

Opinion No. 1152

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

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

OCT 27 1977

FILED

RICHARD A. BISHOP,)
)
 Petitioner)
)
 v.)
)
 DISTRICT OF COLUMBIA,)
)
 Respondent)

Docket No. 2362

AXEL-FELIX KLEIBOEMER,)
)
 Petitioner,)
)
 v.)
)
 DISTRICT OF COLUMBIA,)
)
 Respondent)

Docket No. 2379

MEMORANDUM ORDER

The facts in these cases are fully set forth in the Opinion this Court filed on October 18, 1977. The petitioners had filed these refund cases in an effort to challenge the legality and constitutionality of that portion of the Revenue Act of 1975 (D.C. Law No. 1-23) which amended D.C. Code 1973 Sec. 47-1574 et seq so as to remove the exemption previously granted to unincorporated professionals. The petitioners and their class, who fell within the above category, are all non-residents who have paid the tax in question. In denying their claims this Court held that the exemption was repealed only after notice as required by D.C. Code 1973 Sec. 1-144(c) (Supp. IV 1977), that the Council was not prohibited by the Self Government and Governmental Reorganization Act (D.C. Code 1973 Sec. 1-147(a) (5) (Supp IV 1977)) from repealing the exemption and thereby taxing the petitioners and their class for the privilege of doing business in the Dis-

trict of Columbia and finally that the tax does not violate the Privileges and Immunities or the Equal Protection Clauses of the Constitution. U.S. Const., Art., IV, Sec. 2, c 1; Amend. XIV. The only equal protection argument discussed by the Court was whether the franchise tax discriminated between residents and non-residents since the former are entitled to take deductions for the franchise tax paid under Section 47-1574, et. seq. in computing their District income tax. See D.C. Code 1973, Sec. 47-1557a(b)(10).

I

Subsequent to issuing its Opinion, the Court, sua sponte, set these cases down for a further hearing on October 20 and requested further comments and memoranda directed to the constitutionality of Section 47-1574b which was also amended by the Revenue Act of 1975. Prior to that amendment Section 47-1574b had merely provided that the rate of the franchise tax would be eight percent upon the taxable income of every unincorporated business. Section 47-1574b has now been amended to provide:

For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied (a) for one taxable year beginning on or after January 1, 1975, a tax at the rate of 12 per centum upon the taxable income of every unincorporated business, whether domestic or foreign, (except those expressly exempt under section 47-1554) and (b) for the taxable years beginning on or after January 1, 1976, a tax at the rate of 9 per centum upon the taxable income of every unincorporated business, whether domestic or foreign, (except those expressly exempt under section 47-1554), and (c) for the taxable year beginning on or after January 1, 1976 but prior to January 1, 1977 and for the taxable year beginning on or after January 1, 1977 but prior

to January 1, 1978, a surtax at the rate of 10 per centum of the tax determined under clause (b) hereof. The minimum tax payable under this section shall be \$25.00.

The effect of the amendment is to increase the rate of the tax and to establish the date upon which professionals would begin to pay the tax for the first time.

The Council in removing the exemption provided that the tax would be levied at a rate of twelve per cent for "one taxable year beginning on or after January 1, 1975" and thereafter at a rate of nine percent a year with a surtax for the taxable year arising "on or after January 1, 1976". The result is that those taxpayers on a calendar tax year began paying for the privilege of doing business on January 1, 1975 while those on a fiscal tax year began paying for that privilege at some later date. The District has advised the Court that some fiscal year taxpayers in this category began their fiscal years as late as December 1, 1975. Moreover, the District has required taxpayers in the same class to pay different rates of tax at the same time. Thus, Doctor A who is on a calendar tax year became liable for the tax on January 1, 1975 while Doctor B who is on a fiscal tax year, became liable on December 1, 1975. The tax is a privilege or franchise tax and therefore Doctor A was required to pay for the privilege of maintaining an office here eleven months before Doctor B. If both had decided to give up their respective practices on April 1, 1976, Doctor A would have paid for fifteen months while Doctor B would have paid for only four months. The petitioners, both of whom are on a calendar tax year, argue that this is unequal treatment. This Court agrees.

The District argues that the tax is not unfair because all taxpayers pay twelve percent for the first year and nine

percent thereafter. This argument overlooks the fact that the members of the class begin paying the tax at a variety of times. The District has cited several cases in support of their argument which this Court finds are either distinguishable or lend support to the petitioners contention. For example, the District cites Kelly v. District of Columbia, 102 Wash. L. Rep, 2093, Tax No. 2225 (D.C. Super Ct. 1974) (Kelly I) in which this Court, after having determined that the District was reassessing different taxpayers in the same class every one, two, three or four years ordered the District to begin a two year cyclical reassessment program until such time as the District had the manpower and resources to reassess all properties annually as required by the statute. There the result was that every real property was reassessed once every two years rather than the haphazard method previously used by the District. The District overlooks a second opinion filed in that case in which this Court held that the District could not go to a single year reassessment program until it had completed the cycle required by Kelly I. (Kelly v. District of Columbia, 105 Wash. L. Rep, 577, Tax No. 2225 (D.C. Super Court 1977) (Kelly II)). Prior to that decision it had already been held in this jurisdiction that "a cyclical assessment program may be permissible provided any inequities resulting therefrom are of an accidental and temporary character". District of Columbia v. Green, 310 A 2d 848, 855 (D.C. App 1973).

Here the District has adopted a stairstep approach in beginning a tax and in the rates of tax. There is no showing of

necessity or a logical reason for such an approach. The argument on behalf of the District suggests that the taxable date was arbitrary and perhaps selected using the federal tax code as a guideline. In fact, the District had argued that it merely followed the language used in Section 1 of the Internal Revenue Code of 1954 (26 U.S.C. Sec. 1) which provides in part:

- (a) Rates of tax on individuals. --
 - (1) Taxable years beginning in 1964. -- In the case of a taxable year beginning on or after January 1, 1964, and before January 1, 1965, there is hereby imposed on the taxable income of every individual . . .

The fact that the District may have followed a federal statute does not save the local statute from a valid constitutional challenge. Moreover, the District again overlooks Section 21 of the same federal tax code which provides that if there is a change of rate in the tax on or after a given date, the taxpayer would pay the old rate prior to the effective date of the change and the new rate thereafter regardless of the beginning date of his taxable year.

Had the District used the same language in Section 47-1574b, no constitutional issue would have been raised. The effective date of the tax could easily have been set at January 1 or any other date in the year. While it's true that some taxpayers would have become liable for the tax in the middle of their respective taxable years, all taxpayers would have become liable at the same time and at the same rate. Instead, the District elected a system under which different taxpayers in the same class would be taxed at different times and at different rates. This Court can see no difference between the statute, as it's presently written, and a system where this same respondent chose to apply different debasement

factors to the same class of property at the same time. Both schemes are unfair and discriminate among members of the same class. District of Columbia v. Green, supra at 855. As a result, Section 47-1574b as amended denies the petitioners and their class the equal protection of the law. Bolling v. Sharke, 347 U.S. 497 (1954).

II

This Court has determined that in its present form the statute discriminates against members of the same class. Of course every statute is presumed to be valid but that presumption has been overcome in this case by the petitioners. It now becomes the function of the Court to determine whether an alternative construction would save the constitutionality of Section 47-1574b. Sutherland, Statutory Construction, 45.11 (3rd ed. 1973). See also United States v. Thorne, 325 A 2d, 764, 766 D.C. App 1974; District of Columbia v. Walters, 319 A 2nd 332, 336 (D.C. App 1974).

The statute can be cured of any constitutional problems if it is read so that the tax liability for all members of the class arise at the same time and all taxpayers within that class are taxed in the same rate.

The earliest date upon which the tax under the present statute would apply to all taxpayers in the class is December 1, 1975, the date of the beginning of the last fiscal year in 1975. The Court concludes therefore that the Council would have intended the statute to read so as to begin the liability for the franchise tax on December 1, 1975 in order to save its

constitutionality. Any earlier date would raise serious questions since some taxpayers would still be subject to a tax before others. The Court cannot now require a fiscal year taxpayer whose tax year would have begun, for example, on December 1, 1975 under the statute, to now begin payment for an earlier date. Thus, the earliest date suggested by the District when all taxpayers became liable was December 1, 1975.

The second issue is the tax rate and when the change in that rate becomes effective. Again, under the statute as it now reads, taxpayers in the same class pay different rates of tax at the same time. The Court construes the statute to read, with respect to any change of rate, the same as Sections 1 and 21 of the Internal Revenue Code of 1954 when read together. In other words, the tax rate is computed by applying the old rate before the effective date of the change and the new rate after the effective date of change. The effective date of the change is the first day of January 1976 and the last day of December 1977 for the surtax.

