided in sections 47-2403 and 47-2404: Provided, however, That such person shall have first made his complaint to the Board of Equalization and Review respecting such assessment as herein provided, except that, in case of increase of valuation of real property over that for the immediately preceding year, where no notice in writing of such increase of valuation is given the taxpayer prior to March 1 of the particular year, no such complaint shall be required for appeal."

complain of a raise in the level of assessment from 55% to 60% since they were unaware of any as a result of Respondents' actions, and that therefore these Petitioners, and other persons similarly situated, were effectively denied an adequate administrative and legal remedy.

Witness after witness appeared in testimony to plaintively testify that he/she thought the increase was due to the increased market value as claimed by the assessor and was unaware at time of appeal to the Board of Equalization and Review that there are two levels of assessment for the same class of single family residential properties.

William E. Wickens, after receiving an approximate 25% increase notice of assessment in early 1973, specifically inquired in writing in March 1973 about the true value and level of assessment percentage, but did not receive an answer. He had paid $100,000 for his property and asserted $85,000 as the proper market value in his appeal

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6/ (continued)

D.C. Code 1967, Supp. V, §47-2405 also provides the same relief:

"Any person aggrieved by any assessment, equalization, or valuation made pursuant to sections 47-708 and 47-709, may within six months after October 1 of the year in which such assessment, equalization, or valuation in the same manner and to the same extent as provided in sections 47-2404 and 47-2413: Provided, however, That such person shall have first made his complaint to the Board of Equalization and Review respecting such assessment as herein provided, except that, in case of increase of valuation of real property over that for the immediately preceding year, where no notice in writing of such increase of valuation og given the taxpayer prior to March 1 of the particular year, no such complaint shall be required for appeal..." (Note that in D.C. Code 1967, Supp. V, §47-2405, all references to §47-2413 should read §47-2403. See District of Columbia v. Berenter, et al., __U.S.App.D.C.__ 463 F.2d 367 (1972).)

to the Board of Equalization and Review, since the third floor was unlivable due to the inability to heat, and heavy rains brought water into his living room. At the time he personally appeared for his appeal to the Board he was not told what his level of assessment was. Following appeal the Board recommended an estimated market value of $91,000 for fiscal year 1974. Mr. Wickens received an April 17, 1973 letter from Edward S. Baran [7/] advising that the assessment was decreased to $59,150. [He was not so also advised but this was 65% of the estimated market value which the Board of Equalization and Review had appended to his property.] Several days later he received another letter from Mr. Baran noting that due to an "administrative error" Mr. Wickens was to disregard the earlier letter; he was now being assessed at the level of $54,600. [He was not so also advised but this was 60% of the estimated market value which the Board had set on his property.]

> "If everyone is assessed at the same level of assessment based on the same standards for all other single family residential properties in the District of Columbia, then I am satisfied", testified Mr. Wickens.
>
> "If, however, everyone else, or some others, are assessed at 55% and I am at 60%, then I would not be satisfied...and it would be extremely unfair."

It is clear, that except in the cases of Petitioners Kalmus and Seven Corners Realty, Petitioners were unaware of the two levels of assessment (55% and 60%) for single family residential properties used to find assessed value from estimated market value for fiscal year 1974.

7/ Edward S. Baran is Associate Director for Assessment Administration in the District of Columbia's Department of Finance and Revenue and is also "Alternate Chairman" of the Board of Equalization and Review, frequently sitting as Chairman, administering the Board for Kenneth Back, (Respondent), Director of the Department of Finance and Revenue.

In fiscal year 1974, 1,044 residential complaints (appeals) were taken. Only three of these cases (two of the three include Kalmus and Seven Corners Realty) raised the question of the increase of the percentage from 55% to 60% and premised this on unconstitutional bases. On technical ground, therefore, but with gross inequity, this Court could dismiss Petitioners Kalmus and Seven Corners Realty from the relief subsequently granted the other Petitioners.

Petitioner Kalmus received a letter dated April 16, 1973, 8/ from Edward S. Baran, Alternate Chairman, following the appeal to the Board and was advised in that letter that:

> "...No evidence was submitted to the Board by Petitioners [concerning their questioning the legality of only changing valuations on approximately one-half of the total number of District properties each year]". (emphasis supplied)

The appeal was denied; the assessment stood unabated. The evidence that the Board found wanting has now been submitted through testimony and documentation to this Court.

Petitioner Seven Corners Realty, although challenging the constitutional inequality before the Board, first had its total assessment reduced from $7,200 to $5,200 and then subsequently received an "administrative error" letter advising that the fiscal year 1974 level of assessment was $4,800. The estimated market value for this property is $8,000. It is interesting to note, however, that the Respondents have never explained to the officers, directors or general manager of this corporation that the various assessments resulted from first increasing the level of assessment from 55% ($4,400) to 65% ($5,200) and finally back to 60% ($4,800) when the "administrative error" was discovered.

8/ Petitioners' Exhibit 11.

The Res. idents argue that for this C t to have jurisdiction these Petitioners, and all other similarly situated, prior to filing their appeal in the Tax Division, must pay both installments of a tax bill (September and March), within 6 months after October 1, 1973, based on a tax assessment which this Court finds is invalid, void, unconstitutional, arbitrary and invidious. The Court is not persuaded by this argument and cannot believe that Congress intended that the statute 9/ be subverted to include deceit of the populace, by either unintentional oral and written misinformation (at best) or by deliberate misstatement (or deliberate omission) of oral and written information (at worst).

It would be absurd, under the extraordinary and precise circumstances of this case, to dismiss Petitioners Kalmus and Seven Corners Realty and require them to file their cases anew, after October 1, 1973, following the payment of a tax assessment the Court finds unconstitutional, in order to pray for the same final relief now immediately available in this forum (except it would then be for a refund and it is presently for an injunction). This will not only save the Petitioners and the Court substnatial time, money and duplication to produce testimony and documentation but will similarly spare the Respondents their additional and substantial time, money and duplication.

9/ "Any person aggrieved by any assessment by the District of any personal property, inheritance, estate, business-privilege, gross-earnings, insurance premiums, or motor-vehicle-fuel tax or taxes, or penalties thereon, may within six months after payment of the tax together with penalties and interest assessed thereon, appeal from the assessment to the Superior Court of the District of Columbia. The mailing to the taxpayer of a statement of taxes due shall be considered notice of assessment with respect to the taxes...", §47-2403, supra. [§47-2405, supra, provides that appeals from real estate assessments are to be made in the same manner as provided in 47-2403. (Note that in §47-2405 all references to 47-2413 should read 47-2403. See fn. 6 above.)]

Should the Court adopt Respondents' argument it would, in effect, add yet another dimension of inequity to a situation already surrounded by unfairness, secrecy and lack of candor. It would be tantamount to telling a taxpayer that he must pay thousands of dollars and that he must yield days, weeks and months of his effort to develop testimony and documentation at his individual high expense to reap, in return, a few dollars in the majority of cases (and hundreds or more of dollars in other cases) just to have the right to present constitutional argument and to exhibit that which is already before this Court. Would not this attitude in and of itself be a coercive device on the taxpayers to not pursue their due remedies because of financial and time inability?

The six named Petitioners, and all other similarly situated, who did not appeal the increase in their fiscal year 1974 real property tax assessment to the Board of Equalization and Review could not have complained of a raise in the level of assessment since they were unaware of any, as a result of Respondents' action, until after April 2, 1973, the last date for appeal to the Board. Accordingly, they were resoundingly and effectively denied an adequate administrative and legal remedy.

Respondents contend that these persons were fully aware of their rights to appeal any assessment, equalization or valuation to the Board and cite as authority for this proposition, the reverse side of the notice of change of assessment mailed to the taxpayers.[10/]

10/ The reverse side of the property assessment change notice clearly states that "the new assessed valuation shown on the reverse of this notice is the result of a continuous property review and reassessment program to provide uniformity in the assessment of your property with similar type properties located in the District of Columbia." (emphasis supplied) [It is evident from the reading of both sides of this notice that the taxpayers have no information given thereon to indicate the percentage level of assessment at which the taxpayer is being assessed, nor what the original and changed (if any) market value is.]

Respondents further claim that as a result of the above "notice" the Petitioners failed to exhaust their administrative remedies under the applicable statutes of the District of Columbia (§47-709, §47-2403, §47-2405, supra), "the only remedies enacted and provided for by Congress", and that therefore they are totally without relief, legal or equitable.

It is important in connection with this to note that the taxpayers had no way of knowing about the change in level of assessments until early June 1973, approximately two months after the time had expired for making their appeals to the Board of Equalization and Review. How can it seriously be argued by the Respondents that Petitioners slept on their rights and failed to exhaust their administrative remedies when there was no way for these taxpayers, as the result of the actions of the Respondents individually and severally, to know the full basis of why and how they were being taxed, or what generated the increase. The public disclosure, by efforts of the Petitioners with massive assistance from the communications media (press, radio and television) came far too late to afford the customary relief to approximately 77,485 single family residential real property taxpayers who are being assessed at 60%, while 18,893 of similar class single family residential properties continue to be assessed at 55%. And it is of further utmost importance to note that in the extraordinary instance when a taxpayer (Kalmus) suggested the above inequality and had the foresight to protest on this very constitutional ground, that it was then proclaimed by the Board of Equalization and Review that there was "no evidence" before the Board to substantiate the charges. It took the persistence of Petitioners and the

discovery orders of this Court and the trial itself to bring forth that evidence. The totality of this accumulated knowledge, in both raw material and analyses, was always with the Respondents (not with Petitioners), although it was not--until more recently--translated into the exact form needed by Petitioners to prove their allegations and needed by the Respondents, "...in the event that this Court ordered assessment evaluations to be modified so that the Respondents could be prepared [to adjust the tax rolls] accordingly."[11/]

Arthur Keyes, Jr., testified that he did not know the market value of his property ($77,600) remained the same when he received his notice of increase of assessment from $42,682 to $46,560 in calendar year 1971 effective fiscal year 1973. He was also neither aware nor advised that the entire increase came about as the result of a change in the level of assessment from 55% to 60%.

