Opinion No. 819

DISTRICT OF COLUMBIA TAX COURT

FILED

JUL 23 1952

Board of Tax Appeals for the District of Columbia

THE VIRGINIA HOTEL COMPANY, Petitioner,	)	
v.	)	Docket Nos. 1302, 1303, 1304, 1305
DISTRICT OF COLUMBIA, Respondent.	)	

FINDINGS OF FACT AND OPINION

All the foregoing proceedings involve one taxpayer and one issue, and pertain to the taxable calendar years of 1947, 1948, 1949 and 1950, respectively. For obvious reasons they have been consolidated for consideration and disposition. All raise the question whether interest on a promissory note payable in the District of Columbia and secured on real estate located therein, but signed by non resident is "income from sources within the District of Columbia" as that term is meant in the District of Columbia Income and Franchise Act of 1947. In proceeding, Docket No. 1302, there is raised a question as to whether the tax was assessed within the time prescribed in Section 10 of Title XII of the District of Columbia Income and Franchise Act of 1947.

Findings of Fact

The parties have stipulated, and the Court finds as facts the following:

The parties hereto by their respective counsel do hereby stipulate that the following facts may be accepted in this cause as established by proof without the introduction of further evidence in support thereof. Either of the parties hereto may introduce evidence of any additional relative facts no inconsistent with this stipulation and any facts herein stipulated shall be subject to the objections of materiality and relevancy.

1. The petitioner was during the calendar years 1947, 1948, 1949 and 1950 and still is a Virginia Corporation with its only place of business at 1107 Eye St., N.W., Washington, D.C. and during the years 1947, 1948, 1949 and 1950 was, and still is engaged in the District of Columbia in the business of holding, leasing and operating real estate.

2. All of the stockholders of petitioner were, and are either descendents of, or members of the family of the late Joseph E. Willard.

3. Among the parcels of real estate owned by the petitioner in the early part of 1946 and for a long time prior thereto, was that described as "lot 32 in the combination of lots by the Virginia Hotel Company in Square 225", located on the westside of 14th St., N.W., between F St. and Penna. Ave., Washington, D.C. upon which is located the Willard Hotel.

4. Prior to March 1, 1946 the Willard was leased to and operated by the Willard, Inc., a Virginia Corporation and wholly owned subsidiary of the petitioner.

5. On March 1, 1946, the petitioner sold the Willard to Maxwell Abbell and Peter A. Miller, residents of Chicago, Illinois, and Detroit, Michigan, respectively, for the sum of $3,150,000, of which $850,000 was cash, and the balance represented by a promissory note signed by Maxwell Abbell and Peter A. Miller and being in the language following:

"FOR VALUE RECEIVED, MAXWELL ABBELL AND PETER A MILLER promise to pay to The Virginia Hotel Company, or order, the principal sum of TWO MILLION THREE HUNDRED THOUSAND DOLLARS, with interest from the date hereof, at the rate of four per centum per annum, on said principal sum or on so much thereof as may from time to time remain unpaid, said principal and interest being due and payable as follows: - in monthly installments of Sixteen Thousand Eighty-eight and 83/100 Dollars each commencing on April 1, 1946, and continuing on the first day of each and every month thereafter up to and including December 1, 1946, and in monthly installments in the amount of Twenty Thousand Three Hundred and Fifty Dollars commencing on the first day of January, 1947, and continuing on the first day of each and every month thereafter up to and including December 1, 1947, and in monthly installments of Fourteen Thousand Five and 55/100 Dollars commencing on the first day of January, 1948, and continuing on the first day of each every month thereafter up to and including December 1, 1948, and in monthly installments of Ten Thousand Eight Hundred and Thirty-three and 33/100 Dollars commencing on the first day of January, 1949, and continuing on the first day of each and every month thereafter up to and including December 1, 1963, and in monthly installments of Ten Thousand Eight Hundred Thirty-three and 33/100 Dollars commencing on the first dayoof January, 1964, and continuing on the first day of each and every month thereafter up to and including March 1, 1964; each installment when so paid to be applied first to the payment of interest on the amount of principal, remaining unpaid and the balance thereof credited to principal, the entire balance of principal and interest, if any, to be due and payable on the first day of April, 1964.

