

*Opinion*  
*No. 1160*

SUPERIOR COURT OF THE DIST. OF COLUMBIA

TAX DIVISION

JUN 9 1978

FILED

OLD EUROPE, INC.,  
Petitioner

v.

Tax Division Nos. 2303  
and 2346.

DISTRICT OF COLUMBIA,  
Respondent

and

NEW 5510, INC.,  
t/a PICCADILLY RESTAURANT,  
Petitioner

v.

Tax Division Nos. 2347  
and 2391.

DISTRICT OF COLUMBIA  
Respondent

MEMORANDUM OPINION

These matters come before the Court, having been consolidated for trial, on petitioners' claims for a refund of personal property taxes, on the grounds that, in each case and for the years in question, the District of Columbia erroneously assessed a personal property tax on the food and beverages purchased for use in their restaurants. The evidence was presented in the above-captioned cases, as well as in the companion case Carter-Bonhardt, Inc. v. District of Columbia, Tax Division No. 2367, also decided this day, on February 1, 1977. The parties have submitted a written stipulation and have filed proposed findings of fact, many of which were agreed upon. The Court has considered the testimony presented at the trial, as well as the facts as stated in the documents filed by both sides. We have further

considered the proposed conclusions of law, the memoranda of law on the legal issues involved filed on behalf of the parties, and the oral arguments heard on June 30, 1977. This opinion shall represent the Court's findings of fact and conclusions of law.

The ultimate question to be determined by the Court is whether the items of food and beverages purchased by petitioner restaurants for service to their diner-clientele constitute the "average stock in trade of dealers in general merchandise" and, as such, could no longer be taxed as personal property by the District of Columbia after July 1, 1974, under D.C. Code 1973, §47-1207 as petitioners contend, or whether they should be considered "supplies" and therefore taxable as respondent maintains. The relevant facts are for the most part common to all the cases before the Court and, unless otherwise indicated, will be treated as applicable to all cases. In each case, petitioners are appealing from the assessment placed upon their food and beverages. Petitioner Old Europe, Inc., in Tax Division No. 2303, attacks an assessment on its food and beverages for fiscal year 1975 in the amount of \$5,356.37 and claims a refund of personal property taxes of \$128.56. In Tax Division No. 2346, the same petitioner is attacking the assessment made on its food and beverages for fiscal year 1976, which were valued at \$8,382.52, and is claiming a refund in the amount of \$201.15. Petitioner New 5510, Inc., in Tax Division No. 2347, appeals from the taxation of its food and beverages valued at \$3,302.47 in 1976, and claims a refund of \$79.25. Finally, in Tax Division No. 2391, petitioner New 5510, Inc., is claiming a refund of \$95.32 (including interest of \$6.52) paid in personal property taxes for fiscal year 1975, on the assessment of food and beverages at a value of \$3,700.00

Petitioner Old Europe, Inc., is a District of Columbia corporation which has operated the restaurant "Old Europe" at 2434 Wisconsin Avenue, Northwest, since 1949. Petitioner New 5510, Inc., is also a District of Columbia corporation engaged in the restaurant business. It operates, and has operated since 1964, the "Piccadilly Restaurant" at 5510 Connecticut Avenue, Northwest. The manner and operation of the two restaurants is substantially similar. Petitioners maintain in the operation of each of the restaurants numerous items of food and beverages. All meals sold in the restaurants are prepared, and most are served, on the premises. On rare occasions, meals are sold for off-premises consumption. The meals on the premises are served at tables by waiters and waitresses employed by petitioners.

Most of the items of food and beverages on petitioners' menus are prepared by petitioners prior to being served to the customers. However, there are many items of food and beverages purchased by petitioners which are sold without any preparation. Typical of these items are wines, soft drinks, champagne, packaged beer, liquor furnished to the customer by the bottle, bread, rolls and pastries, milk, pickles in a relish tray, butter in some cases, cheese, luncheon meats, sugar; tea bags, ketchup, tomatoes, parsley, olives and so forth. For all fiscal years prior to 1975, the first year in issue, petitioners included items of food and beverages in schedule "A" of their District of Columbia personal property tax return. Under that schedule was

to be listed all merchandise or stock in trade. The District of Columbia accepted the manner in which petitioners reported the items of food and beverages prior to fiscal year 1975.<sup>1/</sup> For fiscal years prior to 1975, the District also accepted personal property returns from other District of Columbia taxpayers engaged in the restaurant business who included items of food and beverages listed on schedule "A" of their returns. However, respondent also accepted personal property tax returns prior to fiscal year 1975 from taxpayers engaged in the restaurant business who listed items of food and beverages on schedule "B" of their returns. In this schedule were supposed to be included all supplies, raw materials and work in process.