Those who did not timely file an appeal testified they believed the increase had been the result of distressingly high but nevertheless increasing property valuations and accordingly did not appeal because of the belief that this was a:

> "...uniform thing across the District of Columbia...I thought the whole city was getting this...When I read about the matter [in the newspapers] I became outraged, saw counsel for the petitioners and said I wanted to be part of this suit."[12/]

11/ Testimony of John E. Rackham, Assessment Standards Specialist, with the D.C. Department of Finance and Revenue.

12/ Ann F. Brinkley, one of the named Petitioners.

"I thought the value of my property was being increased", testified Clarzell Green, who received an assessment notice on November 14, 1972 advising that his property at 1464 Morris Road, S.E. was increased in assessment from $8,974 to $9,780. Based on a market value of $16,317, the increase represents the difference between old 55% level of assessment and the new 60% level of assessment. Mr. Green was not advised of the reason for this change in level of assessment. He obtained the "appeal papers" [for the Board of Equalization and Review] but "the form was such" that he decided to get a lawyer. After that he became one of the named Petitioners in this cause.

When Stephen D. Smoke received his notice of change in assessment from $20,033 to $25,194,[13/] he appealed and appeared before the Board of Equalization and Review. He specifically inquired as to the rate or percentage of market value at which his property was being assessed and received no specific answer from Edward S. Baran [sitting as Alternate Chairman] other than "rates and percentages were of no concern" and Mr. Baran was only interested in a "fair value".

For appreciation of this case it is of small moment whether Mr. Smoke's house had an estimated market value of $37,800 as he believed (and was therefore being reassessed at approximately 67%) or whether it had an estimated market value of $42,000 as Charles W. Fortney, Jr.[14/] testified, and that therefore he was being assessed at 60%. The important concern is that the assessment level increased from 55% to [at least] 60% without Mr. Smoke's knowledge.

13/ Petitioners' Exhibit 13.

14/ Supervisor, Real Estate Assessment Section, District of Columbia Department of Finance and Revenue, who rotates in also sitting as occasional Chairman of a panel functioning as the Board of Equalization and Review.

> "On June 5 [1973] I read in [the local newspaper] about the percentage; then I computed and got my rate of 67%... I felt something was wrong and I wrote [Petitioners' counsel] and gave him some background....and am filing suit on behalf of myself and all other taxpayers similarly situated seeking to get the bills at a 55% level of assessment of estimated market value."

There is no question that in the ordinary and routine case, before an appeal can be processed to the Tax Division of the Superior Court of the District of Columbia, the taxpayer would have to wait until after October 1, 1973,[15/] if he had first made his complaint, prior to April 2, 1973, to the Board of Equalization and Review respecting such assessment for fiscal year 1974.[16/] The appeal could also only be taken if the taxpayer first paid all the tax (both September 1973 and March 1974 installments).[17/]

Three of the five named Petitioners, and 1,039 of the remaining single family residential property complaints to the Board of Equalization and Review timely made in fiscal year 1974, prior to April 2, 1973, did not complain of the raise in the level of assessment from 55% to 60% and further did not complain of the two separate, unequal classes of citizens owning single family residential property in the District of Columbia, some taxed at 55%, and some at a 60% level of assessment, because they did not know about these situations, nor could they have known by individual diligence. Even had they known (as Petitioners Kalmus and Seven Corners Realty did and asserted), the Alternate Chairman of these proceedings would undoubtedly have responded, as he did to Petitioner Kalmus,[18/] that there was "no evidence" to substantiate the charges. Accordingly, if the Court agreed with

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15/ §47-709, supra.

16/ §47-2405, supra.

17/ §47-2403, supra.

18/ See fn. 8, supra.

Respondents' position, these taxpayers would be barred from raising the question of the increase in level of assessment, and its illegality, even after the full taxes were paid and even after October 1, 1973, since this unknown, undisclosed and sometimes concealed matter was not appealed timely to the Board of Equalization and Review by April 2, 1973, at which time only the issue of the correctness of the estimated market value was raised. Therefore, unless action be taken by this Court (as it has by the Orders of June 29, 1973, which appear hereinafter) these taxpayers would be forever precluded from "going back" and would be totally without relief. It would be unconscionable for the Court to support Respondents' position.

In Tumulty et al. v. District of Columbia, (1939), 69 App.D.C. 390, a case concerned with the personalty tax statutes and assessment made thereunder, it was admitted that a corporation, sought to be held liable for tax on personalty for years preceding the corporation's acquisition of ownership, at no time received notice of the omitted property assessments attempted to be made during the tax years involved or notice of the attempted assessments after a certain period of time. Associate Justice Vinson (subsequently Chief Justice of the Supreme Court of the United States) wrote that:

> "The Supreme Court of the United States has definitely declared that 'the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require.'" 19/

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19/ Davidson v. New Orleans, 96 U.S. 97, 24 L.Ed. 616; Weyerhaueser v. Minnesota, 176 U.S. 550, 20 S.Ct. 485, 44 L.Ed. 583; Hager v. Reclamation District, 111 U.S. 701, 4 S.Ct. 663, 28 L.Ed. 569.

> "...that somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace." (footnote omitted), (emphasis supplied), p.398.

As Tumulty says:

> "It is a rule without exception that if a property tax assessment is not properly made, there is no proper basis for a tax, and a tax attempted to be collected is void." (footnote omitted), at p. 395.

Respondents' contention in this case that because Petitioners had not exhausted their administrative remedies they could not pursue this action has a familiar echo:

> "The District contends here that 'the doctrine that tax assessments must be attacked through the machinery provided by the statute and are not subject to collateral attack' must control the disposition of this appeal. We are in accord with such principle of law, with the settled exception to the rule that a tax based upon a void assessment may be questioned or attacked wherever found. We think it clear that all administrative remedies in matters of taxation must be exhausted before resort can be had to court action. Nelson v. First Nat. Bank, 8 Cir., 42 F.2d 30, but think it equally clear that when the assessment is void, the taxpayer may resort to equity for relief, without following statutory remedies. Particularly is this true, in a case like this, where the person now assessed never received notice of such attempted assessment giving it opportunity to appear before the board of personal tax appeals. This is the rule as regards judgments, and necessarily would control an assessment, which, while partaking of the nature of, does not possess the dignity of, a judgment. As we have shown, there can be no doubt that the tax claim in the present case was utterly void. It was void because there was not a proper assessment under the statute..." (footnotes omitted) (emphasis supplied), Tumulty, supra, pp. 399-400.

In our case, even though the statute provided the administrative remedy by complaint (appeal) to the Board

of Equalization and Review, that appeal was hollow and without the minimal standards of fairness embodied in the concept of due process. Procedural due process requires at least a revelation of the evidence upon which the administrative order is based, and an opportunity to explore that evidence at a hearing before the Board. If there is a failure to specify, with sufficient particularity, the basis of the change in assessment [i.e. from 55% to 60% and that taxpayers in the same class of properties are being taxed at different levels of assessment], then a taxpayer does not have the reasonable opportunity he is entitled to for preparation and presentation of his complaint and the appeal is wholly without foundation. Since the level of assessment, about which the taxpayer knew nothing, is "inflexible" 20/ and the taxpayer erroneously thought, as he had been led to believe, that he was protesting an assessment based on a rise in property values, a complaint-appeal to the Board of Equalization and Review had to be futile, and it was.

This Court completely agrees with Tumulty that:

> "A tax to be valid depends upon a particular statute creating liability and upon the proper procedural steps being taken by the taxing authorities. It is fundamental that an assessment must be validly made before tax liability can possibly accrue to the taxpayer." (emphasis supplied), p. 400.

In fiscal year 1973 there were 37,290 changes of all kinds in the assessments in the District of Columbia of which approximately 34,193 (99.61%) were attributable to changes in single family residential property levels of assessment.

20/ Testimony of Charles W. Fortney, Jr. The estimated market value might be changed by increase or decrease, but the level of assessment, (raised from 55% to 60% by the orders of Mr. Back) was "inflexible".

In fiscal year 1974 there were 45,364 changes of all kinds in the assessments in the District of Columbia, of which approximately 40,056 (88.3%) were attributable to changes in single family residential property levels of assessment.

Let us consider the circumstances under which a taxpayer eventually receives and later pays his tax bill on real property in the District of Columbia:

1. Market value on the property (also referred to as estimated market value) is fixed by the assessors and depends upon the individual value of each property. If a taxpayer questions this estimated market value, and either wishes (as is highly customary) that there be a decrease in the estimated market value (rarely is there a request for an increase) then the taxpayer can complain (appeal) to the Board of Equalization and Review and he can contend that there has been unequal or unfair treatment as to the market value and give his reasons therefor. If he is still aggrieved, he can pursue his remedy by appeal to the Tax Division, Superior Court of the District of Columbia.

2. The level of assessment (that is the percentage by which market value is multiplied to get the assessment). Sometimes this is called "debasement factor"; sometimes this is referred to as the "multiplier". During fiscal year 1973 and fiscal year 1974 this was either at 55% or 60% for single family residential properties in the District of Columbia.

3. The tax rate (presently $3.32 per $100.00 of assessed value) which is set by the District of Columbia City Council.

To completely understand what has happened in this case, to be able to observe and harken to the taxpayers'

plight, to see if the actions in this case measure up to the truth of Phipps v. Commissioner of Internal Revenue, 10 Cir., 127 F.2d 214, 216, that:

> "Equitable and just results can be obtained in the levy and collection of taxes only if both the Government and the taxpayer act in good faith and assume and maintain a consistent position toward each other."

a searchlight on history is essential.