To illustrate the above changes, under the present statute, Doctor A, a calendar taxpayer became liable for the tax January 1, 1975 while Doctor B did not become liable until December 1, 1975. As the statute is now construed by the Court, they both became liable on December 1, 1975. They should have paid at the rate of twelve percent for December 1975 and nine percent on and after January 1, 1976. The surtax became effective for both on January 1, 1976 and will cease after December 31, 1977.

III

This memorandum Order modifies this Court's opinion filed

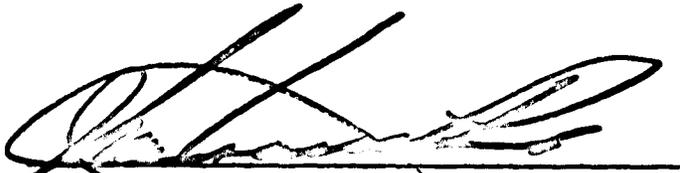
on October 18, 1977, to the extent that the petitioners are now entitled to a refund for all their franchise taxes paid prior to December 1, 1975. Any members of the class who were fiscal year taxpayers and had perfected their claim for refund as provided by law, would now be entitled to a refund or credit consistent with the above and for the difference between twelve percent paid after January 1, 1976 and the nine percent that this Court has construed to be due after that date.

ORDER

It is hereby

ORDERED that consistent with the Court's opinion of October 18, 1977, and consistent with this Memorandum Order, the petitioners shall be granted a refund.

Separate Judgment Orders shall be entered in each case.



JOHN GARRETT PENN
Judge

Dated: October 27, 1977

Copies served:

John M. Bixler, Esquire
1700 Pennsylvania Avenue, Northwest
Washington, D. C. 20006

Philip L. Kellogg, Esquire
James L. Lyons, Esquire
KELLOGG, WILLIAMS & LYONS
1776 F Street, Northwest
Washington, D. C. 20006

Richard L. Aguglia, Esquire
Assistant Corporation Counsel, D. C.

Mr. Kenneth Back
Finance Officer, D. C.

1204

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION

RICHARD A. BISHOP,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

and

AXEL-FELIX KLEIBOEMER,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

SEP 25 10 42 AM '81

FILED

Docket No. 2362

Docket No. 2379

ORDER

It is hereby:

ORDERED that the timely filing of individual claims at the administrative level by affected taxpayers is a prerequisite to refunds in this suit, and it is further

ORDERED that the District of Columbia shall compute interest at 4% on the refunds from the date such individual claims are timely filed until the date of the making of the refund.

John D. Thompson

John D. Thompson
Judge

September 29, 1981

- cc: Philip L. Kellera, Esq.
- Bradley G. McDonald, Esq.
- John M. Dinkin, Esq.
- Ronald D. Aucutt, Esq.
- ✓ Richard L. Agostino, Esq.
- Carolyn L. Smith, Director
- Department of Finance
- and Revenue

SEP 25 11 42 AM '80

RICHARD A. BISHOP,
Petitioner,

v.

Docket No. 2362 FILED

DISTRICT OF COLUMBIA,
Respondent.

and

AXEL-FELIX KLEIBOEMER,
Petitioner,

v.

Docket No. 2379

DISTRICT OF COLUMBIA,
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

ADMINISTRATION

On October 20, 1980, the parties presented to this Court a proposed consent judgment which set forth the following three (3) unresolved issues in this case:

1. Whether a taxpayer who has failed to file a claim for refund under D.C. Code §47-1506j within three years from the time the tax was paid is entitled to receive a refund of the tax paid or, alternatively, whether the filing herein by the petitioner Axel-Kleiboeemer of his individual claim for refund, his claim for refund filed for the class, and his class action petition constituted the timely filing of a claim or the timely filing of a petition by the members of the class.
2. Whether a taxpayer is entitled to receive a refund of tax paid for a year or years for which the statute of limitations has not run if he fails to file a claim for refund under D.C. Code §47-1506j.
3. When interest as provided by law begins to run.

The judgment order, with some slight modifications not here relevant, was signed on October 22, 1980, and argument on these three issues was set for December of 1980. Briefs were filed, pursuant to the terms of the October 22, 1980 judgment order, with short extensions to

both parties. After consideration of the arguments and briefs of the parties, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

THE CLAIM FOR REFUND ISSUE

On March 25, 1976, petitioner Kleiboemer, the class representative in this suit,^{1/} paid the tax here in dispute and simultaneously filed an individual claim for refund at the administrative level as required by statute as a prerequisite to suit. That claim for refund was denied on March 26, 1976 by the Department of Finance and Revenue. On April 5, 1976, petitioner Kleiboemer filed a class action petition for refund of tax in the Tax Division of this Court.

On October 18, 1977, the Tax Division of this Court denied the request of petitioners Bishop and Kleiboemer for refund in this case and dismissed their petitions with prejudice. In a separate Order entered on that same day, the Tax Division certified this case as a class action maintainable under Superior Court Civil Rules 23(b)(1)(A) and 23(b)(1)(B), except for petitioner Bishop. On October 27, 1977, the Tax Division, sua sponte, modified its October 18, 1977 opinion and ruled that petitioners were entitled to a refund of all franchise taxes paid by them prior to December 1, 1975. The Court went on to state:

Any members of the class who were fiscal year taxpayers and had perfected their claim for refund or abatement of tax, would now be entitled to a refund or credit consistent with the above [opinion]. . . .

^{1/} Petitioner Bishop was excluded at his own request from the class when it was certified.

ORDERED that the class consists of those non-resident taxpayers who have paid the unincorporated business franchise tax pursuant to D.C. Code 1973, Sec. 47-1574b (Supp. VI, 1977), except for Richard A. Bishop (See Tax Docket No. 2362), and it is further

ORDERED that the petitioner, Anel-Felix Kleibocmer, is hereby granted a refund for the franchise tax he paid for the period January 1, 1975 through November 30, 1975, together with interest as provided by law, and it is further

ORDERED that the members of the class shall be entitled to refund of taxes, consistent with the Opinion and Order as modified by the Memorandum Order, provided they have complied with an order of the U.S. Court of Appeals for the District of Columbia Circuit, 47-1574b (Supp. VI, 1977), D.C. v. Royce, 507 A.2d 700 (D.C. App. 1986); (emphasis supplied; 105 W.L.R. 2019, 2019.)

Both decisions were appealed.

On November 30, 1970, while these two decisions were being considered on appeal (App. Docket Nos. 12871, 12872, 12920 and 12921), petitioners filed with the Tax Division a motion for an order "compelling inclusion of notice to members of the class" of the expiring redemption period set forth in D.C. Code 47-1586j in the District's December, 1970 mailing to class members. Petitioners went on to state in that motion that:

By order dated October 27, 1977, this Court directed the refund of all taxes paid by members of the class . . . for the period January 1 through November 30, 1975, provided they have complied with an order of the U.S. Court of Appeals for the District of Columbia Circuit, 47-1574b (Supp. VI, 1977), D.C. v. Royce, 507 A.2d 700 (D.C. App. 1986); (emphasis supplied; 105 W.L.R. 2019, 2019.)

- 4 -

In order to protect fully the rights of the members of the class, counsel are of the view that notice must be given to the class in a timely fashion to permit the filing of the necessary claims for refund. (Emphasis supplied; Motion at 1,2.)

Subsequently, on December 12, 1978, and prior to the mailing of the requested notice to the class members, petitioner Kleiboemer filed one claim for refund at the administrative level on behalf of "all non-residents who are subject to the District of Columbia Unincorporated Business Tax by virtue of owning and engaging in the conduct of unincorporated personal service businesses in the District of Columbia and who have paid for the tax, except for Richard A. Bishop." (Emphasis supplied.) Thus, some two and one-half years after bringing suit, petitioner Kleiboemer, as the class representative, filed a class claim for refund at the administrative level. As stated above, prior to bringing this suit only an individual claim was filed by petitioner Kleiboemer on his own behalf at the administrative level. The class claim for refund was rejected at the administrative level and respondent opposed the filing of that claim on behalf of the entire class at the trial level as contrary to the statutory requirement (§47-1586j) of individual claims. On the same date, respondent questioned the trial court's jurisdiction to hear and determine petitioner's motion, given the fact that its October 18 and 27, 1977 rulings effectively disposed of all the issues at the trial level which were then currently on appeal.

On December 13, 1978, the District of Columbia Court of Appeals granted petitioners-appellants unopposed motion to remand the record (but not the merits of the case-in-chief), so that the trial court could consider their motion to compel inclusion of a notice

of the expiring limitations period to members of the class in the District's December, 1978 mailing.

On January 3, 1979, the Tax Division entered an Order pursuant to its oral ruling and declared null and void the class claim for refund as contrary to §47-1586j. The trial court did, however, find appropriate individual notice to the members of the class of the statutory requirement to file a claim for refund not only regarding tax year 1975, but tax years 1976 through 1978 as well.