AND it is expressly agreed that if default be made in the payment of any one of the aforesaid installments, when and as the same shall become due and payable, then and in that event the unpaid balance of the aforesaid principal sum shall, at the option of the holder of said note, at once become and be due and payable, anything hereinabove contained to the contrary notwithstanding.

AND in the event of any such default or any default in the covenants and agreements contained in the Deed of Trust securing this note, the party secured or any holder of said note is to look solely to said property covered by the Deed of trust or the proceeds of the sale thereof for the payment of said note, and the satisfaction of any liability or any obligation otherwise arising under the said note or Deed of Trust, and if the net proceeds arising from such sale shall be insufficient to pay in full the debt secured by the said Deed of Trust or this note, and to satisfy any such liability or obligation otherwise arising hereunder, the said Maxwell Abbell and Peter A. Miller, or either of them, shall not be held liabile or responsible for the payment of any deficiency.

The privilege is reserved of paying from time to time on and after January 1, 1947, in addition to the payments provided for, the whole or any part of the unpaid balance provided for herein, upon giving to the holder of the note ninety (90) days' notice in writing of intention to pay such additional sums provided that all interest due on each additional sum paid shall be paid simultaneously therewith.

Principal and interest payable at The Riggs National Bank of Washington, D.C.

6. The aforesaid note was secured by a deed of trust upon the Willard. After the sale of the Willard neither the petitioner nor any of its directors, officers or stockholders had any connection with, or relation to the Willard or any activity therein, except as the holder of the aforesaid note secured by deed of trust on the Willard.

7. During the calendar years 1947, 1948, 1949 and 1950, petitioner received the following amounts as interest on the aforesaid note: $35,103.69, $30,899.97, $77,737.94 and $75,028.43 respectively and were excluded as income from the District of Columbia sources. With respect to the tax assessed for 1947, petitioner contends that the same was assessed after the 3-year period provided in Sec. 10 of Title XII of the 1947 Act. On the other hand respondent contends that the tax was assessed within the 5-year period provided in Sec. 10(a)(3) of the same title of said Act. The franchise tax return filed by petitioner for the year 1947 showed a tax of $566.69 which was duly paid. The franchise tax returns filed for the years 1948, 1949 and 1950 reported no taxable income, each year showing a net loss.

On February 21, 1952 the assessor of the District of Columbia assessed a tax deficiency against petitioner with interest as shown below for the years indicated:

Year	Tax Deficiency	Interest to 2/21/52	Interest to 5/19/52	Total
1947	$4,255.43	$983.00	$76.80	$5,315.23
1948	2,201.93	390.21	39.17	2,711.26
1949	3,548.04	393.92	57.80	4,000.56
1950	1,650.92	84.20	25.44	1,760.56
	$11,727.17	$1,851.33	$199.21	$13,787.71

Petitioner on May 19, 1952 paid to the Collector of Taxes, D.C., the sum of $13,787.71 under protest as shown by the attached copy of the letter dated May 19, 1952 and executed by Joseph W. Wyatt, President of the Virginia Hotel Company.

8. Thereafter on May 20, 1952, petitioner filed petitions for refund of the foregoing sums paid under protest and said petitions were timely filed.

9. During the years 1947, 1948, 1949 and 1950 Maxwell Abbell and Peter A. Miller were and still are non-residents of the District of Columbia and residents of the states of Illinois and Michigan respectively.

10. The tax in controversy is the corporation franchise tax imposed by the District of Columbia Income Tax of 1947 (Title 47, Chapter 15).

11. The tax returns for the respective years involved in this proceeding are hereby stipulated as being in evidence without any formal proof.

Opinion

In respect of which might be called the main issue, namely whether the interest here involved was "income from sources within the District of Columbia" it is necessary that consideration be given to the pertinent sections of the Income and Franchise Act of 1947, which read as follows:

"TITLE VII - TAX ON CORPORATIONS

'SEC. 1. TAXABLE INCOME DEFINED. - For the purposes of this title, and unless otherwise required by the context, the words 'taxable income' mean the amount of net income derived from sources within the District within the meaning of title X of this article.

'SEC. 2. IMPOSITION AND RATE OF TAX. - 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 5 per centum upon the taxable income of every corporation, whether domestic or foreign (except those expressly exempt under title II of this article."