By Order of the Commissioner No. 69-96 (March 9, 1969) among the departments established in the Government of the District of Columbia was the Department of Finance and Revenue to be headed by a Director [Kenneth Back],

> "...who shall perform the functions herein transferred, delegated or otherwise assigned and who shall have the authority to redelegate such functions as he deems necessary.
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> ***
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> "The Director of the Department of Finance and Revenue is responsible for planning, implementing and administering programs with centralized accounting; assessment and collection of taxes; research on revenue sources; custody and disbursement of funds; and auditing financial accounts and records; and serving on the Committee on Special Assessments and the Board of Equalization and Review." (emphasis supplied)

In effect, the Department of Finance and Revenue is a cabinet department.

Respondents and Petitioners both agree that the Mayor-Commissioner delegated to the Finance Director of the District of Columbia (in this instance, Respondent Kenneth Back) the full duty and responsibility to fix the level of assessment on real estate:

> "No one besides me had the right to make decisions at debasement factor [level of assessment]. This entire responsibility was delegated to me by the Mayor," testified Mr. Back.

According to Mr. Back, Congress authorized the District of Columbia in 1955 to institute the first city-wide reassessment ever made in this jurisdiction. An assessment manual of instructions and procedures and cost schedules on all properties was developed and all properties were inventoried and inspected between 1955 and 1959 with an augmented staff of assessors. After this initial program was over the incremented staff reverted to its original size.

[It should be noted the assessment is done on a calendar year basis for a forthcoming fiscal year, i.e., calendar year 1971 for fiscal year 1973.]

For at least the past 10 years (and perhaps even further) all single family residential real properties were assessed at a 55% level of assessment of estimated market value, and since at least 1956 (perhaps further removed) all commercial and industrial real property (that is, non-single family residential) was assessed at a 65% level of assessment of estimated market value. Director Back contends that from 1956 through calendar year 1968 the "policy" was to have 65% of estimated market value as the level of assessment for single family residential property; he agrees, that in reality, this "policy" was not achieved.

It is clear that not all of the assessors, even those working in the area of assessments for many years, were aware of this "policy". Charles Beal, assessor, testified that:

> "I do not remember using a level of assessment on single family residential other than 55%."

The testimony and documentation at this trial make it evident that the majority of the public was not informed at all, of this "policy"; those few [21/] who were informed of

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21/ Petitioners' Exhibit 37, *infra.*

"65%" were misled to believe this was 65% of fair market value [not "full cash" value] and were justified in believing, by reason of Respondents' public statements, 22/ that all single family residential properties were at the 55% level of assessment.

According to Mr. Back, the District of Columbia commenced reviewing in fiscal year 1960 on a cycle basis those properties which had first been put into the system and those which had been assessed the earliest. Four years were estimated for accomplishment of everything. A debasement manual was developed and used in the first review program and subsequently.

In 1962 the manual was revised, Mr. Back contending that the debasement factor then was 65%. Another four-year cycle began. Then the computer was obtained and Mr. Back decided to shift the major emphasis to the sales comparison approach by the use of the computer. As he stated, over and again, "the basic function of assessment is equalization".

Mr. Back testified that he made the decision to phase the residential property to 65% over a period of time. In 1968 he set up "work programs" of cycles beginning with the calendar year 1969 and continuing in calendar year 1970 (for fiscal 1971 and fiscal 1972, respectively), in which his "policy", at his directive, was that all the properties reviewed through his office and by assessors under his supervision would be brought up to the level of assessment of 55% for single family residential properties (some properties not achieving that level), and 65% for commercial/industrial properties.

22/ Petitioners' Exhibit 49, *infra*.

Commercial property represents approximately 60% of the total real properties in the District of Columbia; residential properties represent approximately 34% of all properties in the District and vacant land represents approximately 6% of all real property in the District of Columbia.

The EMV program (data processing system for estimated market value) was implemented in 1968 and, if a particular property is in the EMV program, the procedure is essentially as follows:[23/] an "EMV" sticker comes out of the computer, containing land value, improvement value and the result of the mathematical computations, the multiplier (level of assessment, debasement factor) having been set at 60% in the present instance). This is physically placed on the permanent record card. The assessor who receives this card for review can either accept or reject that estimated market value. If he accepts the estimated market value this figure goes on the assessment rolls. Subsequently, it is reviewed by others reviewing that neighborhood (that is by at least his supervisor and then through the real estate assessment review board). Only in an extraordinary case would it come to the associate director for his individual review.

If the assessor rejects the estimated market value and assigns a new estimated market value to this property, i.e., $90,000, and this new market value has been reviewed, as above, the case is then put back into the data system and the computer multiplies this new estimated market value at the 60% level of assessment. Accordingly, a $54,000 figure comes out of the computer and this $54,000 figure goes on the tax roll.

23/ From the testimony of Edward S. Baran.

Mr. Back conceded that by the end of 1970 all District of Columbia single family residential properties had a uniform factor of 55% and that therefore both equalization and the same level of assessment (debasement factor) existed for two years: that is calendar year 1969 for fiscal year 1971 and calendar year 1970 for fiscal year 1972.

Nevertheless, at a meeting of all of the then available supervisors and other assessors for real property in the District of Columbia, held in December 1970 and attended by several of the witnesses who testified at this trial, the oral order, at the direction of Mr. Back, was given to his staff of assessors to change the level of assessment for single family residential real properties from 55% to 60% for all those properties reviewed commencing in calendar year 1971 (for fiscal year 1973) and then for calendar year 1972 (for fiscal year 1974).

> "We decided to review as many properties as possible in neighborhoods of less than 60% and as we reviewed to bring them up to 60%, using a multiplier of 60% when reviewed...aiming for a reasonable degree of equalization while trying to eventually get to the goal of 65%".

Mr. Back contends that this was a "work plan" and all conversations concerning this matter took place between him and the people who worked for him in the Department of Finance and Revenue.

Admittedly, the Mayor-Commissioner and his deputy, Kenneth Back, the Finance Director since 1958, have made no effort to comply with the District of Columbia Administrative Procedure Act. No set of rules was published. No change in the level of assessment was published. Respondents concede that the Finance Director's "policy goal" of 65% was never reduced to final written form and admit that when this change

in the level of assessment (debasement factor) for fiscal year 1973 assessment was ordered by the Finance Director, he did not consult with the Mayor-Commissioner, or with the City Council; he did not advise the Budget Officer of this change; he did not publish this change in the D.C. Register; he did not give public notice nor other written notice to the taxpayers. Mr. Back maintained that after consultation with the Corporation Counsel:

> "We thought the Administrative Procedure Act did not apply to us in real estate tax; and also the Board of Equalization and Review does not have rules and regulations; there are no regulations in D.C. real estate tax."

As a result of this, and beginning in calendar year 1971 (notices were mailed out to taxpayers between November 1, 1971 and March 1, 1972, but the assessors' work was accomplished in calendar year 1971 (for fiscal year 1973)) the bills sent out in September 1972 to approximately 34,000 (or to 1/3 of these taxpayers, Respondents contend) of the 96,378 single family residential properties had their level of assessment changed from 55% to 60% of estimated market value.

In calendar year 1972, for fiscal year 1974, approximately 40,000 more (or to approximately 1/2 of these taxpayers, Respondents contend) single family residential properties had their level of assessment changed from 55% to 60% of estimated market value.

Presently, 18,893 single family residential properties remain at the 55% level of assessment.

The assessment increases in both fiscal years 1973 and 1974 for single family residential properties were represented

to the public as increases in property value. But, in fact, the changes of assessment in fiscal year 1973 were due, in over 90% of the cases, solely to a rise in the level of assessment. In fiscal year 1974 about 50% of the rise was due to increases in property value and about 50% to rises in the level of assessment from 55% to 60%.

Using data derived during testimony and, in particular, from the Respondents' own figures and projections 24/ the following information was obtained for fiscal years 1973 and 1974:

Total increased assessment single family residences fiscal year 1972 - 1974	$209,794,400
Increased assessment single family residences fiscal year 1972 - 1974 due to increase from 55% to 60% in the level of assessment ("debasement factor")	$113,713,800
Increased assessment single family residences fiscal year 1972 - 1974 due to increase in market value (estimated market value)	$ 96,080,600 25/

This exhibit demonstrates that, as a result of these acts of the District of Columbia in raising the level of assessment (debasement factor) for two years for part of the single family residential properties from 55% to 60%, the assessment of that class of property was increased by $113,713,800 out of a total assessment increase in the same two year period of $209,794,400. The substantial nature of the effect of this change in the level of assessment over this two year period is evident.

24/ Testimony of John E. Rackham, using the records of D.C. Department of Finance and Revenue.

25/ Petitioners' Exhibit 43.

The 18,893 single family residential properties are still assessed and unchanged at 55% for a total of $181,829,000.

For fiscal year 1974 there are 9,377 vacant land properties zoned single family residential (or approximately one-half of the 18,398 total such vacant land properties in the District of Columbia. "Depending on which neighborhoods they are in," [26/] 55% or 60% levels of assessment are used for the vacant properties zoned as single family residential.

It is apparent that if the City Council increased the tax rate from $3.00 per $100.00 of assessed value to $3.30 per $100.00 of assessed value, [it is presently $3.32 per $100.00 of assessed value] all real estate taxes are increased 10%.

If the Mayor-Commissioner, through his deputy, the Finance Director, raises the level of assessment (debasement factor) from 55% to 60% of estimated market value, then all real estate taxes are increased 9.0909%.