Prior to fiscal year 1974, the District of Columbia levied a personal property tax on petitioners' average monthly inventory of merchandise, including food and beverages, for the twelve-month period ending June 30th of any particular year. For the inventories of dealers in general merchandise, the items listed in schedule "A" of the personal property tax return are reported and taxed based upon an average monthly figure. However, the District of Columbia taxes the supplies listed on schedule "B" of the personal property tax return based upon their value as of July 1st, at the beginning of any particular fiscal year. The only explanation offered

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<sup>1/</sup> In fact, respondent audited the personal property tax returns of petitioner Old Europe, Inc., for years 1958, 1959, 1960 and 1961, and audited the returns of petitioner New 5510, Inc., for the years 1968 through 1972. See Petitioners' Exhibits 12-15, 17, 18-A, 18-B and 19-22.

for the District of Columbia's accepting, prior to fiscal year 1974, the value of items of food and beverages reported under either schedule "A" or schedule "B" of the personal property tax returns of taxpayers engaged in the restaurant business was that, since the tax rate was the same under both schedules, it was of no significance. Due to the different manner, however, in which personal property was taxed depending upon under which schedule it was listed, the potential tax liability was less for supplies, being valued as of the beginning of the fiscal year, than for inventories or stock in trade, which value was computed by using the average monthly inventory over a twelve-month period.

Congress, in the District of Columbia Revenue Act of 1971,<sup>2/</sup> phased out the tax on the average stock in trade of dealers in general merchandise over a three-year period beginning July 1, 1972. The tax on such stock in trade was repealed in its entirety as of July 1, 1974, for fiscal year 1975. Petitioners, on their personal property tax returns for fiscal year 1973, took advantage of the one-third reduction in personal property taxes on stock in trade of dealers in general merchandise as provided in §201 of the Revenue Act of 1971. As previously stated, respondent did not question the manner in which petitioners reported items of food and beverages on these returns. Again in their return for 1974, petitioners reported food and beverages as stock in trade.

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<sup>2/</sup> Pub. L. No. 92-196, §201, 85 Stat. 653 (codified at D.C. Code 1973, §47-1207).

taking advantage of a two-thirds reduction in the tax as provided in the Act. However, for fiscal year 1974, in the second year of the transition period, the District of Columbia decided to adjust the returns of all taxpayer-restaurants which reported food and beverages on schedule "A," by placing the value of such property in schedule "B," and taxing them as supplies using the value as of June 30, 1973. If any returns were not so adjusted, it was due only to an oversight.<sup>3/</sup>

On May 6, 1974, respondent published notice of its intent to promulgate the following rule:

"Stock in Trade" shall be defined as business inventory which is offered or held for sale, in a finished form, by a wholesaler or retailer.

All other materials or parts held for the production, by whatever means, of "Stock in Trade" is hereby designated as supplies. The full and true value of the supplies of whatever nature and kind, held, shall be declared in Schedule "B" of the Personal Property Tax Return.<sup>4/</sup>

Notice of the adoption of the proposed rule was published in the D.C. Register on June 24, 1974. The notice provided that the rule was effective immediately.<sup>5/</sup>

The District of Columbia sent petitioners a copy of the rule as adopted, together with blank personal property tax return forms for fiscal year 1975. At the top of the notice sent was the following explanation:

The Department of Finance and Revenue hereby gives notice of the following adopted rules which define the term "Stock in Trade" and clarifies methods of reporting the value of certain property for purposes of personal property taxation.

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<sup>3/</sup> Although the testimony is unclear, it appears from the exhibits filed that petitioners' returns for fiscal year 1974 were adjusted.

<sup>4/</sup> See 20 D.C. Reg. 1069 (May 6, 1974).

<sup>5/</sup> 20 D.C. Reg. 1316 (June 24, 1974).