"Title X - PURPOSE OF ARTICLE AND ALLOCATION AND APPORTIONMENT

'SEC. 1. PURPOSE OF ARTICLE. - It is the purpose of this article to impose (1) and income tax upon the entire net income of every resident and every resident estate and trust, and (2) a franchise tax upon every corporation and unincorporated business for the privilege of carrying on or engaging in any

trade or business within the District and of receiving such other income as is derived from sources within the District: PROVIDED, HOWEVER, That, in the the case of any corporation, the amount received as dividends from a corporation which is subject to taxation under this article, and, in the case of a corporation not engaged in carrying on any trade or business within the District, interest received by it from a corporation which is subject to taxation under this article shall not be considered as income from sources within the District for the purposes of this article. The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District."

"TITLE VII - TAX ON CORPORATIONS

"SEC. 1. TAXABLE INCOME DEFINED. - For the purposes of this article, and unless otherwise required by the context the words 'taxable income' mean the amount of net income derived from sources within the District within the meaning of title I of this article.

"SEC. 2. IMPOSITION AND RATE OF TAX. - 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 5 per centum upon the taxable income of every corporation, whether domestic or foreign (except those expressly exempt under title II of this article)."

"TITLE XII - ASSESSMENT AND COLLECTION; TIME OF PAYMENT

"SEC. 1. DUTIES OF ASSESSOR. - The Assessor is hereby required to administer the provisions of this article. As soon as practicable after the return is filed, the Assessor shall examine it and shall determine the correct amount of tax."

Sections 2(b), 3, 4(b) and 29(a) of the District of Columbia Revenue Act of 1939 provide as follows:

"SEC. 2(b). TAX ON CORPORATIONS. - There is hereby levied for each taxable year upon the taxable income from District of Columbia sources of every corporation, whether domestic or foreign (except those organizations expressly exempt under paragraph (d) of this section), a tax at the rate of 5 per centum thereof."

"SEC. 3. DEFINITION. - The term 'net income' means the gross income of a taxpayer less the deductions allowed by this title."

"SEC. 4(b). OF CORPORATIONS. - In the case of any corporation, gross income includes only the gross income from sources within the District of Columbia. The proper apportionment and allocation of income with respect to sources of income within the without the District may be determined by processes or formulas of general apportionment under rules and regulations prescribed by the Commissioners."

"SEC. 29 (a). DUTIES OF ASSESSOR. - The assessor is hereby required to administer the provisions of this title. The Assessor shall prescribe forms identical with those utilized by the Federal Government, except to the extent required by differences between this title and its application and the Federal Act and its application. He shall apply as far as practicable the administrative and judicial interpretations of the Federal income-tax law so that computations of income for purposes of this title shall be, as nearly as practicable, identical with the calculations required for Federal income-tax purposes. As soon as practicable after the return is filed the assessor shall examine it and shall determine the correct amount of the tax."

It will be seen from a comparison of the section from the Act of 1939 with those of the Act of 1947 that in both Acts the tax is imposed upon the net income of the corporate taxpayer "from sources within the District." True in the 1947 Act a "privilege" is spelled out, so as to bring the tax within the definition sphere of excise taxes. It should be observed, however, that unlike the usual or ordinary excise tax, the tax imposed by the Act of 1947 is not measured by the net income of the corporation, but, as stated above, is imposed upon such net income.

The comparison of the pertinent sections of the two Acts will further disclose that in the Act of 1939 the Assessor (and on appeal the Board of Tax Appeals) was required to follow the administrative and judicial interpretations of Federal income-tax law, while such provision is missing from the Act of 1947. In that connection the respondent contends that such omission is significant - even to the extent of indicating that Congress intended that interpretations and decisions of Federal tax law in essence, or for practical purposes similar to the Act of 1947 should not be followed by the Board. On the other hand, the petitioner claims that no significance should be attached to the omission, because since there was no Federal tax law similar to the Income and Franchise Tax Act of 1947, the omitted language became inapplicable and had no place in the Act.

In a proceeding before the Board between the same parties (Docket No. 1280) decided May 2, 1952, it was held that under the Revenue Act of 1939, interest received in 1946 on the note here under consideration, was

from sources without the District of Columbia. In rendering that decision the Board felt bound by, and followed decisions of the United States Board of Tax Appeals, (now the U.S. Tax Court) upon earlier Revenue Acts, pertinent provisions of which were similar to those of the District of Columbia Revenue Act of 1939. The Board would have followed such course, even if it had believed that the decisions of the Federal tribunal were erroneous under the generally accepted principles of the applicable law.