In 1970 Kenneth Back did request the City Council to increase the tax rate by 30¢/$100.00, but the Council refused to raise the tax rate. Although Mr. Back testified there was no connection between the Council's refusal to increase the tax rate and his unpublicized subsequent actions, the fact is that several months later in that same year, Director Back orally directed his assessors to raise the debasement factor from 55% to 60%.

How was the public informed of all these occurrences? What was the taxpayer led to believe?

In his letter of January 8, [27/] 1973 Respondent Kenneth Back, as Director of the Finance Department, wrote answers

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26/ Charles W. Fortney, Jr.

27/ Petitioners' Exhibit 37.

to questions propo ied by the President of the Chevy Chase Citizens Association and the Chairman of its Special Committee on Assessments in response to their requests for information concerning the proposed increases in the District of Columbia real estate assessment for fiscal year 1974. He advised, among other matters, that:

> "It has been a long-standing tradition and policy in the District to assess all properties as close as possible to 65% of full market value. However, because of rapidly changing (generally rising) real estate values and the lag between the time or reevaluations and the date the changes go on the tax rolls, assessments when measured against current values will tend to be somewhat less than the 65% standard.
>
> ***
>
> "[The reassessments are to be figured] on the basis of 65% of fair market value. This same standard applies to all sections of the city. If a taxpayer feels that his assessment exceeds 65% of the current market value of his property, I would certainly urge him to contact our Department for an explanation." (emphasis supplied)

Responding to the question, "Is the same reassessment policy to be followed throughout the city at this time for both residential and commercial properties?" Mr. Back replied, "Yes".

In his February 8, 1973 letter to Walter E. Washington, Mayor-Commissioner, [28/] Mr. Back submitted a "progress report" on the District's real estate assessment program in which he averred that:

> "The longstanding administrative policy in the District is to assess all properties at 65% of fair market value." (emphasis supplied)

In his attachment to the above letter he advised the Mayor-Commissioner that,

> "[The recent reassessments were computed] on the basis of 65 percent of fair market value...and [the same assessment policy was applied throughout the city for both residential and commercial properties]". (emphasis supplied)

This same attachment (Questions and Answers on the District's Real Estate Program), prepared by Director Back's office, was

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28/ Petitioners' Exhibit 37.

"disseminated in many ways, including tax payers, for their general information." 29/

As to both aforementioned letters, Mr. Back testified that he really intended to say "at full cash value at 65%", instead of what he did say ("fair market value at 65%"). He explained that saying "fair market value" rather than "full cash value" was not an attempt to mislead but it was "the result of not being careful enough". 30/

Mr. Back did not know of any jurisdiction where the "stair-step" level of assessment was used as he has attempted to use it in the District of Columbia:

> "...but it is certainly the subject of discussion among assessors".

Agreeing that "level of assessment" has many meanings for many persons, Mr. Back's plans for calendar years 1973 and 1974 (fiscal 1975 and 1976) "is to make cash equivalent adjustments and to apply our standard of 65% to the true and full value of lawful money, which is the 'assessed value'".

At trial he avowed his intention to complete the tax roll by July 1, 1973 [unless this Court ordered otherwise, as the Court immediately did upon completion of trial] and that the Mayor would certify it that date. Of the single family residential properties 77,485 were to be certified at 60% level of assessment and 18,893 were to be certified at 55% level of assessment.

29/ Edward S. Baran, Associate Director.

30/ "All real estate in the District of Columbia subject to taxation, including improvements thereon, shall be listed and assessed at not less than the full and true value thereof in lawful money." D.C. Code 1967, §47-713.

In appeal case after appeal case before the Board of Equalization and Review [31/] reductions in the "assessment" were refused. It was noted on the appeal itself (but the taxpayer was not so informed) that the "assessment is the product of raising the level of assessment from 55% to 60%" or, that "this appeal for reduction is not warranted. The increase is because the level of assessment went from 55% to 60%".

Respondents [32/] and Petitioners agree that the increase in an individual's tax bill could be the result of any of three possibilities:

1) There could have been a rise in the debasement factor (level of assessment) and a lowering of the estimated market value; or

2) There could have been a rise in the estimated market value with no change in the debasement factor (level of assessment); or

3) There could have been no rise in the estimated market value but a rise in the debasement factor alone (level of assessment).

The important thing is the taxpayer would not know which of these three possibilities increased or decreased his assessment. It is obvious they were not only not informed of which of these possibilities affected their assessments, they were also not informed of the real reason for refusing a change in assessment when they appealed.

Petitioners' Exhibit No. 49 is a telling document indeed. Prepared by the Office of Public Affairs of the District of Columbia and published in July of 1972, "For Your Information--Services of the District of Columbia Government" is a booklet:

31/ Among others, Petitioners' Exhibits 28 and 29.

32/ Respondent Back.

> "...designed to offer a clear and complete guide to the District Government's program, projects and facilities...wider knowledge of the District Government's operations will lead to an even stronger partnership between the citizens and their government in the drive to improve the quality of life in this community." 33/

At page 48 the following is the entire information given concerning real estate tax in the District of Columbia:

> "Real estate is taxed at an annual rate of $3.32 for each $100 of assessed valuation. For taxing purposes, the assessed valuation of property averages about 55 percent of market value."

Prior to trial this Court denied Petitioner's Motion to Certify this Action as a Class Action pursuant to Civil Rule 23(a) of the Superior Court. 34/ The case had been appropriately filed in the Tax Division which, having its own applicable rules, had neither adopted nor incorporated by reference Civil Division class action Rule 23, or any other rule pertaining to class actions.

Pursuant to the sua sponte recommendation of the Court at that time, Petitioners filed an amended complaint (petition) on June 18, 1973 which sought relief alternatively as (1) certified class action to which the Court had addressed itself in the Order of June 14, 1973; (2) uncertified class action (taxpayers' suit); and (3) individual petitioner's action.

The Court suggested, both at time of the Respondents' Motion to Dismiss on June 19 (denied) and again immediately prior to commencement of trial (June 25) pursuant to Respondents' orally renewed Motion to Dismiss (again denied), that the case should proceed as if it were a class action; there

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33/ Walter E. Washington, Mayor.

34/ Order of June 14, 1973.

would be a ruling on the question at the time of this Opinion. Respondents were in no way taken by surprise, nor hampered in their production of evidence. Their defense fully encompassed the situation as if both alternative prayers of Petitioners ((2) and (3) supra) survived.

The absence of a specific class action rule, however, does not prevent this Court from acting under its inherent and general equity powers in order to effectuate justice. It was only in the totality of the evidence adduced at trial that it could be fairly found that justice compels this cause be construed as a taxpayer's suit brought on behalf of the individual Petitioners and all other similarly situated.

The right of taxpayers to bring suit against municipal officials to assert public and private rights as against improper or illegal conduct by public officials is a firmly established principle of law.

> "Of the right of resident tax payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the tax payers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the State or county, there would seem to be no substantial reason why a bill by or on behalf of individual tax payers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of process in such cases.", Crampton v. Zubrinskie, 101 U.S. 601, 25 L.ed. 1070, (1880).

Such taxpayers' suits may be brought to enjoin the collection of a tax if that tax is illegal or unauthorized, and if grounds for equitable relief are present. A recent analogous case involving these principles in which a taxpayer's action was brought and relief granted on behalf of all taxpayers is Knoff v. City and County of San Francisco, 81 Cal. Rptr. 683, 1 Cal. App. 3d 184 (Ct. of App., First District, 1969). In Knoff, the Court held,

> "Petitioners' status as San Francisco taxpayers made them 'beneficially interested' parties who could maintain this action because...its object was to compel the performance of public duties which the law specifically enjoins... For the same reasons, they brought the action in a representative capacity...which made it a class action." 81 Cal. Rptr. 691-2.

Named Petitioners have a pecuniary interest in the subject matter of the action which makes them 'beneficially interested' parties. They brought the present suit on behalf of themselves and all other taxpayers whose cases are the same or similar. While the right of each taxpayer is individual and separate, prosecution of separate actions would create a multiplicity of suits by individual taxpayers who all have the same common relation of remedial right and who would all be injured alike by the illegal level of assessment.

Yokley on Municipal Corporations states the rule as follows:

> "The general right of a taxpayer to bring suit against municipal officials in an assertion of public and private rights as against improper or illegal conduct by authorized officials is a firmly established principle of law. It is an essential element of a taxpayer's suit that the suit be brought in behalf of a plaintiff and other citizens and taxpayers.
>
> "A taxpayer's suit is necessarily a class action. It must be brought not by individuals, but by individuals, for themselves and for all of the citizens similarly situated." Vol. 4, Sec. 602, p. 36.

McQuillen on Municipal Corporations (3d Ed. Rev.) makes the same point:

> "...a distinction is to be drawn between an injunction suit by a taxpayer merely to prevent the collection of the tax imposed on plaintiff, as an individual, and a suit by one or more taxpayers, in behalf of all, to enjoin an entire levy or its enforcement. As to the latter, it is well settled that if the tax is illegal or unauthorized, and grounds for equitable relief are present, a taxpayers' suit lies to enjoin the levy or collection of such taxes." Vol. 18, Sec. 52.33, p. 71. (emphasis supplied)

It is recognized that the right to a taxpayer's suit in the present case is the only method by which to achieve substantial justice for the whole body of single family residential real property owners in the District of Columbia.

Is then the level of assessment a "rule" and "rule-making" the act of fixing the "rule", as Petitioners contend, and therefore within the public illumination required by the District of Columbia Administrative Procedure Act? Or, conversely, is the level of assessment, as Respondents contend, a "policy long held and intended", a 65% "goal" yet unattained, and therefore exempt from the District of Columbia Administrative Procedure Act?

It is well-established that when the District of Columbia City Council publishes notice of the proposed tax rate each year, and holds a public hearing, and gives at least 30 days notice to the public, the action is publicly voted on by the Council, and a rule is made. This is required under the District of Columbia Administrative Procedure Act.