Beginning with fiscal year 1975, petitioners were required, pursuant to the rule, supra, to list food and beverages as supplies on schedule "B" of their returns.

Petitioners on their personal property tax returns for 1975 and 1976, the years in issue, did not list any items of food and beverages under schedule "B" as supplies and did not report them under schedule "A" as stock in trade since, in their view, the tax on such property had been repealed. The personal property tax bills received by petitioner Old Europe, Inc., for fiscal years 1975 and 1976, and by petitioner New 5510, Inc., for fiscal year 1976, had the following stamped words thereon: "Adjusted For Depreciation Rates Omissions -- Last Year's Values." These words did not appear on the personal property tax bill of petitioner New 5510, Inc., for 1975. On the personal property tax return forms for 1976 there appeared the following words under schedule "B":

Other supplies -- wrapping and packing materials, advertising materials, sales-books, fuel, china, glass, silver, food and beverages dispensed in restaurants, etc. Raw materials used in the manufacture of finished products. Work in process -- material and labor costs but not general overhead.  
(Emphasis added.) 6/

Prior to the rule adopted by respondent for fiscal year 1975, the Department of Finance and Revenue of the District of Columbia issued no instructions, regulations, or policy statement as to where or under which schedule food and beverages of restaurants should be reported on the personal property tax return. Respondent in the past has treated the following items as inventory:

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6/ Except for the addition of the words, "food and beverages dispensed in restaurants," the heading was essentially the same as in previous years.

gasoline and oil furnished by a service station; lumber in a lumber yard, even if portions of a full piece or section are cut and sold to the customer; flowers in a florist shop, whether arranged or sold individually; meat in a butcher shop; fish in a fish market; items in a vending machine -- however, the elements of items such as sandwiches are supplies before being physically included in the sandwiches; ice cream in an ice cream parlor; and vitamins with which pharmacists fill a prescription.

Petitioners basically argue that the words, "dealers in general merchandise of every description" in D.C. Code 1973, §47-1212, and the words, "dealers in general merchandise," in D.C. Code 1973, §47-1207, include persons in the restaurant business. They further argue that the "stock in trade" or "merchandise" of a restaurant, within the meaning of these statutes, are the inventories of the restaurant, including items of food and beverages. In the alternative, however, petitioners contend that, if it is determined petitioners are not dealers in general merchandise, and that food and beverages are not stock in trade of such dealers, then respondent is estopped at this time from taxing the food and beverages of petitioners as supplies based upon its acceptance of the returns of petitioners until 1974, in which food and beverages were reported as stock in trade.

Petitioners do not find fault with the definition of stock in trade which appeared in the rule, supra, adopted and published on June 24, 1974, since restaurants "offer" food and beverages to the public in a finished state, thereby qualifying these items as stock in trade. However, they do argue that the Department of Finance and Revenue had no authority to characterize as supplies "food and beverages dispensed in restaurants" on the 1976 personal property tax return.

The District of Columbia, on the other hand, maintains that restaurant owners are not dealers in general merchandise within the meaning of D.C. Code 1973, §§47-1207 and 47-1212, since restaurants primarily offer, or are selling, a service, rather than merchandise. It contends that in the Revenue Act of 1971,<sup>2/</sup> Congress was concerned merely with stores or other mercantile businesses, in which categories respondent argues restaurants cannot be, and never were intended to be, included. The District of Columbia further argues that items of food and beverages purchased by petitioners and utilized in the preparation of the meals served to the customers are not finished products and therefore do not constitute their stock in trade. In its opinion, since food and beverages must be processed and prepared before being sold in finished form for ultimate consumption by the public, these items must constitute a supply.

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<sup>2/</sup> See note 2, supra.

The origin of the statute with which we are concerned goes at least as far back as 1902, when Congress, as part of a major appropriations Act for the District of Columbia, included a section on the taxation of personal property.<sup>8/</sup> In the Act, Congress provided for a personal property tax on dealers in general merchandise:

Dealers in general merchandise of every description shall pay to the collector of taxes of the District of Columbia one and one-half per centum on the average stock in trade for the preceding year.