On January 19, 1979, petitioner Kleiboemer filed a notice of appeal from the Tax Division's rejection of his class claim for refund (App. Docket No. 79-123). Subsequently, petitioner asked the Court of Appeals to defer the filing of any further appellate pleadings on this issue until after final determination of the case-in-chief (i.e., the validity of the tax itself) had been made. Appellee-respondent opposed that motion and moved to dismiss the appeal as premature, since the trial court, on remand of the record, had yet to make a final determination of a remaining notice issue not germane to these proceedings. Action by the Court of Appeals on the District's motion to dismiss was stayed pending a final determination by the trial court of all remaining issues.

On March 15, 1979, the trial court decided all remaining issues on remand of the record and petitioners filed a second appeal (App. Docket No. 79-547), which was consolidated with the first (App. Docket No. 79-123) for all purposes by the Court of Appeals on June 26, 1979. The Court of Appeals further stayed any action on those

motions pending a final determination on the merits of the validity of the tax.

On February 12, 1980, the District of Columbia Court of Appeals, sitting en banc, reversed the judgment of the Tax Division and held that the tax in issue violated the proscription of a commuter tax as set forth in Section 602(a) (5) of the Self-Government and Governmental Reorganization Act (D.C. Code 1973, §1-147 a(5)(Supp. V, 1978). Its mandate was returned to the Tax Division on May 29, 1980 and, pursuant to that mandate, judgment for petitioners was entered by this Court on October 22, 1980. The terms of that judgment provided that, inter alia, the District notify affected taxpayers of the requirements for obtaining refunds, i.e., the filing of individual claims. With that notice, the District was required to supply and did supply a form entitled "Summary of Information Regarding Unincorporated Business Tax Refund", which would be treated by the District as a claim for refund form, if timely filed.

FINDINGS OF FACT

II

THE INTEREST ISSUE

This Court adopts the findings of fact contained above and determines that the question of when interest must be paid by the District of Columbia on overpayments claimed by taxpayers is governed by the relevant District of Columbia Code citation, 1973 ed., §47-2413 (c), which provides for the award of interest on overpayments of tax reads as follows:

(c) Any other provision of law to the contrary notwithstanding, if it is determined by the Commissioner or by the Superior Court that there has been an overpayment of any tax, whether as a deficiency or otherwise, interest shall be allowed and paid on the overpayment at the rate of 4 per centum per annum from the date the overpayment was paid until the date of refund, but with respect to that part of any overpayment

which was not assessed and paid as a consequence of an additional tax interest claim or interest and paid only after the date of filing a claim for refund or a petition to the Superior Court as the case may be. (Emphasis supplied.)

CONCLUSIONS OF LAW

I

THE CLAIM FOR REFUND
ISSUE

The Tax Division (Penn.J.) held invalid the District's imposition of the unincorporated business tax for the first eleven (11) months of 1975. The trial court made it perfectly clear, however, that individual claims for refund within the meaning of §47-1586j were necessary. It, therefore, rejected petitioner Kleiboemer's class claim for refund for the 1975 taxable year. Aware of the expiring statute of limitations for other years in which taxes were paid pending resolution of the validity of the tax by the Court of Appeals, the trial court also rejected petitioner's class claim for refunds for 1976 through 1978. In this regard the trial court stated that the class members should be individually notified (and were) of "the statutory requirement to file a claim for refund . . . and . . . that such notice should include notice not only regarding tax year 1975, but tax years 1976 through 1978 as well." (Order at 1,2; Emphasis supplied.)

The Court's subsequent Order of January 3, 1980, when combined with those of October 18 and 27, 1977, leaves no doubt that the class here represented has been judicially defined as:

- (1) non-resident professionals doing business in the District and subjected to tax since 1975,

- (2) who have paid the tax, and
- (3) who have filed individual claims for refund under §47-1586j,
- (4) except for Richard A. Bishop.

This Court concludes, therefore, that Judge Penn has ruled that a timely administrative claim is a prerequisite to a refund of the tax paid, and as such, is the law of the case.

Even assuming Judge Penn had not already ruled that the filing of timely individual claims for refund was a predicate to recovery, this Court, for the reasons that follow, would have so held:

The relevant District of Columbia statute, §47-1586j, 1973 ed. (Supp. VII, 1980), reads in part as follows:

(a) Refund to taxpayer. --

... where there has been an overpayment of any tax imposed by this subchapter, the amount of such overpayment may be credited against any liability in respect of any income or franchise tax or installment thereof (whether such tax was assessed as a deficiency or otherwise), on the part of the person who made the overpayment, and the balance shall be refunded to such person.

No such credit or refund shall be allowed unless the taxpayer has filed a claim for such credit or refund within the three years immediately following the date of the payment of the tax or the date of the expiration of the period of limitation for assessment of the tax, whichever is later, and the amount of such credit or refund shall not exceed the portion of the tax paid during the three years immediately

preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of such credit or refund. Every claim for credit or refund must be in writing, under oath; must state the specific grounds upon which the claim is founded, and must be filed with the Mayor. (Emphasis supplied.)

The words emphasized in the above Section by respondent have remained virtually unchanged^{2/} since Everett Dirksen referred Bill H.R. 2282^{3/} to the Committee on the District of Columbia on February 27, 1947. The purpose of the statute is clear - to limit refunds on overpayments to named persons in amounts specified in writing within a certain time frame for budgetary purposes. Thus, unless a taxpayer claims in writing that a specified amount of tax has been overpaid, more than three years from payment, no refund will be allowed. In this way, the District of Columbia, through the Congress of the United States, may forecast and plan for its fiscal obligations and comply with Charter requirements that the District's budget must be balanced and the District cannot expend funds in excess of its revenues. Self-Government Act §442(a)(1), 448, and 603(c). This conclusion is bolstered by the language of the statute itself:

... and no tax or part thereof which the Mayor may determine to have been an overpayment shall be refunded after the period prescribed therefore in the Act concerning the funds of the District of Columbia which are to be used for the purpose of the District of Columbia.

2/ The word "Mayor" has been inserted in place of the word "Assessor".

3/ H.R. 3737 (80th Cong., 1st Sess., 1947) was the Bill actually reported out.

Moreover, Judge Penn provided for individual notice to these taxpayers (in the District's December 1978 mailing, as stated above) of the requirement to file separate claims for refund for the taxable years 1975-1978. At the time of that mailing, the applicable statute of limitations had not run on any year involved in these proceedings.

Further, the notice attached to this Court's judgment order of October 22, 1980, was required by that very order to be mailed to all affected taxpayers. The notice informed taxpayers of their right to complete an enclosed form to be treated by the District as a timely refund claim for all open years. At the time of the mailing, 1977, 1978, 1979 and 1980 were all years for which the applicable statute of limitations had not run.

The Court is also cognizant of the fact that further notice of the requirement to file individual claims for refund for 1975 (and a suggestion to file for all years) appeared in the District Lawyer, Feb. 1978, Vol. 2, No. 3 at 57-58 and in several newspaper articles. See, for example, page B-2 of the April 5, 1979 edition of the Washington Post.

It is, therefore, difficult to perceive how the taxpayers have been injured by the requirements of individual claims for refund.

The requirement of an individual claim for refund is supported by the case of District of Columbia v. Keyes, 362 A.2d 729 (D.C. App. 1976). In that case, Arthur and Lucille Keyes, on behalf of themselves and others similarly situated, brought suit against the District for partial refunds paid in fiscal year 1973 on all single-family residential properties in the District of Columbia which

4/ The action was brought as an uncertified class action.

were assessed at 60% of estimated market value. The trial court awarded the refunds sought. In reversing, the appellate court noted that the refund of taxes illegally or erroneously assessed and voluntarily paid was not permitted at common law and was a matter within the purview of the legislative branch. The Court further found that under the statutory procedure applicable to the case, the recovery of refunds through appeal to the Superior Court first required (as here), a complaint to the proper administrative body. Since the taxpayers failed to follow their administrative remedies for fiscal year 1973, refunds were disallowed. The Court of Appeals in Keyes, aware of the precedential effect of its decision for future class action tax refund cases,^{5/} also disallowed refunds under a separate theory. The Court went on to state:

While application of the principles of equity occasionally may be appropriate in tax litigation (e.g., Green) to avoid hardship and the financial instability of taxpayers, such an application to require the government to make good on its tax liability is not appropriate. The government is not a party to the tax liability. The government is not a party to the tax liability. The government is not a party to the tax liability. This should be done only in a rare case (e.g., Green). Otherwise, financial instability would be inevitable. Tax statutes are necessarily formalistic and often technical. It is essential that we adhere to such formalism, even at times a seeming hardship results to the taxpayer. See, e.g., Georgia Lumber Construction Co. v. Director of Revenue, 207 Ga. 175, 53 S.2d 175, 176 (1959). In rare cases, financial considerations require that the government make good on its tax liability. Where class action tax refunds for fiscal years in the past are at issue, the holder court would not annul from some inexhaustible treasury. The reality is that the funds could only be supplied by an additional tax on innocent

taxpayers, or the reduction of services, in an already financially beleaguered city. Only in extraordinary circumstances, not here present, should the equity relief sought be afforded. (Footnote omitted; Emphasis supplied; 362 A.2d at 737.)