Although Respondents, through counsel, profess that "in retrospect, more publicity would have been a good thing", nevertheless they maintain that there "never have been any rules or regulations" for real property assessments because

the District of Columbia Code, §47-401 through 47-1101 details what the procedures are and "therefore we do not have to make or publish any rules or procedures".

The District of Columbia Administrative Procedure Act,[35/] became effective on October 21, 1969, after 12 years effort on the part of the District of Columbia Bar Association and other active groups to secure enactment of minimum standards of fair procedure to be observed by the administrative agencies of the District of Columbia.[36/] In meaningful effect, it is a "Bill of Rights" for the citizen, baffled and confused by the uncentralized maze of documents, writings, rules, procedures and regulations. There was no question then, and there is no question now, that a substantial number of independent administrative agencies of the District of Columbia have a significant effect, by their decisions, rules and regulations, on the lives of the citizens of the city. As was said by Frank E. Cooper, State Administrative Law (1965), Vol. 1, p.2:

> "[A] baffling heterogenity of procedural rules [exists], which is a source of needless confusion but, more importantly, [is also reflected] in the widely disparate approaches to related problems and in the application of variant principles and philosophies of economic and social control."

The Senate Report, No. 1581, 90th Congress, 1st Session, Committee on the District of Columbia, clearly expresses the purpose of the Administrative Procedure Act:

35/ P.Law 90-614, 82 Stat. 1203; D.C. Code 1967, Supp. V, §1-1501 et seq.

36/ Hearing before the Subcommittee on the Judiciary of the Senate Committee of the District of Columbia, 90th Cong., 2d Sess., April 25, 1968, pp. 74-76. See, also, H. Rep. No. 646, 89th Cong., 1st Sess. (1965).

"PURPOSE OF THE BILL

The purpose of the bill is to provide an Administrative Procedure Act for the District of Columbia, covering the more than 93 administrative governmental agencies within the District government, and the laws which those agencies administer.

The bill makes mandatory the establishment by the Commissioner of the District of Columbia and the District of Columbia Council for themselves and for all subordinate agencies of the District of Columbia, rules governing the formal and informal procedures prescribed or authorized by the bill, and likewise requires that each independent agency of the District establish such rules for itself.

The bill is designed to meet a longstanding need in the District of Columbia for the improvement of administrative process and the achieving of uniformity and full disclosure of administrative rules and rulemaking procedures of District government agencies comparable to those required of Federal agencies under the Federal Administrative Procedure Act."

There are three primary features of the D.C. APA:

(1) requirements for the compilation and publication of the rules of administrative agencies; (2) the opportunity for a fair hearing for parties involved in a "contested case," i.e., a quasi-judicial, adversarial proceeding; and (3) regularizing and making uniform the right of judicial review.

In the D.C. APA, D.C. Code, 1967, Supp. V, §§1-1502(6) and (7), the terms "rule" and "rule-making" are defined:

"(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 Commissioner, Council, or of any agency (emphasis supplied);

"(7) the term 'rulemaking' means Commissioner's, Council's, or agency process for the formulation, amendment, or repeal of a rule;"

A legislative hearing, relating to "the making of a rule for the future" (Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226, 29 S.Ct. 67, 69, 53 L.Ed. 150 (1908) is a:

> "...non-adversary proceeding which seeks to devise broad policy applicable to the public generally, or a substantial segment thereof, rather than to individual parties. ...the quasi-legislative inquiry tends to consult broad relevant data available from surveys, studies and published experience,...the staff report often is presented to the interested public with the invitation to appear at a public hearing to oppose or praise.", Jones, et al. v. District of Columbia, et al., 116 U.S.App.D.C. 301, 323 F.2d 306 (1963).

The instant case has striking analogy to F. Lewis-Mota et al., v. The Secretary of Labor, 469 F.2d 478 (1972) where a class action was brought by aliens seeking to enter and reside in the United States as permanent residents and where the court held that a Directive of the Secretary of Labor abrogating precertification of certain occupations for visa issuance was not promulgated in conformity with the publication and notice requirement of the Administrative Procedure Act, 5 U.S.C.A. §551 et seq. In Lewis-Mota the Secretary of Labor in the past had published certain schedules listing particular occupational categories. In 1969 a new schedule, setting forth a precertification list, and abolishing the original schedule was established after due notice. One year later the Secretary of Labor, without first publishing in the Federal Register, issued a Directive suspending the entire schedule precertification list and providing that previously issued precertifications would be valid only for a specific period of time. This Directive was not published in the Federal Register until almost one year after its issuance. The Second Circuit Court of Appeals held that:

> "While the Secretary strenuously argues that he was merely announcing 'a general statement of agency procedure or practice' within §553(b)(3)(A), the label that the particular agency puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact." pp. 481-2.

That Court then looked to the effect of the Directive and found that:

> "...it changed existing rights and obligations... By virtue of this substantial impact both upon the aliens and the employers, notice and opportunity for comment by the public should first be provided"., p. 482

In Junghans v. Department of Human Resources of the District of Columbia, D.C.App., 289 A.2d 17 (1972), the Commissioner's Order directing the Department of Human Resources to set the level of public assistance payments at 75% of the public assistance standards was held to be a "rule" within the meaning of the D.C. APA, which "rule" never became effective since, among other reasons, it was never published in the D.C. Register as required by the statutes and notice of the proposed rule was inadequate by its failure to specify where and how interested parties were to submit their comments. The reason of Junghans is the reason of the instant case:

> "We note also the proposition that administrative agencies have the responsibility of fully informing themselves of the public's viewpoint before making difficult and fundamental policy determinations concerning the allocation of scarce resources. Pharmaceutical Manufacturers Association v. Finch, 307 F.Supp., 858, 865-866 (Del.1970).
>
> "Given the consequences for the residents of the District that flow from the decision by the Council and the Commissioner to enact one of the several possible formulas for the payment of welfare assistance, the procedural steps taken by the Council and the Commissioner in this case require careful scrutiny to determine whether they pass muster under the applicable statutes and rules.", p.22.
>
> * * *
>
> "Commissioner's Order No. 70-265, whether we consider it an implementing directive, as Corporation Counsel characterizes it, or prescribing policy, is a 'rule' as defined by the D.C. APA. Congress has directed in Section 7(c) of the APA that 'each rule adopted . . . by the Commissioner . . . shall [not] become effective until after its publication in the D.C. Register.' D.C.Code

1967, §1-1506(c) (Supp. IV, 1971). Since Commissioner's Order No. 70-265 was never published in the D.C. Register, as Congress has mandated, it never became effective.

"Congress has further provided in the D.C. APA that before adopting any rule or amendment thereof the Commissioner 'shall . . . publish . . . 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,' D.C.Code 1967, §1-1505(a) (Supp. IV, 1971)..." (footnote omitted), p.23.

and further

"...we construe the full requirements of Section 1-1505(a) 37/, as dictated by Congress, to be that the notice must afford interested persons an opportunity to be heard on the proposed rule. In order to be afforded that opportunity, the general public must be advised of the current status of the proposed rule as it stands before the rulemaker. We believe that Congress intended the notice of of a proposed rule to inform the public that the rulemaker (a) would either wait 30 days before taking final action on the pending proposal, or (b) was contemplating taking final action in less than 30 days." (footnote omitted), p.24.

Practices that happened before the D.C. APA can no longer continue.

For example, as a result of the rulemaking requirements of the D.C. APA the Insurance Commissioner no longer could, as he has done in the past, raise insurance rates

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37/ "The Commissioner and Council 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 sub-section of any notice shall be made not less than thirty days prior to the effective date of the proposed adoption, amendment, or repeal, as the case may be, except as otherwise provided by the Commissioner or Council or the agency upon good cause found and published with the notice." D.C.Code, 1967, Supp. V, §1-1505(a).

without an opportunity to the public to be heard. 38/

It was said about the Revised Model State Act (upon which the D.C. APA is based) that there is the requirement of:

> "...notice in rulemaking proceedings as well as in contested cases, and [this] includes special provisions designed to assure the fairness of hearing procedures...
>
> * * *
>
> "To an ever increasing extent, provisions are appearing in state statutes, requiring that before an administrative agency takes any action which will significantly effect private rights, the agency must give notice and afford interested parties an opportunity to be heard. This legislative trend reflects 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." Cooper, State Administrative Law, supra, Vol. I, at p.135, (emphasis supplied)

Respondents claim exemption from the D.C. APA. But D.C. Code 1967, §47-713 provides:

> "All real estate..., shall be...assessed at not less than the full and true value thereof..."

The District of Columbia Register, Title 16, Department of Finance and Revenue, is a September 1970 publication of the D.C. rules and regulations affecting a variety of taxes, but does not cover real estate taxes. There are also no rules and regulations for the Board of Equalization and Review.

The taxpayer witness 39/ put it well indeed when, shaking with indignation, he earnestly advised the Court:

> "I'm furious!"

38/ Hearing before the Subcommittee on the Judiciary of the Senate Committee of the District of Columbia, 90th Cong., 2d Sess., April 25, 1968, pp. 74-76. See, also, H. Rep. No. 646, 89th Cong., 1st Sess. (1965).

39/ William R. Leonard, presently with the news media of Airlie House Foundation; until several weeks ago and for 11 yrs., Executive Producer, NBC, in Washington, handling commentary, documentary film programs concerning local problems in Washington.

And rightly so! This taxpayer was an educated, sophisticated person, trained in the uncovering of news. What about the less educated, less sophisticated citizen untrained in detecting that which is not there to be seen, or that which is confusing to even those to whom this responsibility is delegated?

As Martin K. Schaller [40/] expressed it:

> "It would be very difficult for an inexperienced person to find that there was no rule for reassessments."