After the passage of this Act it shall be unlawful for any person or persons entering the District of Columbia subsequent to June thirtieth in each year, and establishing a place of business for the sale of goods, wares, or merchandise, either at private sale or at auction, to conduct such business until a sworn statement of the value of said stock has been filed with the assessor of the District of Columbia, who shall thereupon render a bill for the unexpired portion of the fiscal year at the same rate as other personal taxes are levied. The assessor is hereby authorized to reassess said stock whenever in his judgment it has been undervalued. The goods, wares, and merchandise of any person or persons, who shall fail to pay the tax required by this paragraph within three days after beginning business, shall be subject to distraint, and it shall be the duty of the assessor to place bills therefor in the hands of the collector of taxes, who shall seize sufficient of the goods of the delinquent to satisfy said tax: Provided, That said owner shall have the right of redemption within thirty days on payment of said tax, to which shall be added a penalty of one per centum, together with the costs of seizure. The collector shall sell such goods as are not redeemed, at public auction, after advertisement for the three days preceding said sale. 9/

8/ Act of July 1, 1902, Ch. 1352, 32 Stat. 617 (1902) (current version at D.C. Code 1973, 247-1212). The debates in Congress in 1902 reveal that the appropriations Act was not a new Act, but merely a rejuvenation of an 1877 tax law which was still on the books but never enforced due to the fact that the machinery for the collection of personal property taxes was abolished in 1878. 35 CONG. REC. 4897, 4898 (1902) (remarks of Rep. Cannon and Rep. Benton).

9/ Ch. 1352, 32 Stat. 618-619 (codified at D.C. Code 1929, 220:759 (current version at D.C. Code 1973, 247-1212)). The present statute is substantially similar to the original version, having been amended only once in 1904.

It further provided for the rate of tax on tangible personal property:

On all tangible personal property, assessed at a fair cash value (over and above the exemptions provided in this section), including vessels, ships, boats, tools, implements, horses, and other animals, carriages, wagons, and other vehicles, there shall be paid to the collector of taxes of the District of Columbia one and one-half per centum on the assessed value thereof. 10/

In the District of Columbia Revenue Act of 1971, Congress, as we previously noted, gradually phased out the tax on the average stock in trade of dealers in general merchandise. It did this, however, by amending paragraph 2 of section 6 of the Act of 1902, by adding to the end of D.C. Code §47-1207 the following sentence:

Effective July 1, 1972, the rate of tax applicable to the average stock in trade of dealers in general merchandise shall be two-thirds of the rate of tax established by the District of Columbia Council for application generally to personal property subject to taxation for the fiscal year ending June 30, 1972; and effective July 1, 1973, the rate of tax applicable to the average stock in trade of dealers in general merchandise shall be one-third the rate of tax established by the District of Columbia Council to be applied generally to personal property subject to taxation for the fiscal year ending June 30, 1973; and effective July 1, 1974, the tax on the average stock in trade of dealers in general merchandise is repealed. 11/

The problem which the statutes quoted here raises in the minds of the parties, and which this Court must face, is what is to be included within the phrase, "dealers in general merchandise of every description," and what is meant by the words, "stock in trade," as both of these terms were used in paragraph 3 of section 6 of the 1902 Act, and which appear presently in D.C. Code §47-1212.

10/ Ch. 1352, §6, par. 2, 32 Stat. 618 (codified at D.C. Code 1929, §20:754 (current version at D.C. Code 1973, §47-1207)).

11/ Pub. L. No. 92-196, §201, 85 Stat. 653 (codified at D.C. Code 1973, §47-1207).

The ultimate issue which is the basis of petitioners' suit involves a determination of the effect in the 1971 Revenue Act of the repeal of the personal property tax on the "average stock in trade of dealers in general merchandise."

Petitioners, as we have noted, maintain that the phrase, "dealers in general merchandise of every description" has always included petitioners and other restaurant owners and that their "stock in trade" consists of food and beverages. Thus, the repeal of the tax on such property affected restaurant owners, as well as others who are dealers in general merchandise, leaving the personal property of restaurants, other than their stock in trade, subject to tax. Since respondent argues that petitioners and other restaurant owners are not dealers in general merchandise having a stock in trade, it contends that the repealing statute in 1971 had no effect on the taxability of the food and beverages of restaurants. The fact that Congress repealed the tax on the stock in trade of dealers in general merchandise, rather than the stock in trade of dealers in general merchandise of every description, leaving §47-1212 alone, respondent argues, supports its position that there is still a class of personal property, such as food and beverages, which is taxable under §47-1212, notwithstanding the repealing language in §47-1207. Petitioners concede that there still may be certain property of restaurants subject to tax, such as knives, napkins and the like, which are taxable as supplies, but as far as petitioners are concerned, the repealing language in §47-1207 left nothing in §47-1212 upon which to base a tax on food and beverages of restaurant owners.