The Board does not believe that in these proceedings the Federal decisions above mentioned have the same binding force upon the Board, but rather they should be considered as any other decisions of a respectable tribunal dealing with a similar set of facts. Especially is this so in the light of the great respect which the Supreme Court has for the decisions of the United States Tax Court.

After all, what the United States Tax Court determined, and what this Board is trying to determine is whether certain interest payments were income from sources within a certain geographical area - United States in one instance, the District of Columbia in the other. The decisions of the United States Tax Court uniformally held that the domicile or residence of the obligor was the source of interest income.

The Court believes that the better and more logical rule is stated in Standard Marine Insurance Co., Ltd., 4 B.T.A. 853; Marine Insurance Co., Ltd., 4 B.T.A. 857; Estate of L. E. McKinnon, 6 B.T.A. 412; Ocean Accident & Guarantee Company Corp. Ltd., 13 B.T.A. 1047, and Sumitomo Bank, Ltd., 19 B.T.A. 480, namely, that the source of interest income is the obligor and its situs is his residence.

The respondent contends that the receipt of interest by the petitioner was a part of the regular trade or business of the petitioner, on the stated premise that the sale of the Willard Hotel was in the ordinary course of the taxpayer's trade or business under the decision of the Court of Appeals in Robb v. District of Columbia, 80 U.S. App. D.C. 246, 152 F.2d 283. The

Court cannot agree with that contention, but even if it were sound, interest income would not for that reason have its source within the District of Columbia. In many of the U.S. Tax Court cases cited above the obligation upon which the interest was paid arose out of business conducted in the United States, while the source of the interest income was held to be without the United States.

Inasmuch as the tax here under consideration is imposed upon a privilege and, therefore, an excise, Congress could have made the measure of the tax almost any event, act or condition. It could have based the tax upon interest on encumbrances secured on real estate in the District, or from notes held by note holders in the District or from notes physically in the District or on notes which, as does the note here involved, provides that the interest is payable in the District. None of these measures or bases were adopted by Congress. Instead it provided that for the privilege of engaging in business and receiving income the corporation should pay a certain percentage on net income from sources within the District of Columbia.

While not controlling, it is significant and persuasive that in later Revenue Acts and in Section 119 of the Internal Revenue Code, Congress has provided that the source of interest income is the residence of the obligor. Such provisions were declaratory of the law as laid down in the earlier decisions of the United States Tax Court upon which the Board relied in its decision in Docket No. 1280, and were a recognition and affirmance by Congress of the principles therein announced, A. C. Mirk, 10 T.C. 77, 83.

The Board in deciding the proceeding Docket No. 1280, did not rely entirely on the decisions of the United States Tax Court, but cited the well known work of Merten's Law of Federal Income Taxation, and the well reasoned decision of the Supreme Court of Missouri in Petition of Union Electric Company of Missouri, 161 S.W. 2d. 968, 971, 972.

The Court does not believe, as did the former Member Sole in Community Finance Corporation v. District of Columbia, Docket No. 738, that the omission

of the provisions of Section 119 from District of Columbia Revenue Act was indicative of Congress' intention that such provisions not obtain in the District. The Federal Revenue Acts are more detailed and complicated than those of the District, and there are many provisions of the Federal law declaratory of principles of tax law applicable to the District of Columbia that are not found in the District of Columbia Revenue Acts.

Resort must be had to the ordinary meaning of the term "sources". As Judge Goodrich said in Lord Torres, 25 B.T.A. 154, 161, "The commonly accepted definition of the term "source" is 'that from which anything comes forth, regarded as its cause or origin, the first cause.' Webster's New International Dictionary," And in Funk & Wagnalls New College Standard Dictionary (1947) we find the word "source" defined as "1. That from which any act, movement, or effect proceeds; an originator, creator, origin. * * * * * 5. The initiator of a payment, dividend, etc." The interest income here involved did not originate or flow from the real estate which secured the note, nor from the business conducted by the holder of the note or from the note itself, regardless of where the note is held or where the interest is payable. It originated and flowed from the obligors on the note.