The results of the Keyes case rest on many of the same grounds advanced by the District here.^{6/}

The following cases are examples of numerous cases which support the position that a strict construction of exclusive statutory remedies for tax refunds is required:^{7/}

Jones v. Liberty Glass Co., 332 U.S. 524 (1947); Roserman v. U.S., 323 U.S. 658 (1945) (claims for tax refunds must conform strictly to the requirements of Congress); Anniston Mfg. Co. v. Davis, 301 U.S. 337, 342 (1937) (if the administrative remedy is fair and adequate, other questions need not be considered, and the substitution of an exclusive remedy directly against the Government is not an invasion of constitutional right); Marboefer Pkg. Co., Inc. v. Indiana Department of State Revenue, 301 N.E. 2d 209 (1973) (where the legislature has by statute created a right, afforded a remedy and prescribed a procedure to be followed in connection with the remedy, that procedure must be strictly followed).

The following cases lend support for the position that a class claim for refund at the administrative level (under §47-1586j) is not maintainable.

In Rose v. American Airlines, Inc., 331 F.Supp. 72 (N.D. Ill., 1971), plaintiffs brought a class action suit challenging the constitutionality of the Airport and Airway

^{6/} The Keyes rationale has been followed by the trial court in Calvin Humphrey & River Park v. D.C., Tax Division Docket No. 2221.

^{7/} It is conceded that these particular cases, unlike Keyes do not involve class action suits.

Revenue Act of 1970. The Act imposed an 8 percent tax on domestic flights and a \$3.00 per ticket tax on international flights originating in the United States. Plaintiffs sought, inter alia, that the new airline rates be declared null and void and that the funds collected thereunder be refunded to the public.

The United States Government moved to dismiss the claim for refund brought on behalf of the class since only the named plaintiffs had filed individual claims for tax refund at the administrative level under 26 U.S.C. §7422(a). Section 7422(a) is similar to D.C. Code §47-1586j and reads as follows:

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) NO SUIT PRIOR TO FILING CLAIM FOR REFUND. -- No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof. (Emphasis supplied.)

In agreeing with the Government's contention in this regard, the Court stated:

The recent case of Agren v. Alaska Air, Inc., 331 F.Supp. 615 (D.C. Alaska, 1970) has held that sec. 7422(a) requires that before suit for refund can be filed in the Federal court a claim must have been duly filed with the Secretary and that this requirement applied individually to each claimant. The court concurs with the holding in Agren, and accordingly the claims of the class for refund are stricken for failure to comply with 26 U.S.C. §7422(a). (Emphasis supplied, 331 F.Supp. 79.)

Essentially, an unauthorized agent may not "claim an unspecified refund for unknown principals." Harkins v. United States, 66-2 U.S.T.C. 19543, at 86, 702 (E.D. Okla. 1966), aff'd. on other grounds, 375 F.2d 239 (10th Cir. 1967). Consequently, the only party of whom we are aware that has standing to bring this action under 28 U.S.C. §1346(a)(1) is the named plaintiff, Agron, who, at best, may be said to constitute a class of one. McConnell v. United States, 295 F.Supp. 605, 606 (E.D. Tenn. 1969); Lipset v. United States, 37 F.R.D. 549, 551-552. (S.D.N.Y. 1963), appeal dismissed, 339 F.2d 956 (2d Cir. 1966). (Emphasis and asterisk supplied; 325 F.Supp. 488.)

In McConnell v. U.S., 295 F.Supp. 605 (E.D. Tenn. 1969), the individual claim requirement - financial stability - espoused by respondent here, is set forth as follows:

Conceding arguendo that the plaintiffs and other striking employees of Kingsport Press, Inc. and their respective spouses may be members of the same class, before any taxpayer may maintain any action to recover any internal revenue tax alleged to have been erroneously or illegally assessed or collected, ~~it is an absolute and indispensable prerequisite that the claimant must show that he is the taxpayer or the transferee of the tax.~~ Section 1346(a)(1), U.S.C. ~~has been held to require the Secretary of the Treasury to issue regulations according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.~~

~~This serves to define the appropriate burden of proof on the claimant.~~
~~On the other hand, it is an established principle of law that the government is to be held to its contract.~~
~~See, U.S. v. United States, 208 U.S. 209, 272 S.Ct. 376, 75 L.Ed. 1025, 1027 [1]. " * * * It is vital to the functions of government that taxes be collected promptly and if errors are made, that they be expeditiously corrected. To this end the statute requires the taxpayer to make a timely charge of overpayment with grounds therefor, that the government may make investigation and refund the amount due, if any, without being subjected to the delay and expense of litigation * * *."~~
Hales v. United States, C.C.A. 6th (1940), 125 F.2d 637, 300, [3], [4], affirmed (1941), 314 U.S. 186, 193, 62 S.Ct. 214, 86 L.Ed. 132, 138. (Emphasis supplied, 295 F.Supp. 606).

See Heisler v. U.S., 463 F.2d 375 (9th Cir. 1972); see also, Henderson v. Carter, 195 S.E.2d 4 (Ga. 1972) and Hooks v. Comptroller of Treasury, 289 A.2d 332 (Md. 1972), for similar state cases supporting respondent's position on this point. Cf., U.S. v. Felt and Tarrant Manufacturing Co., 283 U.S. 269 (1931) and U.S. v. Rochelle, 363 F.2d 225 (5th Cir. 1966).

The Court notes that petitioners have not cited a single case involving the refund of income or franchise taxes whereby the administrative process was successfully by-passed.

The legislative history of §47-1586j and its federal counterpart, 26 USC §7422(a), further support the District's position on this point. House Report No. 543 (80th Cong. 1st Session, 1947 at 4) on Title XII (in which §47-1586j is contained) of the 1947 Income and Franchise Tax Act for the District of Columbia reads as follows:

Title XII contains the provision with respect to assessment and collection of taxes, time for payment of the same and certain other administrative provisions.
(Emphasis supplied.)

The Senate Report (No. 28, 80th Cong. 1st Sess., 1947 at 4) is identical. Moreover, the legislative history of D.C. Code 1973, §47-2413(c), discussed, supra, makes reference to the award of interest only from the date "on which the District is apprised of the fact that an overpayment is claimed to have been." Compliance with Section 1586j is the only applicable mechanism by which such notice can be given.

The cases interpreting Section 1586j's federal counterpart, 26 U.S.C. §7422(a) and its legislative history are unanimous in ruling that compliance with the statute - individual claims for refund even in class actions -- are exclusive and an indispensable prerequisite to bringing suit. In addition to the

cases cited above, many other courts have ruled that Section 7422(a) must be strictly construed in favor of the Government. See, for example, Moser v. Wood, 235 F.Supp. 547 (D.Ariz. 1964); French v. Smyth, 110 F.Supp. 795 (N.D. Cal. 1952). One of the purposes of strict construction is to give the Government notice of pending claims and thus protect it from stale demands for refunds. See, for example, Ryan v. Harrison, 146 F.Supp. 671 (Ill. 1956). The exclusivity of the procedure has been upheld since its inception. See, for example, Kent v. No Cal. Reg. Office of Am. Friends Service Committee, 497 F.2d 1325 (9th Cir. 1974); DuPont Glove Fashion, Inc. v. American Tel. and Tel. Co., 428 F.2d 1297 (S.D.N.Y. 1977), aff'd 578 F.2d 1366, 1367, (2nd Cir. 1978) cert.denied, 99 S.Ct. 465 (1978).

In the DuPont Glove Fashion case, supra, the U.S. District Court once again rejected a class action claim for refund where all of the individual claimants had not followed the statutory procedure for filing refund claims. The Court went on to state:

Many members of the class plaintiffs represent those who have not filed refund claims, and even those members of the class who have filed refund claims have not yet brought a refund suit against the government. If the plaintiffs prevail, and the defendants in turn are allowed to recover from the government as they seek to do by their third-party complaint, the plaintiff taxpayers will have succeeded in avoiding the strict procedural requirements for obtaining refunds. In effect they will have obtained a refund of taxes from the government without having the Internal Revenue Service or any other agency to consider such claims administratively, and without being subject to the statutes of limitations imposed by the Code. This would clearly negate the Congressional purpose in creating the refund provisions of the Code. (Footnote omitted; Emphasis supplied; 428 F.Supp. 1303.)