The legislative history which accompanied the 1902 Act reveals little as to what Congress intended to include within the phrases, "dealers in general merchandise of every description" and "stock in trade" as those phrases were used in paragraph 3, section 6 of the 1902 Act. Petitioners have cited portions of the debates in Congress, supra, with reference to the 1902 Act to show that Congress in 1902 was merely using language from an earlier tax law in 1877 in which law the term "stock in trade" was apparently defined broadly. We did not find the references to the 1877 Act (35 Cong. Rec. at 4902) significant in one way or the other to the issue before this Court. The legislative history accompanying §201 of the Revenue Act of 1971, which repealed the tax on the average stock in trade of dealers in general merchandise, is cited by both sides in support of their arguments.<sup>12/</sup> Respondent contends that a reading of the committee reports demonstrates that petitioners and other restaurants are not dealers in general merchandise. Petitioners, on the other hand, utilize the legislative history to bolster their contention that the term, "stock in trade" must be broadly construed.

The Court believes that essential to the determination of the issue before us, is an understanding of what Congress in the 1902 Act intended to include within the phrase, "dealers in general merchandise of every description," as well as what was intended by the term "stock in trade."

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<sup>12/</sup> See S. REP. NO. 92-489, 92nd Cong., 1st Sess. 14 (1971); H. R. REP. NO. 92-598, 92nd Cong., 1st Sess. 43 (1971).

Unfortunately, the legislative history is of no assistance in this regard. Moreover, it appears that the issue presented is one of first impression in this jurisdiction, as we were unable to discover any relevant cases in this area. Both parties have, however, relied on cases from other jurisdictions for support of their positions. Although not directly on point, petitioners have cited cases dealing with the definitions of stock in trade and inventory. Respondent has relied on the interpretations given to the bulk sales laws of other states, that a restaurant is not a mercantile-type business nor is the owner a merchant, and that the meats and flour used by a cafe proprietor to furnish meals are not merchandise within the meaning of those particular statutes.<sup>13/</sup>

We do not find that any of the cases cited by either party are relevant to our decision as to the correct interpretation of C47-1207 and C47-1212.

Without the aid of either legislative history or case law, a broad interpretation of the language, "dealers in general merchandise of every description" in C47-1212 would not be unwarranted. We believe that this language is broad enough to include restaurant owners. In fact, the legislative history accompanying C201 of the Revenue Act of 1971, which repealed the tax on the average stock in trade of dealers in general merchandise supports a broad reading of this phrase and demonstrates the widespread application of the tax prior to its repeal. The

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<sup>13/</sup> See, e.g., D.C. Coffee Co. v. Board of Health of the Queen, 293 S.W. 684 (Ark. 1927); Daggett v. Wolf, 44 S.W. 2d 1063 (Tex. 1931).

section of the Senate Report describing the repeal of the tax and the reasons Congress was taking such action was entitled, "Repeal Business Inventory Tax." The Report equated the tax on the average stock in trade of dealers in general merchandise with the business inventory tax, using such terms interchangeably. For example, the Report stated that the personal property tax in the District of Columbia "is presently applicable only to business inventories, or the average stock in trade of dealers in general merchandise."<sup>14</sup> In view of the manner in which the committee titled that section of the Report and considering the sentence just quoted, it is logical to conclude that, in the mind of Congress, the business inventory tax was synonymous with the tax on the average stock in trade of dealers in general merchandise. A restaurant has inventories the same as any other business establishment in the District of Columbia. Although the Senate Report spoke of "mercantile-type enterprises," "mercantile establishments" and "stores," we do not believe, contrary to the position taken by respondent, that the legislative history of the 1971 Revenue Act requires us to find that Congress never intended to include restaurants among the businesses which would no longer be taxed on their inventories.

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<sup>14</sup> S. REP. NO. 92-489, 92nd Cong., 1st Sess. 14 (1971). The House Report, H. R. REP. NO. 92-598, 92nd Cong., 1st Sess. 43 (1971), was identical to the Senate Report.