Although $200,000 per year, since 1969, has been appropriated for the publication of all rules and regulations of the District of Columbia in one set of volumes, this project is not yet completed. Even when completed it will not include rules of real estate assessment since they do not exist in written form.

The Board of Equalization and Review, chaired nominally by the Assessor, [Director of the Department of Finance and Revenue], but actually administered by Edward Baran, Associate Director, is designed to deal with the assessed factor, "...but, in practicality, the discussion comes down to 'what is my property worth?' The debasement factor (level of assessment] is fixed." [41/] The Board has two functions:

40/ Executive Secretary for the District of Columbia and Executive Secretary to the Mayor-Commissioner whose numerous duties include taking charge of publishing the D.C. Register and all rules of the District of Columbia in accordance with the D.C. APA. It is, however, not his function to decide what the rules should be; his duty is ministerial.

41/ Director Back.

(a) to review property values; (b) to equalize. 42/

The Board does not have any rules and regulations to assist it or the taxpayer; it only has an inter-office memorandum, not available to the public, which gives "guidelines", stressing courtesy to the public and how to call the appeal hearing to an opening and closing. 43/ As Respondents' Brief says, at page 30, it is "...merely designed to show the style in which the hearings before the Board will be held."

The assessors themselves are not certain as to what occurs at these Board of Review appeal hearings. Mr. Fortney (who, among others, sits on panels of the Board) at first thought there were written procedures for the Board, which he has chaired on occasion, and then, after being asked to produce these written procedures, realized there was only an inter-office memorandum for guidance.

> "Of course, (testified the Director, Kenneth Back), it was not my intention to keep this [raising level of assessment] a secret or we would not have put it on the card [permanent record card] itself 44/ available to the public."

42/ D.C. Code 1967, §47-708:
"The Assessor and Deputy Assessor of the District and the board of all of the assistant assessors, with the Assessor as chairman, shall compose a Board of Equalization and Review. . .It shall be the duty of said Board of Equalization and Review to fairly and impartially equalize the value of real property made by the board of assistant assessors as the basis for assessment. Any five of said Board of Equalization and Review shall constitute a quorum for business, and, in the absence of the Assessor, a temporary chairman may be selected. They shall immediately proceed to equalize the valuations made by the board of assistant assessors so that each lot and tract and improvements thereon shall be entered upon the tax list at their value in money; and for this purpose they shall hear such complaints as may be made in respect of said assessments, and in determining them they may raise the valuation of such tracts or lots and improvements as in their opinion may have been returned below their value and reduce the valuation of such as they may believe to have been returned above their value to such sum as in their opinion may be the value thereof."

43/ Petitioners' Exhibit 33.

44/ There is one permanent record card for each of the 97,707 single family residential properties (including garages) in the District of Columbia.

But, it was later proved at trial that the level of assessment is not placed on the permanent record card, and that therefore the taxpayer believed he was dealing with increased market values when he made his appeal to the Board of Equalization and Review. When his appeal was rejected, the taxpayer did not know this occurred because the assessment level, of which he remained unadvised, went from 55% to 60%, and was "inflexible".

It would certainly appear appropriate, in furtherance of Mr. Baran's statement that:

> "Petitioner has to bring in evidence [before the Board] to support his conclusions or theory",

and in the clarity of this trial, to have the Board of Equalization and Review promulgate, (through compliance with the D.C. APA) rules and regulations for its operation and then duly disseminate those rules and regulations. In this way the taxpayer can know what is expected of him and what the Board is reviewing on appeal, and fair play throughout should be had.

Whichever version of the testimony is accepted concerning the level of assessment in years prior to calendar year 1969, all witnesses concede that despite the provisions of §47-713, supra, single family residential levels of assessment were at 55% of estimated market value and commercial levels of assessment continued at 65%, and both levels of assessment so remained for calendar year 1970. Accordingly, before October 21, 1969, when the D.C. APA went into effect, and before notice, public participation, and publication were required, the "rule" was then 55% for single family residential property.

The action of the Respondent officials of the District of Columbia, in fixing a level of assessment of estimated market value of single family residential property, as a basis of its assessment for purpose of real estate taxation, is "rulemaking" within the definition of the D.C. APA (§1-1502(7)). The increase of the level of assessment from 55% to 60% is the adoption or amendment of a "rule" within the definition of §1-1502(6) of the Act.

Accordingly, the Respondents acted contrary to law when they failed to compile, index andpublish the 55% level of assessment in effect on October 21, 1970 (§1-1507).

It is undoubted that Respondents again acted contrary to law when two years after the effective date of the D.C. APA they increased the level of assessment from 55% to 60% and then failed to publish a 30 days notice of the proposed increase, failed to permit public participation in said increase, and failed to publish the increase when effective, in the District of Columbia Register (§1-1505, 1506).

No government, municipal or otherwise, should lose faith in its people or forget, even for a moment, that it is a government ... "for the people".

Nevertheless, throughout the case, Respondents assert that whatever the findings of the Court, injunctive relief does not pertain because: 1) Petitioners have or had both adequate administrative and legal remedies under §47-709 and §47-2405, D.C. Code, which precludes equitable relief in this case; (b) Petitioners have failed to allege extraordinary circumstances which merit equitable relief; (c) Petitioners' claim of money damages does not constitute irreparable injury entitled to equitable relief; (d) Petitioners' suit for injunctive

relief is asking the Court to perform a function which is exclusively legislative.

Clearly the rules of the Tax Division do not provide for injunctive relief which is, as Respondents note in their Brief (at p.21) "addressed to the discretion of the court... In determining whether an injunction should be granted, the court should adhere to the basic doctrines of equity".

And it is further obvious 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," D.C.Code, 1967, &47-2410.

It is well-established that a court will not exercise its equity powers for interference of collection of taxes simply on grounds that the taxes are illegal, Dows v. Chicago, 11 Wall. 108, 110, 20 L.Ed. 65; Hannewinkle v. Georgetown, 15 Wall. 547, 21 L.Ed. 231; State Railroad Tax Cases, 92 U.S. 575, 613, 23 L.Ed. 663, 673; Burgdorf v. District of Columbia, 7 App.D.C. 405, 443; Buchanan v. MacFarland, 31 App.D.C. 6. The reason for this was stated in Dows, supra;

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers upon whom the duty is devolved of collecting the taxes may derange the operations of government, and thereby cause serious detriment to the public.", p.110.

The Government pleads failure to exhaust administrative remedies as a barrier to invocation of injunctive relief, yet the same Government, at best, misinformed its citizens-taxpayers that the level of assessment was being applied discriminatorily to the same class of citizens. This matter has been fully developed in an earlier stage of this Opinion. This same

Government did not advise its citizens of its intentions, did not permit its citizens to participate in the "rule-making", did not publish as required, and then, two months after the time for administrative action had passed (and only then as a result of depositions taken in this litigation, and the publicity given those depositions) were public statements made by the Respondents' representatives concerning these levels of assessment, several statements lending no clarification to the prior misinformation.

This is a case where, "in addition to the illegality of an exaction in the guise of a tax", special, indeed exceptional, circumstances exist, bringing"...the case within some acknowledged head of equity jurisprudence...[where] a suit may be maintained to enjoin the collector," Miller v. Standard Nut Margarine Co. of Fla., 284 U.S. 498 (1932), at p.509. The latter decision was made despite the sweeping prohibition of 26 U.S.C.A. 1543 [now, 26 U.S.C.A. 7421(a)],[45/] in language highly similar to §47-2410, supra, that:

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

As the Supreme Court observed in Standard Nut Margarine, the Court has:

> "...repeatedly indicated that extraordinary and exceptional circumstances render its [statute in question] provisions inapplicable.", at p.510.

Again and again the Supreme Court has spoken to this matter. This same section, 26 U.S.C.A. 1543, which totally negates equitable relief, was held to be "...inapplicable in

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45/ Under many cases (see its fn. 57 and 58) 26 U.S.C.A. 7421 has been interpreted to permit actions to enjoin collection of taxes under the Internal Revenue Code where the exaction is illegal or where extraordinary circumstances exist "within some acknowledged head of equity jurisprudence".

exceptional cases where there is no plain, adequate, and complete remedy at law." (footnote omitted) Allen v. Regents of University System of Georgia, 304 U.S. 439, 449 (1938); 82 L.Ed. 1448.

Hillsborough T.P. v. Cromwell, 326 U.S. 620 (1946) held that the then 28 U.S.C.A. 384 [46/] and 28 U.S.C.A. 41(a) [47/] did not prevent a taxpayer's suit for equitable relief challenging certain state assessments on intangible property on the grounds that the taxpayer was being singled out for a discriminatory assessment in violation of the 14th Amendment to the United States Constitution.

See also, Cooley, Taxation (4th Ed.), Vol. 4, Section 1645, for the proposition that:

> "If the valuation is purposely made too high... through the adoption of a rule which is designed to operate unequally upon a class and to violate the constitutional rule of uniformity, the case is a plain one for the equitable remedy by injunction. So is any case in which a tax is rendered unequal or unfair by fraudulent or reckless conduct of officers, or in which the party is deprived by like practices of important rights which the law intends to secure for him; such, for instance, as the right of appeal from an assessment, or to be heard by the board of review before his assessment should be raised. Injunction also lies where certain property is intentionally and wrongfully assessed at a higher percent of valuation than other property, in pursuance of a system..."

Compare, also, another injunctive suit (class action) brought to require an end to inequality in the level of assessment in relation to fair market value which suit was

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46/ Providing that suits in equity may not be sustained in federal courts "in any case where a plain, adequate, and complete remedy may be had at law."

47/ Providing that "no [federal] district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state."