In conclusion, where the legislature has provided a right (the refund on taxes illegally or erroneously assessed and voluntarily paid^{9/}) where none previously existed, the procedure afforded to obtain that right must be strictly followed. The administrative remedy afforded by §47-1586j is fair and adequate and promotes fiscal stability. Moreover, petitioners have failed to demonstrate injury, since class members have received multiple and individual notice of the requirement to file administrative claims for the relevant tax years.

CONCLUSIONS OF LAW

II

THE INTEREST ISSUE

The clear and unambiguous language of §47-2413(c) awards interest on overpayments such as petitioner Kleiboemer's only from the date of filing a claim for refund. Since petitioner Kleiboemer paid the disputed tax for 1975 and filed a claim for refund on the very same day, the issue is moot with respect to interest on his own particular refund for 1975. The Court's decision on this issue will, however, have a substantial effect on the amount of interest awarded class members who filed separate claims for refund near the statutory deadline (i.e., within three years after payment of the tax).

In support of their position on this issue, petitioners do not cite a single case (Brief at 13-17). Petitioners' argument is that "the traditional way interest is computed" is "from the date the overpayment was paid until the date of refund" (Brief at 14). This traditional rule, petitioners submit, is the federal rule and the rule in all 30 states that have a statute on the subject. Petitioners concede that:

^{9/} See District of Columbia v. McCall, 88 U.S.App.D.C. 217, 188 F.2d 999 (1951) and Lynch v. District of Columbia, D.C. Mun.App., 32 A.2d 540 (1943).

There is no American jurisdiction
except the District of Columbia
that withholds interest on over-
payments of tax until a claim
for refund is filed. (Brief at
15.)

It is important to note that the Congress of the United States, acting as a local legislature for the District of Columbia, enacted the interest statute which is codified at §47-2413(c). The same legislative body enacted §6611(b) of the Internal Revenue Code, which provides for interest "in the case of a refund, from the date of the overpayment . . .", enacted §47-2413(c) which provides for interest on overpayments "only from the date of filing a claim for refund . . .". (Emphasis supplied).

It is equally important to recognize that §§47-2413(c) and 47-1586j must be read in concert. Taken as a whole, these sections underscore the requirement of filing separate claims for refund from which date interest runs. For this court to hold that separate claims are not required by §47-1586j would vitiate the meaning of §47-2413(c); if separate claims are unnecessary, then interest could only be computed by totally rewriting the interest statute. Thus, petitioners' argument that §47-1586j does not require individual claims cannot be squared with the method by which interest must be computed under the unambiguous terms of §47-2413(c).

Reference to the legislative history of §47-2413(c) strongly bolsters respondent's argument on this point.

Prior to the D.C. Court Reform Act of 1971 (P.L. 91-358), §47-2413(c) read in relevant part as follows:

Provided, That with respect to that part of any overpayment which was not assessed and paid as a deficiency or as additional tax such interest shall be allowed and paid only from the date of filing a claim for refund, a petition to the Board, or a complaint with a court of competent jurisdiction, as the case may be. (Emphasis supplied; §47-2413(c) (1967 ed.))

For purposes of this case, the quoted language is the same as the present language in §47-2413(c). Thus, the critical language and requirements of §47-2413(c) have not changed since they were first enacted.

The purpose of the 1952 enactment was to provide a procedure for obtaining refunds of overpaid taxes where no such procedure previously existed. This was accomplished by adding a new section (14) to title IX of the District of Columbia Revenue Act of 1937, consisting of five subsections. The relevant subsection to this issue (subsection (d) prior to 1970 and now codified as subsection (c)) was characterized in a House Committee Report (H.R. No. 1977, 82nd Cong. 2d Session 1952 as follows:

(d) Provides for the payment of interest at the rate of 4 percent upon overpayments refunded, whether the refund is made administratively or by order of the Board of Tax Appeals or by order of court of competent jurisdiction, and whether the overpayment refunded resulted from an original payment of tax or from the payment of a deficiency assessment. A distinction is made, however, between overpayments resulting from original or voluntary payment of tax or a deficiency assessment resulting from the assessment of a deficiency and overpayments resulting from the assessment of a deficiency. In the case of the former, the date of crediting is intended to be treated as the date of refund for purposes of computing interest, since the crediting

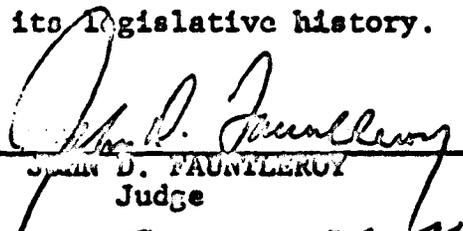
of an overpayment where authorized is a constructive refund to the taxpayer.

This subsection (d) of the new section 14 is intended to apply to all overpayments of taxes, including income, excise, sales, and use taxes, and thus modifies existing law. (Emphasis supplied; Report at 4.)

To the same effect is S.R. No. 1471 (82nd Cong. 2d Session 1952; a copy of that report is attached as Respondent's Exhibit No. 4). It is, therefore, beyond dispute that Congress intended that interest would begin to run "on the date on which the overpayment is claimed to have been made . . .", i.e., the date of the filing of the individual claim for refund.

Petitioners argue that class "certification rendered it unnecessary -- indeed, as we have shown effectively impossible -- for individual class members to pursue their own remedies privately . . ." As stated above, Judge Penn ordered individual notice be given to all class members of the statutory requirement to file administrative claims for refund four (4) months in advance of the 1975 deadline and far in advance of the 1976-1978 deadlines. This was done. Thus, the private pursuit of those administrative remedies can most certainly be the measuring rod for the award of interest.

The award of interest at 4% from the timely filing of an administrative claim for refund is supported by the unambiguous words of the controlling statute and is supported by reference to its legislative history.



John D. FAUNTLEROY
Judge
September 24, 1981

No. 1151

OFFICE OF THE CLERK OF THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

OCT 18 1977

FILED

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

TAX DIVISION

RICHARD A. BISHOP,)

Petitioner)

v.)

DISTRICT OF COLUMBIA,)

Respondent)

Docket No. 2362

AXEL-FELIX KLEIBOEMER,)

Petitioner)

v.)

DISTRICT OF COLUMBIA,)

Respondent)

Docket No. 2379

These petitioners have filed these actions in order to obtain a refund for franchise taxes paid to the District of Columbia pursuant to D. C. Code 1973, §47-1574 et seq. (Supp. IV 1977). The amount of the tax is not in dispute, however, the petitioners challenge the legality of the tax and have requested the court to declare D. C. Law No. 1-23 to be a tax on all or a portion of the personal income of these petitioners, to rule that the tax unlawfully discriminates against nonresident owners of unincorporated personal service businesses in the District of Columbia and to further rule that that tax was enacted without adequate public notice as guaranteed by D. C. Code 1973, §1-144(c) (Supp. IV 1977).

The two cases have been consolidated for purposes of this appeal and the Court has granted the request of petitioner Kleiboemer to treat this case as a class action with that class consisting of those nonresident taxpayers who have paid the tax imposed by Section 47-1574. The class which petitioner Kleiboemer represents does not include petitioner Bishop.^{1/}

I

The facts in this case have been fully stipulated and the parties have also stipulated a number of joint exhibits. Based upon that stipulation of facts the Court makes the following findings of fact:

1/ This Court had previously dismissed an action in which another petitioner had requested injunctive relief. Committee for Fair Taxation of Professionals v. District of Columbia, Civil No. 11269-75. That case is presently on appeal and these petitioners have incorporated the record in that case as a part of the record in this case.

1. The application of an unincorporated business franchise tax to unincorporated professions and unincorporated personal service businesses by the Revenue Act of 1975 (D.C. Law No. 1-23) was accomplished by the District's repeal of the exemption afforded to professionals and personal service businesses contained in D. C. Code 1973, §47-1574. Before the adoption of Section 605 of the Revenue Act of 1975, Section 47-1574 read as follows:

"For the purposes of this subchapter (not alone of this title) and unless otherwise required by the context, the words "unincorporated business" means any trade or business, conducted or engaged in by any individual, whether resident or nonresident, statutory or common-law trust, estate, partnership, or limited or special partnership, society, association, executor, administrator, receiver, trustee, liquidator, conservator, committee assignee, or by any other entity or fiduciary, other than a trade or business conducted or engaged in by any corporation; and include any trade or business which if conducted or engaged in by a corporation would be taxable under sections 47-1571 and 47-1571a. The words "unincorporated business" do not include any trade or business which by law, custom, or ethics cannot be incorporated, any trade, business, or profession which can be incorporated only under chapter 11 of title 29, or any trade or business in which more than 80 per centum of the gross income is derived from the personal services actually rendered by the individual or members of the partnership or other entity in the conducting or carrying on of any trade or business and in which capital is not a material income-producing factor."

Section 605 of the Revenue Act repealed the "professional" exemption by deleting the second sentence contained in section 47-1574.