The fact that the Committee Report did not specifically mention restaurants and similar businesses in addition to retail and mercantile-type establishments, which the Committee seemed to direct its attention to in the Report, does not necessitate the conclusion that Congress never intended to repeal the tax imposed on the personal property of restaurants under §47-1212, along with the repeal of the tax on the stock in trade of other businesses. Therefore, based upon what little there is of the legislative history relevant to this issue, we find that the phrase, "dealers in general merchandise of every description" in §47-1212 must be broadly construed, and that there is no reason to distinguish, for purposes of the personal property and §47-1212, the food and beverages used by petitioners and other similar restaurants, from the inventories or stock in trade of other dealers in general merchandise in the District of Columbia.

We believe that there are other factors which support our finding that the tax on the average stock in trade of dealers in general merchandise in §47-1212 included a tax on the food and beverages of restaurants and that there is no compelling reason to distinguish restaurants from other business establishments. The second paragraph of §47-1212 requires persons entering the District and "establishing a place of business for the sale of goods, wares, or merchandise" to file a statement as to the value of the stock in trade. The language "goods, wares, or merchandise" is consistent

with the language "general merchandise of every description" appearing in the first paragraph of §47-1212, and supports, we believe, a broad construction of the latter phrase. The definition of "stock in trade" in Black's Law Dictionary is "[m]erchandise or goods kept for sale or traffic" or "that form of property owned by a craftsman upon which he exercises his art, skill, or workmanship, and upon which he uses the tools of his trade or business."<sup>15/</sup> Food and beverages are certainly goods kept for sale and the restaurant chefs exercise their skills in the preparation of meals. On the federal level, the income tax regulations provide that inventories are necessary in circumstances in which "the production, purchase, or sale of merchandise is an income-producing factor."

Moreover, the regulations further provide that--

inventory should include all finished or partly finished goods and, in the case of raw materials and supplies, only those which have been acquired for sale, or which will physically become a part of merchandise intended for sale \* \* \*. <sup>16/</sup>

The District of Columbia tax provisions have no similar statute nor are there regulations dealing with inventories. However, goods are described as inventories in Article 9 of the D.C. Uniform Commercial Code in the following situation:

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<sup>15/</sup> Black's Law Dictionary 1588 (4th ed. 1968).

<sup>16/</sup> See Treas. Reg. §1.471-1 (1958).

if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. 17

Taking into account how inventories are generally described as evidenced by these references and considering the fact that Congress in §201 of the Revenue Act of 1971 was repealing the personal property tax on business inventory, we believe we are justified in concluding that the tax on a restaurant's inventory consisting of food and beverages was also repealed as of July 1, 1974.

We find unpersuasive the argument of the District of Columbia that, by not including the words, "of every description" found in §47-1212 after the phrase, "dealers in general merchandise" in §47-1207, Congress intended to continue to tax certain items of personal property, such as the food and beverages of restaurants. There is nothing in the legislative history of the Revenue Act of 1971, nor any other evidence to suggest that Congress intended to make a distinction for purposes of personal property taxes between dealers in general merchandise of every description and simply dealers in general merchandise. We will not endeavor to offer an explanation as to why Congress chose to place the language phasing out and repealing the tax on the average stock in trade of dealers in general merchandise in §47-1207 rather than in §47-1212, nor why Congress did not specifically repeal the

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17 D.C. Code 1973, §28:9-109(4).

first paragraph of §47-1212, which provides for the tax on the average stock in trade of such dealers. Although it is unnecessary for purposes of this decision, it would appear to the Court that certain personal property such as vessels, ships, and boats, are still taxable under §47-1212. We need only decide, however, that whatever remains of §47-1212 at this time, it does not authorize the District of Columbia to impose a tax on the average stock in trade of dealers in general merchandise. We further find that it does not authorize respondent to collect a tax from petitioners on their supply of food and beverages on hand at the beginning of any fiscal year. In fact, Mr. Thomas R. Kinney, supervisor of the Personal Property Assessment Section of the Department of Finance and Revenue, testified that the District of Columbia is not collecting any taxes under §47-1212 at the present time.<sup>10/</sup>