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allowed to proceed to judgment despite the Tax Injunction Act of 1937 (28 U.S.C.A. 1341), Weissinger v. Boswell, (N.D. Alabama), 330 F.Supp. 615, 618 (fn.14) (1971).

In another case, Mr. Justice Field held that to warrant the interference of equity:

> "There must be special circumstances... bringing the case under some recognized head of equity jurisdiction...[such as] where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. Dows v. Chicago, supra, pp. 109-110.

And the Supreme Court of the United States, by Mr. Justice Bradley, held to the same effect that the interference of equity was often warranted if:

> "...the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone.", Union Pacific Railway Company v. Cheyenne, 113 U.S. 516, 525.

Similarly, in the case of Lyon v. Alley, 130 U.S. 177, 178, which went to the Supreme Court from the District of Columbia, it was held that in the removal of a cloud from the title to land, the prevention and removal of such a cloud are within the "domain of the remedial processes of equity" when such a cloud is the result of "illegal taxation". In such instances "...courts of equity have inherent jurisdiction to give relief...against vexatious litigation...", p. 187.

As Mr. Justice Harlan said in Rich v. Braxton, 158 U.S. 375:

> "It must be remembered that 'it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' Boyce's Ex'rs v. Grundy, 3 Pet. 210 215; Drexel v. Berney, 122 U.S. 241, 252, 7 S.Ct.;

> Allen v. Hanks, 136 U.S. 300, 311, 10 S.Ct. 961. And the applicability of the rule depends upon the circumstances of each case. Watson v. Sutherland, 5 Wall. 74, 79," p.406

Our jurisdiction has followed these tenets of the law in numerous cases.

> "...it is well settled that, where there are such special circumstances, equity will intervene, and the statute cited [Section 3224 of the Revised Statutes which provides that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court'] is no bar to the intervention." Craigwell v. Van Riswick, 8 App.D.C. 185, 207 (1896). 48/

In Buchanan v. MacFarland, 31 App.D.C. 6, 14, 15 (1908), citing the cases which held:

> "Special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title." p.15

the court held that equity would assume jurisdiction on the ground that the sale of property under an assessment was void even if the assessment was valid. In that instance, with an obvious analogy to the present case, the proceedings to assess were concluded, the defendants were in no situation to assert any rights therein and, when actually informed of the necessity of action, the time for appeal, even, had passed.

There can be no doubt that the facts and circumstances of the present case, special and extraordinary as they are, provide overwhelming need for the exercise of the Court's inherent power to grant equity in order to do justice. To prevent a multiplicity of suits, to prevent vexatious litigation (for those singular litigants who might yet have timely

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48/ Also, Alexander v. Dennison, et al., (1876), 2 MacArthur (9 D.C.) 562, 564, appeal dismissed (1880), Dennison v. MacArthur, 103 U.S. 522, 26 L.Ed. 813.

recourse to the Court) to avoid irreparable injury to those who, through no fault of their own, were deprived of an informed right to complain of the inequality of treatment, in the light of the merits of the cause, and in a balance of the equities of the parties, this Court finds that recourse to equity was appropriate in this proper case of equity cognizance and that the interposition of equity interference by injunction is justified.

Because of the District of Columbia's failure to follow the mandate of Congress expressed through the Administrative Procedure Act in first establishingand then raising [if appropriate] the level of assessment for single family residential property, the Petitioners, and others similarly situated to them, were totally abrogated of their rights to either agree with or oppose these actions. This failure invalidates the change from 55% to 60% level of assessment of estimated market value and, by Order of this Court, (hereinafter noted) the Respondents are enjoined from proceeding to assess single family residential properties at anything other than 55% until such time as they fully comply with the requirements of the D.C. APA.

The intentional and arbitrary action of the Respondents in applying unequal levels of assessment (55% and 60%) to estimated market value of property within the same class (single family residential) violates the Fifth Amendment [49/] rights under the Constitution of the United States of Petitioners and others similarly situated to them.

49/ "No person shall . . . be deprived of life, liberty, or property, without due process of law."

Bolling v. Sharpe, 347 U.S. 497 (1954) states the position clearly:

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." (footnote omitted), p.499.

The Respondents candidly admitted that for single family residential properties and for calendar years 1969 and 1970 (fiscal years 1971 and 1972, respectively) for the recommended assessment, and ultimately computing and putting on the tax rolls the final assessment figure, a multiplier (also called the level of assessment or debasement factor) was used for all changes those years at only 55%. If there were any other level of assessment used it was administrative error.

The Respondents further admitted that in calendar year 1972 (for fiscal year 1974) and calendar year 1971 (for fiscal year 1973) all changes in assessments were computed at a level of assessment at only 60%, except for miniscule administrative error.

Accordingly, it is admitted that all assessments, which were reviewed in a particular year for single family residential properties, were intentionally computed against the estimated market value at either a 55% level of assessment or a 60% level of assessment.

The net result of these intentional acts was that in fiscal year 1973 the level of assessment was raised for

approximately one-third of the taxpayers of this category--"class" of 96,378 single family residential properties (excluding garages).[50/] In fiscal year 1974 the level of assessment was intentionally raised for approximately one-half of the single family residential properties.

Denying discrimination, the Respondents would excuse these admitted intentional and arbitrary acts, which have created two separate, unequal assessment levels within the same class, by claiming that these acts were "...part of a systematic stair-step approach to return to the District's goal of assessing residential real property at 65% of estimated market value." The Respondents blame the surging increases (as much as 1-1/2% to 2% per month in some areas, particularly, west of Rock Creek Park [51/] in the values of single family residential properties, the lack of sufficient assessors, the fact that assessment rates are always 18 months to 2 years behind rising market values, to explain why the level of assessment had fallen from the "policy" of 65% to 55% on many of these properties.

Respondents point with pride to a co-efficient dispersion of 13 [52/] or "14 District-wide" [53/] to indicate that this is

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50/ Garages, computed under single family residential properties, number 1,329. Accordingly, the total single family residential properties, including garages, but excluding vacant land however zoned, is 97,707.

51/ Respondents' Brief, p.30, and testimony of Mr. Back.

52/ Respondents' Brief at p.31.

53/ Testimony of John Rackham.

a level of assessment proficiency "...attained by only a few other large cities", and that this shows equalization was maintained as fairly as possible with the resources given.

The Government's experts testified that the lower the co-efficient dispersion the better.[54/] In 1967, for example, the co-efficient dispersion was 11.7; the highest it reached in the next 4 years was 12.2 in 1971. In 1972 it rose to 14.0.

In fiscal year 1972 when there was a uniform 55% level of assessment, Anacostia, for example, had a co-efficient dispersion of 10; the most recent survey completed by the District of Columbia Government through May 1973,[55/] shows that since the level of assessment has been increased to 60%, Anacostia has an increased co-efficient dispersion of 18 for the 1973 assessment and 17 for the 1974 assessment. (The witness claimed there was no connection but offered no reason for this sharp, detrimental increase in a less affluent neighborhood of this city.) At the same time, the area west of Rock Creek Park, often referred to as the "more affluent area", maintained a co-efficient dispersion of 10. Chevy Chase had co-efficient dispersions for the above years of 9, 10 and 6; Spring Valley had co-efficient dispersions of 9, 10 and 8, respectively.

Of the 73 neighborhood areas in which the city is divided for statistical assessment purposes (59 of which have

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54/ "An assessor's batting average is a measure [called] co-efficient dispersion. It is a measure of error or inconsistency--and the idea is to get it as low as possible: [It is] a statistical measure of average deviation from the average or median assessment-sales ratio.", Petitioners' Exhibit 37.

55/ Respondents' Exhibit 7.

taxable properties; the balance having a few taxable properties) there are "a few neighborhoods" in which part of each such neighborhood is at the 55% level of assessment and part of which is at the 60% level of assessment. There are also "about 9 whole" neighborhoods at the 55% level of assessment. 56/

"Poor" neighborhoods, according to Charles W. Fortney, Jr., were assessed in fiscal year 1973; "in [fiscal year] 1974, we concentrated mostly in areas where the market values were increasing so fast, 20-30% in calendar year 1972...". When the estimated market value was reduced for fiscal year 1973, then the level of assessment was raised from 55% to 60%; if some property received a decrease in estimated market value for fiscal year 1974, then the level of assessment was raised to 60%.

In fiscal year 1973 whole neighborhoods were increased from 55-60% level of assessment, even those with less than 20% of changes in the estimated market values. As for examplo, Old City and Kalorama.

Petitioners' Exhibit 29 is illustrative. The property was located in the 800 block of East Capitol Street, near Capitol Hill. It was purchased in 1960 for $22,500. The estimated market value was $36,400. "This neighborhood has rapidly gone up in value (i.e., great appreciation of market value)." The old assessment (level of 55%) was $20,040; the market value remained unchanged, yet the new assessment, protested by the taxpayer, was $21,840 (level of 60%). The taxpayer appealed to the Board of Equalization and Review unsuccessfully, the Board writing on the appeal papers that:

56/ Testimony, John Rackham.

"This appeal for reduction is not warranted. The increase is because level of assessment went from 55% to 60%."

> "On the Board [of Equalization and Review] we do not discuss the level of assessment with the taxpayer; we only discuss the market value...We do not have discretion in the individual case to change the level of assessment from 60% back to 55%...The inflexible rule was to go to 60%". 57/

Assessor Beal, in charge of the "Deanwood" N.E. section of the city, where properties ranged in estimated market values from $6,000 to $40,000, testified that he accomplished assessing approximately 2,000 single family residential properties there for fiscal year 1973 and another 2,000 properties for fiscal year 1974. There were a "lot of decreases" [in estimated market value] and a "majority of increases". Probably "all" of the 2,000 properties assessed in fiscal year 1973 were changed; "I do not think any did not go to 60%. However, some may have kept the same estimated market value." Whether the estimated market value was reduced or increased made no difference: the level of assessment would still be 60%.