2. The rate of tax on unincorporated businesses was imposed under D. C. Code 1973, §47-1574b which, before the

adoption of section 604 of the Revenue Act of 1975, read as follows:

For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for each taxable year a tax at the rate of 8 per centum upon the taxable income of every unincorporated business, whether domestic or foreign (except those expressly exempt under section 47-1554). The minimum tax payable shall be \$25.00.

Section 604 of the Revenue Act of 1975 amended section 47-1574b and as amended that section reads as follows:

For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for one taxable year beginning on or after January 1, 1975, a tax at the rate of 12 per centum upon the taxable income of every unincorporated business, whether domestic or foreign (except those expressly exempt under section 47-1554). The minimum tax payable shall be \$25.00. For the taxable years beginning on and after January 1, 1976, there is hereby levied a tax at the rate of 9 per centum upon the taxable income of every unincorporated business, whether domestic or foreign (except those expressly exempt under section 47-1554). The minimum tax payable shall be \$25.00.

3. The only notice of Council hearings to appear in the D. C. Register on the Mayor's proposed Revenue Act of 1975 was dated March 6, 1975, and was published in the March 10, 1975, edition of the District of Columbia Register. (Joint Ex. 1.)

4. A copy of the Mayor of the District of Columbia's proposed Revenue Act of 1975, which included legislation proposing a gross receipts tax upon professionals and other business entities, but not the unincorporated business franchise tax here in dispute, was published in the March 21, 1975, edition of the D. C. Register. (Joint Ex. 2.)

5. Section 404(c) of the D. C. Self-Government Act, (D.C. Code 1973, §1-144(c) (Supp. IV 1977), provides:

The Council shall adopt and publish rules of procedures which shall include provisions for adequate public notification of intended actions of the Council.

6. Pursuant to section 404(c), the Council adopted Resolution No. 1-1-2 on January 7, 1975. Section 6G of the Resolution provides:

The Council shall, at least fifteen (15) days prior to the adoption of any act, resolution, 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. Resolution No. 2/ 1-1-2, adopted on January 7, 1975, Section 6G.

7. On or shortly after March 6, 1975, copies of the District of Columbia City Council's notice of hearings, as described in paragraph 3 hereof, were mailed by the Council's Committee on Finance and Revenue to the numerous persons and organizations including bar associations, civic associations, and other professional associations. (Joint Ex. 3.)

8. The record of the hearings held by the Council's Committee on Finance and Revenue pursuant to the notice described in paragraph 3 above is contained as an appendix to the Hearings

2/ Section 6G has since been amended to require publication at least 30 days prior to any intended legislative action. Resolution PR No. 1-30.

Before the Committee in the District of Columbia United States
Senate on the District of Columbia Revenue Act of 1975, 94th
Congress, First Session, Sept. 8-11, 1975, Part I, pp. 463-838.
(Joint Ex. 4.)

9. The May 30, 1975, edition of the Washington Post contained an article concerning the proposed Budget and alternatives thereto. (Joint Ex. 5.)

10. The June 2, 1975, edition of the Washington Post contained an article concerning the proposed Budget and alternatives thereto. (Joint Ex. 6.)

11. The June 6, 1975, edition of the Washington Star contained an article concerning the proposed Budget and alternatives thereto. (Joint Ex. 7.)

12. On June 24, 1975, the Council of the District of Columbia passed at second reading the Revenue Act of 1975 (Act No. 1-34) which included the repeal of the "professional" exemption, as described in Finding of Fact No. 1.

13. The June 25, 1975, edition of the Washington Post contained an article concerning the Council's action on the Budget including their repeal of the exemption. (Joint Ex. 8.)

14. A meeting regarding the imposition of the tax here in controversy was held by Edward Meyers, Staff Director of the Council's Committee on Finance and Revenue, on June 30, 1975. The meeting was attended by members of the council, members of the Office of the Corporation Counsel, and various members and representatives of the Bar. These persons, (excluding District of Columbia employees) questioned the

amount of revenue estimated by the Department of Finance and Revenue to be gained by the imposition of the tax here in controversy and asked the Committee to consider possible alternatives to it.

15. On July 8, 1975, a meeting was again held by the Committee on Finance and Revenue with respect to the tax here in controversy. The meeting was attended by members of the Council, members of the Office of the Corporation Counsel, and various members and representatives of the Bar.

The amount of revenue to be gained by the imposition of this tax was again discussed as well as possible alternatives to it.

16. On July 14, 1975, Councilmember Barry sent a memorandum entitled "Professionals in the Unincorporated Business Tax" to Kenneth Back, Director of the Department of Finance and Revenue. That memorandum requested a meeting with members of the Department of Finance and Revenue to discuss the unincorporated business tax. (Joint Ex. 9.)

17. The July 16, 1975 editions of both the Washington Post and Washington Star contained articles concerning the opposition to the tax on professionals. (Joint Exs. 10 and 11.)

18. On July 16, 1975, Councilmember Barry sent a memorandum entitled "Professionals in the Unincorporated Business Tax" to C. Francis Murphy, then Corporation Counsel of the District of Columbia inviting further discussion on the removal of the exemption and alternatives thereto. (Joint Ex. 12)

19. On July 21, 1975, a memorandum entitled "The Unincorporated Business Franchise Tax Section of the Council's Revenue Act of 1975" answering the July 16, 1975, memorandum described in Finding No. 18 hereof was sent from C. Francis Murphy to Councilmember Barry. (Joint Ex. 13.)

20. On July 21, 1975, a meeting of the Committee on Finance and Revenue was held to discuss the tax here in controversy. The meeting was attended by members of the Council, members of the Office of the Corporation Counsel, and various members and representatives of the Bar.

At the conclusion of that meeting, the Committee voted to amend from 20% to 50% the maximum salary allowance for professionals that they would recommend to the Council of the District of Columbia.

21. On July 22, 1975, the Committee on Finance and Revenue again met, further considered the percentage of salary allowance to be recommended, and voted to amend the amount allowed from 50% to 55% of net income.

22. On August 5, 1975, the Council of the District of Columbia passed at second reading Act No. 1-43, which raised the salary allowance described in paragraphs 20 and 21 hereof from 20% to 55%. (Joint Ex. 14.)

23. The August, 1975 edition of the Washington Metropolitan Board of Trade News contained an article, concerning the proposed tax on professionals. (Joint Ex. 15.)

24. Hearings on the tax in dispute were held in both the House of Representatives and the Senate of the United States Congress during the month of September 1975. The testimony and exhibits introduced at those hearings are contained in one volume entitled "Hearings and Disposition before the Subcommittee on Fiscal Affairs of the Committee on the District of Columbia House of Representatives to Disapprove the District of Columbia Revenue Act of 1975 and to Amend the District of Columbia Tax Laws Applicable to Unincorporated Business Income," 94th Congress, First Session, September 17 and 19, 1975, (Joint Ex. 16), and in two volumes entitled "Hearings Before the Committee on the District of Columbia United States Senate on the District of Columbia Revenue Act of 1975," 94th Congress, First Session, September 8-11, 1975. (Joint Exs. 4 and 17.)

25. On October 2, 1975, Councilmember Barry sent a memorandum entitled "Committee Report on Bill 1-188, the 'Amended District of Columbia Unincorporated Business Franchise Tax Revision Act of 1975'" to all members of the council of the District of Columbia. (Joint Ex. 18.) The primary purpose of the Bill was to propose a salary allowance of 70% for professionals and other personal service businesses with a standard exemption of \$2500.

26. On October 7, 1975, the Council of the District of Columbia passed the District of Columbia Professional Corporation Revision Act of 1975 (Act No. 1-61), which was signed by Mayor Washington on October 29, 1975. On November 11, 1975,

Act No. 1-61 was transmitted to Congress for review. Act No. 1-61 amends the District of Columbia Professional Corporation Act (D. C. Code 1973, §29-1101 et seq.) by treating professional corporations as "unincorporated businesses" for purposes of the Act of 1947. No other corporations are so treated. (Joint Ex. 19.)

27. On October 10, 1975, Councilmember Barry sent a memorandum to all members of the Council of the District of Columbia entitled "Amended Committee Report, Bill 1-170, the District of Columbia Professional Corporation Revision Act of 1975". (Joint Ex. 20.)