Perhaps the most damaging evidence to the position taken by the District of Columbia in this case is the fact that it accepted the personal property tax returns of both petitioners for every year they were in existence, until the return for fiscal year 1974 was filed, with items of food and beverages listed on schedule "A" as stock in trade or merchandise rather than under schedule "B" as supplies. We note that the Department of Finance and Revenue, after auditing the returns of each petitioner

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<sup>10/</sup> See Transcript at 28.

in several earlier years, deemed those returns as "accepted." The District of Columbia, therefore, must have interpreted the language of §47-1212 as late as 1974 as encompassing the food and beverages of restaurants and taxed this property of petitioners and other restaurants under that statute. The fact that the District also accepted returns in which restaurant owners listed food and beverages in schedule "B" and that, if asked, the Personal Property Assessment Section of the Department of Finance and Revenue would inform these taxpayers to list food and beverages in schedule "B," lends no support to the contention that these items are now, and always were, supplies rather than stock in trade. What can be said is that the Department always accepted the returns of petitioners and others with food and beverages listed as stock in trade and never once issued any directive or policy statement until fiscal year 1975, when it informed interested taxpayers that food and beverages must be included under schedule "B" as supplies. The construction given to §47-1212 by respondent over the years commands great respect and must receive due weight and consideration, unless that interpretation is plainly erroneous.<sup>19/</sup> We find that the construction of the language "dealers in general merchandise of every description" in §47-1212 by the District of Columbia to include the food and beverages of restaurants is not plainly erroneous and must be afforded great weight by this Court.

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<sup>19/</sup> See London v. District of Columbia, 149 U.S. App. D.C. 129, 141, 461 F. 2d 1215 (1972) (footnote omitted); Tumulty v. District of Columbia, 69 U.S. App. D.C. 390, 399, 102 F. 2d 254 (1939).

When the Department of Finance and Revenue on June 24, 1974, adopted the rule, supra, effective for all practical purposes for fiscal year 1975, defining the term "stock in trade" as "business inventory which is offered or held for sale, in a finished form, by a wholesaler or retailer" and designating as supplies "[a]ll other materials or parts held for the production, by whatever means, of 'Stock in Trade,'" it apparently was attempting to clarify the type of property on which the tax was repealed, as provided in §47-1207, and the kind of property which was to continue to be subject to tax. Respondent maintains that items of food and beverages fall into the second category in the rule as supplies, and cannot be "stock in trade" as this term is defined in the rule, since these items are not finished products, but rather, are bought by petitioners to be prepared for the ultimate consumption of their customers. The record shows that the District of Columbia would designate food and beverages as supplies, until they appear on the table in front of the customer, at which point they become stock in trade.<sup>20/</sup> Based upon the manner in which respondent accepted petitioners', and other restaurants', reporting of food and beverages prior to fiscal year 1974, and the fact that we have determined that the tax on petitioners', and other similar restaurants', food and beverages was entirely repealed by §47-1207 as of July 1, 1974, we conclude

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<sup>20/</sup> See testimony of Thomas Kinney in the trial of the companion case of Carter Lanhardt, Inc. v. District of Columbia, Tax Division No. 2367, Transcript at 17-18 (Super. Ct. D.C. February 1, 1977). Mr. Kinney's testimony in the present case was incorporated by reference into Carter Lanhardt, Inc. v. District of Columbia.

that, whatever force and effect the rule adopted by the Department of Finance and Revenue has, it cannot be used by the District of Columbia to tax as supplies<sup>21/</sup> the food and beverages of the petitioners. Therefore, the instructions which appeared for the first time on the 1976 returns at the top of schedule "B," which provided that "food and beverages dispensed in restaurants" are supplies, had no basis in law, and are, therefore, not binding.

The apparent ambivalence demonstrated by the Department of Finance and Revenue with respect to the taxation of food and beverages leads this Court to believe that the Department itself is not really certain how these items are to be taxed. As we have previously stated, the Department accepted until fiscal year 1974, returns which listed food and beverages under either schedule "A" or "B." In fiscal year 1974, it adjusted the returns of all restaurants, including, it appears, those of petitioners, on which was reported food and beverages under schedule "A" by placing these items under schedule "B" instead. Then on June 24, 1974, it adopted the rule defining stock in trade and included a notice of the adoption of the rule with the blank personal property tax forms sent to all taxpayers. However, it was not until the 1976 return that the Department included on the face of the return the direction that food and beverages dispensed by restaurants