On appeal after appeal 58/ the findings of the Board were to the effect that the market value was not inappropriate, that there was no change in the market value for the property, but that the change in the level of assessment went from 55% to 60% and this was the factor that generally caused the increase. But when the taxpayers received their notices of change of assessment and/or made this appeal they did not know that their appeals had to be fruitless in many cases because the change of the level of assessment was "inflexible".

57/ Charles W. Fortney, Jr.

58/ For example, Petitioners' Exhibit 45 and 46, the latter with a total value of assessment at $8,700.

At least some of the more valuable single family residential properties in the District of Columbia, among its "ten highest" listings, were two on Foxhall Road, N.W., one assessed at over $900,000;[59/] the other assessed at over $555,000,[60/] both of which remain assessed at 55% with "no change for 1974".

Although the testimony and documentation was insufficient for the Court to draw a definitive conclusion from isolated facts, or to determine its full scope, it is nevertheless worthwhile to question why, at least in many instances, less affluent neighborhoods were assessed one to two years earlier when many (if not most) more affluent neighborhoods west of Rock Creek Park, the latter having the spiraling increases in market value.

No justification has been shown for the selection of some certain taxpayers to be increased in their level of assessment for fiscal year 1973 and others for fiscal year 1974, the balance remaining to be assessed in the future.

In Hillsborough T.P. v. Cromwell, supra, the court held that:

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class. Sioux City Bridge Co. v. Dakota County,

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59/ Petitioners' Exhibit 35.

60/ Petitioners' Exhibit 36.

> 260 U.S. 441, 445-447, 43 S.Ct. 190, 191, 192, 67 L.Ed. 340, 28 A.L.R. 979; Iowa-Des Moines Natl Bank v. Bennett, 284 U.S. 239, 247, 52 S.Ct. 133, 136, 76 L.Ed. 265; Cumberland Coal Co. v. Board of Revision, 284 U.S. 23, 29, 52 S.Ct. 48, 50, 76 L.Ed. 146.", pp. 623-624.

Although states must, and do, have wide discretion in the assessing and collection of their taxes,

> "...The law is equally clear, however, that such discretion cannot be exercised so as to arbitrarily deprive persons of their constitutional rights...", Weissinger v. Boswell, supra.

Weissinger is particularly interesting because, as a class action, it successfully challenged the constitutionality of Alabama's ad valorem tax program as the result of which different levels of assessment were used in different parts of the state.

Chicago Union Traction Co. v. State Board of Equalization, 114 F.557 (C.C.S.D. Ill. 1902, aff'd. 207 U.S. 20 (1907) found favor in Weissinger where the following was quoted:

> "Taxes are enforced contributions, levied by the State upon the property of individuals, by virtue of its sovereignty, for the support of government, and for the public needs. The money thus taken, until taken, is,***property within the meaning of the Constitution of the United States.***
>
> "Due process of law, applied to the cases under consideration, is the authorized procedure whereby the property of the individual can be taken by the State; it includes the initial authority to levy taxes; the purpose to which money thus raised is to be devoted; and the instrumentalities that distribute the burden upon the citizens. Ours is a government of laws, and not of individual officers, or of boards, or of men.
>
> "Any substantial departure, therefore, in the collection of taxes, from the law, either as to the authority for a tax, or its purpose, or the provisions for the just distribution of

> of its burdens, is a departure from due process of law; and the enforced collection of taxes, in the laying and distributing of which there is a substantial departure from law, is the depriving of a citizen of his property without due process of law."

The District of Columbia said it clearly, in 1896, in Craighill v. Van Riswick, supra:

> "Among the ordinary and essential attributes of sovereignty and subjects of legislation is the power of taxation, which, as Mr. Cooley says in his Treatise on Constitutional Law, ch.4,p.55, is 'unlimited in its range as to the kind of taxes that shall be laid, or the subjects upon which it shall be imposed.' And yet this great and vast power of taxation is rigidly limited in the one respect that it must be uniform and equal in its operation, must be levied for public not for private purposes, and must be laid according to some definite and positive rule of apportionment. Taxes may be laid upon lands, upon personal property, upon occupations, upon special classes of property, or upon special occupations, or upon persons; but within the scope of the selection the tax must be uniform. One man cannot be taxed more in proportion than another. These are well established principles of the law of taxation that require no citation of authorities to support them.
>
> "[This principle of uniformity] is abundantly secured by the provision in the Fifth Amendment to the Constitution that 'no person shall be deprived of life, liberty or property without due process of law: nor shall private property be taken for public use without just compensation.' For private property would be taken for public use without any compensation, and due process of law would absolutely be wanting in any system of taxation that was not uniform in its operations--not necessarily uniform in its results or operating to do exact justice, but free from undue discrimination as to persons." (emphasis supplied), pp. 214-215.

The Craighill case, although dealing with taxation by way of special assessment, nevertheless has used language appropriate to the instant cause:

> "...[such] a system...which leads to a result so absurd...must be radically vicious and unjust. We think that it is vicious, because it is arbitrary; all things arbitrary in the administration of government are vicious. We think

> that it is unjust, because it compels the individual citizen in many cases, probably in most cases, to pay more than his just share of the common burden for the public good." pp. 215-216.

Responsible citizens must pay taxes as part of their responsibility as such citizens. This is, of course, in furtherance of good government with the manifold protections it provides the young and the old, the poor and the rich, the employed and the unemployed, the educated and the less educated. But these citizens must pay their fair share, fairly assessed and equally applied.

Discrimination is not only obvious from the two separate levels of assessment within the same class of single family residential property, but there is also discrimination within whole neighborhoods (part assessed at 55% and part assessed at 60%), and at least some additional discrimination between the less and the more affluent city areas.

It would be incredible to permit this anywhere, and least of all in the nation's capital. This inequality and "prohibited unfairness" 61/ is violative of the due process (equal protection) clause of the Fifth Amendment.

Fundamental constitutional rights cannot be subject to such qualification as the Government would seek to impose.

As was said in 48 Harvard Law Review 1299:

> "If we say with Mr. Justice Holmes, 'men must turn square corners when they deal with the Government,' it is hard to see why the Government should not be held to like standards of rectangular rectitude in dealing with its citizens***."

Accordingly, on June 29, 1973, the Court signed the following Conclusions of Law and Orders:

61/ Bolling v. Sharpe, supra.

1. That this Court has jurisdiction to hear and determine this case under D.C. Code 1967, Supp. V, §11-1201, 1202.

2. That Petitioners have fully established the material allegations of their petitions (consolidated).

3. That this is an extraordinary and exceptional action compelling and justifying extraordinary and exceptional relief.

4. That as a result of the extraordinary and exceptional circumstances detailed through evidence, and acting under the inherent and general equity powers of the Court in order to effectuate justice, this cause is determined as a taxpayers' suit brought on behalf of the individual Petitioners and all others similarly situated.

5. That, as a result of the extraordinary and exceptional circumstances, exhaustion of administrative remedies is not required, nor are Petitioners individually nor all others similarly situated required to pay an invalid and void tax prior to commencement of this action.

6. That the Respondents have failed to comply with the requirements of the District of Columbia Administrative Procedure Act, D.C. Code 1967, Supp. V, §1-1501 through 1510 (inclusive), particularly as pertain to the public notice and participation in "rule-making" requirements for both establishment of rules and changes by "rule-making" concerning the level of assessment (debasement factor) for single family residential real property from 55% of estimated market value to 60% of estimated market value.

7. That the Respondents by intentional and arbitrary actions in application of unequal (55% and 60%) levels

of assessment (debasement factor) of the estimated market value of real property in the District of Columbia within the same class of single family residential real properties, have created unconscionable, arbitrary and invidious discrimination among its citizens of this same class, in violation of the Fifth Amendment of the Constitution of the United States as it applies to the Petitioners individually and to those similarly situated.

8. That the extraordinary and exceptional circumstances of this case, including imminent, grave and irreparable injury, without an adequate remedy at law, command injunctive relief be granted under the general and inherent equity powers of the Court.

It is, therefore, by the Court,

ORDERED:

1. That the Respondents and any and all of their agents, servants or employees be and hereby are enjoined from using, for purpose of taxation, unequal levels of assessment (debasement factor) of estimated market value in determining the assessment, valuation or equalization of single family residential real properties, including residential garages and vacant land zoned residential.

2. That the Respondents and any and all of their agents, servants or employees, be and they hereby are enjoined from placing any assessment, valuation or equalization on single family residential real property (including residential garages and vacant land zoned residential) which has been determined using a level of assessment (debasement factor) other than 55% of estimated market value of such property, until and unless a level of assessment (debasement factor) has been

established after full compliance with the provisions of the District of Columbia Administrative Procedure Act.

3. That the Mayor-Commissioner be and he hereby is enjoined from approving any assessment, valuation or equalization of single family residential real property (including residential garages and vacant land zoned residential) for purposes of taxation, which has been determined using any level of real property tax assessment (debasement factor) other than 55% of estimated market value of such property, until and unless a level of assessment (debasement factor) has been established after full compliance with the provisions of the District of Columbia Administrative Procedure Act.

4. That within 10 days from date of this Order the Petitioners are to submit a memorandum concerning their prayer for costs and reasonable counsel fees; that Respondents are to submit a memorandum in opposition thereto, if any, within 10 days of service of Petitioners' memorandum.

IT IS FURTHER ORDERED that:

Upon consideration of the Petitioners' prayers for costs and attorney's fees, filed July 9, 1973, and Respondents' opposition to same, not yet due or filed at time of this Opinion and Order, a separate Order shall be entered.

Joyce Hens Green
Judge

July 17, 1973

Copies to attorneys
of record.