28. On October 21, 1975, the Revenue Act of 1975 became law (D.C. Law No. 1-23) pursuant to Section 602(c)(1) of the Self-Government and Governmental Reorganization Act (D. C. Code 1973, §31-147(c)(1), (Supp. IV, 1977) which reads as follows:

(c)(1) Except acts of the Council which are submitted to the President in accordance with the Budget and Accounting Act, 1921 [31 U.S.C. 1 et seq.], any act which the Council determines according to section 412(a), should take effect immediately because of emergency circumstances, and acts proposing amendments to title IV of this Act, the Chairman of the Council shall transmit to the Speaker of the House of Representatives, and the President of the Senate a copy of each act passed by the Council and signed by the Mayor, or vetoed by the Mayor and repassed by two-thirds of the Council present and voting (and with respect to which the President has not sustained the Mayor's veto), and every act passed by the Council and allowed to become effective by the Mayor without his signature. Except as provided in paragraph (2), no such act shall take effect until the end of the 30-day period (excluding Saturdays, Sundays, and holidays, and

any day on which either House is not in session beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate and then only if during such 30-day period both Houses of Congress do not adopt a concurrent resolution disapproving such act. The provisions of section 604, except subsections (d), (e), and (f) of such section, shall apply with respect to any concurrent resolution disapproving any act pursuant to this paragraph.

29. On November 1, 1975, Act No. 1-62 became law (D.C.

Law No. 1-31) pursuant to the provisions of the Self-Government Act described in Finding No. 28.

30. As of March 30, 1976, according to the records of Lawrence Cook, Assistant Supervisor of the Business Registration Section of the Department of Finance and Revenue of the District of Columbia Government, approximately 1064 unincorporated business franchise tax returns had been filed on an estimated basis by professionals and personal service businesses subject to this tax for the first time. Of the returns filed, approximately 1060 were filed with either partial or full payment of the amount of tax estimated.

31. Section 602(a)(5) of the D.C. Self-Government and Governmental Reorganization Act, (D. C. Code 1973, §1-147(a)(5) (Supp. IV 1977)) as enacted by the Congress of the United States limits the legislative authority of the Council of the District of Columbia with respect to the taxation of non-residents of the District of Columbia as follows:

§1-147. Limitations.

(a) The Council shall have no authority to pass any act contrary to the provisions of

this Act except as specifically provided in this Act, or to--

* * * *

(5) impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District (the terms "individual" and "resident" to be understood for the purposes of this paragraph as they are defined in section 47-1551c;

32. Under the provisions of D. C. Code 1973, §47-1557a(b)

(10) there is excluded from the gross income of District of Columbia resident taxpayers that portion of an individual taxpayer's gross income which has been taxed under the provisions of the unincorporated business franchise tax, D. C. Code 1973, §47-1574 et seq., (Supp. IV 1977).

II

The petitioners' first contention is that so much of the Revenue Act of 1975 which purports to amend Section 47-1574 is invalid due to the failure of the City Council to publish adequate notice as required by D. C. Code 1973, §1-144(c) (Supp. IV 1977) and Resolution No. 1-1-2 adopted January 7, 1975.^{3/}

^{3/} The text of both the statute and the resolution are set forth in Findings of Fact Nos. 5 and 6.

All of the underlying facts are set forth in the Findings of Fact therefore the Court need only refer to the more pertinent facts at this time.

The Mayor sent his proposed Revenue Act of 1975 to the City Council in early 1975. A notice of Council hearings dated March 6, 1975, was published in the District of Columbia Register on March 10, 1975. There is no dispute that a proper notice published in the District of Columbia Register would be in full compliance with the notice requirements. The notice gave the time, date and place for the hearings "on the impact of revenue proposals contained in the Mayor's Fiscal 1976 Budget". It went on to provide:

Comments are welcome on tax and related revenue measures contained in the Budget (property, sales, income, other) and on new and alternative methods of raising revenue for the District of Columbia. (Emphasis this Court's.)

It then set forth a schedule of meetings to be held on March 18, April 3 and April 4, 1975, and advised the reader that on each day the Committee on Finance and Revenue would hear witnesses on the "entire revenue package" and on "new revenue ideas" (emphasis this Court's). The notice set forth the name and number of the person to contact if a citizen wished to offer testimony and "encouraged" written statements and advised those offering such statements that the "record will be closed on April 7, 1975". Setting aside for the moment the issue before the Court, it can be observed that the above notice was complete and met all due process requirements. Any person

wishing to be heard was advised of the exact procedure he should follow.

Petitioners argue that the notice was invalid however because it failed to give notice that the Council would or might consider the repeal of the exemption granted to the petitioners under Section 47-1574. Actually, although the proposed Revenue Act of 1975 did purport to amend Section 47-1574, it did not in any way suggest a repeal of the exemption granted to the petitioners under that section. Thus, the petitioners argue that the notice itself did not suggest that the Council would consider removing the exemption from the franchise tax and that they were further misled because the proposed Revenue Act of 1975, which was the subject of the hearing, did not purport to amend Section 47-1574 so as to delete the exemption.

The respondent contends on the other hand that the original notice was adequate but that in any event, there was adequate opportunity for the petitioners and their class to comment or submit written submissions subsequent to June 24, 1975, the date when the amended Act was finally passed by the City Council.

Before addressing the adequacy of the notice of March 10, 1975, this Court notes that it finds that respondent's arguments that any defect was cured by the new hearings held in July and August 1975, after the challenged Act had been passed, to be totally without merit. First, the Act had already been passed and second the primary discussion of the hearings at that point

was not whether the exemption should be repealed or reinstated as the case may be, but rather whether the salary allowance allowed professionals should be increased. Such comments or hearings after passage of the Act hardly amounts to what is contemplated by Section 1-144(c) or Resolution No. 1-1-2. The Resolution clearly provided for a notice at least "Fifteen (15) days prior to the adoption of any Act."^{4/} Moreover, the purpose of the notice before the adoption of an act is "to afford interested persons opportunity to submit data and views either orally or in writing as may be specified in such notice". Resolution No. 1-1-2. This Court holds that the notices of hearings after the adoption of the Act failed to satisfy the mandatory requirements for notice.

The respondent also argues that notices were mailed to numerous persons and organizations. This argument also fails however, since presumably the notice was the same as that published in the District of Columbia Register and more important, because the notice was not sent to "all persons subject thereto". See Resolution 1-1-2, §6G. Any attempt to give actual notice to all taxpayers or potential taxpayers who may be the subject of a particular tax enactment is risky business at least and for this very reason the Council has provided for constructive notice by publishing in the District of Columbia Register.

^{4/} Since amended to thirty (30) days. Resolution PR No. 1-30.

Respondent also argues that the petitioners and their class received actual or constructive notice by virtue of a number of articles published in the Washington Post and the Washington Star. The argument that such publications are actual notice must fail for the reasons just discussed and the Resolution provides for publication for the purpose of constructive notice only in the District of Columbia Register. Last, there is no suggestion that the "notices" found in the Washington Post and the Washington Star, if they can be so described, were in the required notice form giving the subject, the date, the time, and the place of the hearings and of procedures for appearing before the Council or submitting written comments.

As is readily apparent, the question concerning notice can only be resolved by looking at the notice published in the District of Columbia Register on March 10, 1975. If that notice failed to comply with the notice requirements, which are mandatory in this case, then so much of the Revenue Act of 1975 which repeals the petitioners' exemption under Section 47-1574 is invalid. See 5 McQuillin, Municipal Corporations, §§16.76, 16.77 (3d ed, 1969 Revised Volume).

Turning to the March 10, 1975 notice, this Court concludes that petitioners argument that the notice is invalid must fail. As already noted, the form of the notice complied with all legal requirements.

While it is true that the notice itself did not refer to the possible repeal of the exemption which is the subject of these petitions, it did make quite clear that the Committee on Finance and Budget would not only consider the Mayor's Budget but also "new and alternative methods of raising revenue for the District of Columbia". The schedule advised that "new revenue ideas" would be discussed on each hearing day. The above language put the petitioners and the members of their class on notice that their exemption might be the subject of discussion and repeal notwithstanding the fact that the Mayor's proposed Budget would have continued the exemption. "New" methods refers to methods not yet in use and "alternative" methods refers to alternatives to some or all of the Mayor's proposal. It also cannot be overlooked that the attention of one interested in the franchise tax exemption would have been drawn to Section 47-1574 since the Mayor's proposal itself would have amended that very section even though not repealing the specific exemption.

The challenged notice left no doubt that the Council would consider, not only the Mayor's tax proposals, but any and all reasonable alternatives thereto. The Council made significant changes to the proposal but those changes were the direct result of the Council's consideration of "new and alternative methods of raising revenue" which result was a "logical outgrowth of the hearing and related procedures". Moreover, "[p]arties have no right to insist that a rule remain

frozen in its vestigial form". South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 659 (1st Cir. 1974). The facts in South Terminal Corporation, although not involving taxes, are similar to those here and the Court while noting substantial changes between what had been proposed and what was adopted nevertheless found the notice adequate. That court's comments have equal applicability here when it concluded that "interested persons were sufficiently alerted [by the notice] to likely alternatives to have known what was at stake." *Id.* at 659. There the published notice mentioned alternative measures for effective reduction in the number of parking spaces in downtown Boston; here the notice made mention of "new and alternative methods of raising revenue."