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<sup>21/</sup> This Court need not decide for purposes of this case whether or not the Department of Finance and Revenue had the authority to issue and adopt such a rule. In view of our decision on this point, we need not decide whether, as petitioners contend, even under the rule as adopted, food and beverages are stock in trade since meals are "offered" as a finished product to customers.

that, whatever force and effect the rule adopted by the Department of Finance and Revenue has, it cannot be used by the District of Columbia to tax as supplies<sup>21/</sup> the food and beverages of the petitioners. Therefore, the instructions which appeared for the first time on the 1976 returns at the top of schedule "B," which provided that "food and beverages dispensed in restaurants" are supplies, had no basis in law, and are, therefore, not binding.

The apparent ambivalence demonstrated by the Department of Finance and Revenue with respect to the taxation of food and beverages leads this Court to believe that the Department itself is not really certain how these items are to be taxed. As we have previously stated, the Department accepted until fiscal year 1974, returns which listed food and beverages under either schedule "A" or "B." In fiscal year 1974, it adjusted the returns of all restaurants, including, it appears, those of petitioners, on which was reported food and beverages under schedule "A" by placing these items under schedule "B" instead. Then on June 24, 1974, it adopted the rule defining stock in trade and included a notice of the adoption of the rule with the blank personal property tax forms sent to all taxpayers. However, it was not until the 1976 return that the Department included on the face of the return the direction that food and beverages dispensed by restaurants

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were to be listed as supplies under schedule "B." We have no idea what finally caused the Department to issue a rule defining stock in trade and then proceed to interpret its own rule to mean that food and beverages are not stock in trade. Whatever the reason, however, we conclude that the Department was not warranted, based upon its past practices, as well as the repealing language of §47-1207, in taxing petitioners' food and beverages as supplies.

Even the logic or consistency of respondent's actions is questionable. One reason offered by respondent to support its position that petitioners are not "dealers in general merchandise" is that they are merely suppliers of a service. Respondent thus suggests that one test this Court should use to determine whether personal property is stock in trade or a supply is whether the taxpayer is providing a service. Is the service station attendant when he fills your car with gas and oil, or the vender in a fish market when he scales and fillets a bluefish, providing any less of a service than the restaurant?<sup>22/</sup> Yet in those instances respondent views the property as inventory. The District considers portions of a piece of lumber sold by a lumberyard and cuts of meat sold by a butcher as inventory, and yet the liquor contained in a bottle used by a restaurant to prepare individual drinks is a supply. Finally, ice cream sold in a parlor is inventory according

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<sup>22/</sup> In the case of a fish market, the Department of Finance and Revenue states that a person buys the whole fish (stock in trade); then after it is purchased, the market prepares the fish as a service to you. Why cannot the drink purchased in a restaurant be analysed in the same fashion -- one purchases the liquor and the bartender then prepares it in the manner desired as a service to the customer.

to the District, while the ice cream sold in a restaurant is considered as a supply. In addition to this, as we noted previously, restaurants offer and sell many items of food, as well as beverages, which involve no preparation at all and undergo no physical change before being consumed by the customer. Following respondent's arguments, at least these would have to be treated as stock in trade and thus not subject to tax.

This Court finds no basis in this record to draw any distinction between those items which require preparation and those which do not, and thus we will not do so. We conclude that petitioners' entire inventories, consisting of food and beverages, were the "stock in trade of a dealer in general merchandise of every description" within the meaning of §47-1212, and that the tax on such personal property was repealed pursuant to §47-1207 as of July 1, 1974.<sup>23/</sup>

Accordingly, petitioner Old Europe, Inc., is entitled to a refund of personal property taxes in the amounts of \$128.56 for fiscal year 1975, and \$201.15 for fiscal year 1976, plus interest, and that petitioner New 5510, Inc., is entitled to a refund of personal property taxes in the amounts of \$79.25 for fiscal year 1976, and \$95.32 for fiscal year 1975, plus interest.

Petitioners are to submit an appropriate order within 10 days of receipt of this Opinion.

DATED: June 8, 1978.

  
FRED S. UPTON  
Judge

<sup>23/</sup> In so holding, we need not address petitioners' argument that the District of Columbia is estopped from taxing their food and beverages as supplies.

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