To follow petitioners argument would mean that the Council "can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary". International Harvester Co. v. Ruckelhaus, 155 U.S. App. D.C. 411, 428, 478 F.2d 615, 632.n. 51 (1973). See also Granadero On The Air, Inc. v. United States, 104 U.S. App. D.C. 391, 262 F.2d 702 (1959); Davis, Administrative Law of the Seventies, §6.01-1 (1976).

The notice in this case was fair and was reasonably calculated to put interested persons on notice that new and alternative tax measures to raise revenue were being considered by the Council. That notice gave sufficient and adequate notice of the Council's consideration of Section 47-1574

and of its amendment of that section repealing the exemption now challenged.

III

The petitioners next argue that, even though this Court should find there was adequate notice of the intent to amend or consider amendment of Section 47-1574 so as to repeal the exemption granted petitioners, such action was beyond the power of the Council due to the limitations on Council power to enact legislation contained in D. C. Code 1973, §1-147(a) (5)(Supp. IV 1977).^{5/} There, Congress has provided that the Council "shall have no authority" to "impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District". They contend that the tax now imposed by virtue of repeal of the exemption contained in Section 47-1574 amounts to a tax on their personal income. This Court cannot agree.

Section 47-1574 imposes a franchise tax on unincorporated businesses for the "privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District". See Sections 47-1571a, 47-1574b. The above language used by Congress in imposing the

^{5/} See the Self-Government and Government Reorganization Act, Pub. L. 93-198, §602, 87 Stat. 774.

tax is unambiguous and is consistent with the legislative history of the tax. See H.R. Rep. No. 543, 80th Cong., 1st Sess. 3-4 (1947).

No court in this jurisdiction has decided the issue presented here, that is, whether the tax is an income tax or a franchise tax. The question was raised in Gardella v. Comptroller of Maryland, 130 A.2d 752 (Md. 1957), where the taxpayers, who were residents of Maryland and paid income taxes to that state, attempted to deduct from their state income tax the amount of their unincorporated business franchise tax paid to the District of Columbia pursuant to Sections 47-1574 et seq. In a persuasive Opinion, the Maryland Court of Appeals ruled that the tax was a true franchise tax and not an income tax and therefore not deductible from the Maryland income tax. That court noted that the tax was imposed for the privilege of doing business and receiving income from sources within the District of Columbia and placed upon the unincorporated entity and not upon the individuals composing that entity. Id. at 753-754.

Petitioners cite Commissioner v. American Metal Co., 221 F.2d 134 (2d Cir. 1955) and New York & Honduras Rosario Mining Co. v. Commissioner, 168 F.2d 745 (2d Cir. 1948) as supportive of their argument, however, each case must be judged upon its own peculiar facts. In American Metal Co. the court held that the tax challenged in that case was an excise tax noting that the tax attached when the ore was

extracted regardless of whether it was thereafter transported or sold. 221 F.2d at 137. In New York & Honduras Rosario Mining Co., the same court had earlier ruled that another tax was an income tax and not an excise tax because it was the substantial equivalent of an income tax as that tax was understood in the United States. It was significant in that case that the tax imposed by Honduras was the equivalent of an income tax in this country and that Honduras, in addition to the "income tax", imposed genuine excise taxes for the privilege of mining. 168 F.2d at 748. In Keasbey & Mattison Co. v. Rothensies, 133 F.2d 894 (3d Cir. 1943), the court concluded that a tax imposed by the Province of Quebec, Canada, was in reality an excise tax since it was imposed upon the privilege of mining as measured on the basis of gross value. That court found the tax to fall within the "accepted standards of an excise tax" and felt it significant that the "allowable deductions are restricted to the cost actually incurred in the mining operation and nothing more". 133 F.2d at 898.

Such cases as those briefly discussed can only suggest guidelines which this Court should follow in deciding the issue. As noted above, the Opinion in Gardella is persuasive. Moreover, the unincorporated business tax is imposed in addition to any income tax the taxpayer may be compelled to pay. Congress has provided that the tax is imposed for the privilege of carrying on or engaging in any trade or business and of receiving income from sources in the District. The fact that

the tax is measured based upon the taxable income makes it no less a franchise tax. Furthermore, unlike an income tax, a minimum tax is payable regardless of whether there is taxable income. See Section 47-1574b. For all of the above reasons, this Court concludes that the tax imposed by Section 47-1574 is a franchise tax as opposed to an income tax.

Petitioners argue that Section 1-147(a)(5) prohibits the Council from enacting not just an income tax on non-residents but any tax which is derived from the nonresidents personal income. This Court interprets the term "tax on the whole or any portion of the personal income" as set forth in Section 1-147(a)(5) to mean a personal income tax as that term is commonly used. That interpretation is consistent with the Legislative History of the Self-Government and Government Reorganization Act. See H.R. Rep. No. 93-482, 93d Cong., 1st Sess. (1973).

These petitioners also overlook the fact that the exemption was merely granted by way of legislative grace and that the tax itself was imposed not by the Council of the District of Columbia but by the Congress of the United States.

This Court finds nothing in the Self-Government or Government Reorganization Act which would prohibit the Council from repealing the exemption granted petitioners under Section 47-1574. The Court holds that the tax is a franchise tax and not an income tax and that Section 1-147(a)(5) merely prohibits the Council from enacting a personal income tax on nonresidents.

IV

The petitioners argue that the tax as imposed upon them violates both the Privileges and Immunities Clause of U.S. Const., Art. IV, §2, C. 1 and the equal protection provisions of U.S. Const., Amend. XIV as well. The equal protection provision of the Constitution applies to citizens of the District of Columbia by virtue of the due process provisions of the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497 (1954). Their claim is based on the fact that a resident unincorporated business has the right to deduct a portion of the franchise tax from its District of Columbia income tax returns. See D. C. Code 1973, §47-1557a(b)(10). A non-resident has no such privilege in the District of Columbia simply for the reason that the nonresident is not required to pay an income tax in the District.

Petitioners place heavy reliance on two cases, namely, Austin v. New Hampshire, 420 U.S. 656 (1975) and Travis v. Yale & Towne Manufacturing Co., 252 U.S. 60 (1920). In Austin, the State of New Hampshire imposed a commuter tax on all non-residents earning income in New Hampshire. That state also imposed a commuter tax on income earned by its residents working in another state but exempted such income from the tax if that income was taxed by the state where earned, if it was exempted by the state where earned, or if the state where it was earned had no tax on income. 420 U.S. at 656. The practical effect insofar as New Hampshire residents were concerned

was that they paid no commuter tax to that state. The Supreme Court found that the tax was unconstitutional under the Privileges and Immunities Clause since the overall result was that the tax fell exclusively on the income of nonresidents. 420 U.S. at 665. In Travis, the discrimination against nonresidents was perhaps even more blatant. There New York imposed a tax on both residents and nonresidents but granted residents an exemption on the first \$1,000 or \$2,000 of income, depending upon their circumstances, while denying a like exemption to nonresidents of that state. That tax was held to be in violation of the Constitution in that it resulted in an unwarranted discrimination against nonresidents who worked side by side with residents of New York. That case was distinguished from Shaffer v. Carter, 252 U.S. 37 (1920) where the "non-resident was not treated more onerously than the resident". 420 U.S. at 664. See also Travellers' Insurance Co. v. Connecticut, 185 U.S. 364 (1902).

The facts in the instant case are clearly distinguishable. Here the tax is imposed equally on both the resident and the non-resident alike and both are entitled to the same exemptions and deductions insofar as the franchise tax is concerned. The only distinction is that a resident is entitled to take a deduction from his District of Columbia income tax return while of course, nonresidents are required to pay no such tax. The fact that a resident may deduct the amount paid for the franchise tax from his local income tax return does not make the tax uncon-

stitutional under any of the cases cited by the petitioners. Petitioners are correct when they argue that the fact that Maryland or Virginia could perhaps make the tax more equitable by allowing them to deduct the franchise tax from their respective state taxes, Gardella v. Comptroller of Maryland, supra, would not save the local tax from a constitutional challenge. See Austin v. New Hampshire, supra at 666-668. However, this Court finds that the franchise tax as imposed under the District of Columbia Code affords equal treatment to both the resident and nonresident and does not violate the Privileges and Immunities Clause or the Equal Protection Clause of the Constitution.

V

The petitioners have made several other arguments but this Court finds those arguments to be totally without merit and they need not be discussed. Since these petitioners do not seek a refund on the grounds that the amount of the tax imposed was excessive, it follows that the Court's action denying their request for, what amounts to declaratory relief, is dispositive of all issues.

ORDER

It is hereby

ORDERED that petitioners request for refund is denied and it is further

ORDERED that these Petitions are dismissed with prejudice. ^{6/}

Dated: October 11, 1977

15/
JOHN GARRETT PENN
Judge

6/ Separate Judgment Orders shall be entered in each case.