For the reasons stated the Court holds that the source of the interest income involved in these four proceedings was without the District of Columbia and that the Assessor erred in assessing the petitioner the deficiences and interest as follows:

Year	Tax Deficiency	Interest to 2/21/52	Interest to 5/19/52	Total
1947	$ 4,255.43	$ 980.00	$ 75.00	$ 5,315.23
1948	2,261.00	360.21	39.17	2,711.38
1949	3,560.04	393.92	57.00	4,000.56
1950	1,650.92	[illegible]	25.44	1,760.56
	$11,727.17	$1,851.33	$209.21	$13,787.71

The Court further holds that the petitioner is entitled to refunds in these four proceedings as follows:

Docket No.	Tax	Interest	Total
1302	$4,255.43	$1,059.80	$5,315.23
1303	2,281.99	429.38	2,711.37
1304	3,548.84	451.72	4,000.56
1305	1,650.92	109.64	1,760.56

The petitioner has assigned an additional error by the Assessor in Docket No. 1302, namely, that the Assessor erred in making the assessment there involved after the expiration of the three year period of limitation beginning April 15, 1948.

The pertinent sections of the Income and Franchise Tax Act of 1947 are the following:

"TITLE XII - ASSESSMENT AND COLLECTION: TIME OF PAYMENT

"SEC. 10. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION. - (a) GENERAL RULE. - Except as provided in subsection (b) of this section -

(1) the amount of income taxes imposed by this article shall be assessed within three years after the return is filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period;

* * * * *

(3) if the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within five years after the return was filed;"

Keeping in mind that Section 10(a)(3) is in the nature of a penalty, the rule of the burden of proof in respect to Sections 10(a)(1) and 10(a)(3) is that, in respect of the former, the burden is upon the taxpayer claiming the expiration of the three year limitation to show that such period had elapsed before assessment; and in respect of the latter, if the District claims that more than 25 per centum of gross income was omitted from the return, the burden is upon the District to show or prove such fact.

The only facts in the stipulation filed herein by the parties pertaining to the second assigned error in Docket No. 1302 is a statement to the effect that the assessment for the calendar year 1947 was made by the Assessor on February 21, 1952, and a paragraph immediately preceding such statement, and reading as follows:

"During the calendar years 1947, 1948, 1949 and 1950, petitioner received the following amounts as interest on the aforesaid note: $35,108.69, $80,899.97, $77,737.94 and $76,028.43 respectively and were excluded as income from the District of Columbia sources. With respect to the tax assessed for 1947, petitioner contends that the same was assessed after the 3-year period provided in Sec. 10 of Title XII of the 1947 Act. On the other hand respondent contends that the tax was assessed within the 5-year period provided in Sec. 10(a)(3) of the same title of said Act. The franchise tax return filed by petitioner for the year 1947 showed a tax of $566.69 which was duly paid. The franchise tax returns filed for the years 1948, 1949 and 1950 reported no taxable income, each year showing a net loss."

The statement in the foregoing quotation that "$35,108.69 * * * * were excluded as income from the District of Columbia sources," means that such item of interest income was excluded from the return of income for 1947 filed by the petitioner, when considered along with the following statements in the paragraph.

In the brief for the petitioner filed in this cause there is found the statement following:

"The tax form provided by the District tax authorities for making a return required under the Act contains two columns on the first page. Column one is titled "Schedule AA, Within and Without the District", Column three is titled "Within the District". Petitioner disclosed in column one, item 7, the sum of $35,108.69 and omitted the sum in column three since it was and still is of the opinion that it was not income from sources within the District. Obviously there has been no failure to disclose income which is the clear intent of the five year limitation period provided in Title XII and furthermore column one of the form clearly indicates that such column is the proper place to list gross income as defined in Section 2 of Title III and column three is the proper place for reporting taxable income within the definition provided in Title VII and X."

All of the statements of fact in the foregoing may be correct, but there is nothing in the stipulation or otherwise in the record to support such statements. It would seem therefore that the respondent has maintained the burden of proof, and that the five year period of limitation applies. In the light of the Court's decision on the main issue, its decision on the second issue herein latterly discussed would seem to be unimportant except as a disposition of all the issues herein.

Decision will be entered respectively in each of the four proceedings involved in accordance with this opinion.

Jno. V. Murdock,
Judge

DISTRICT OF COLUMBIA TAX COURT

FILED
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Board of Tax Appeals for the District of Columbia

THE VIRGINIA HOTEL COMPANY,
Petitioner,
v.
DISTRICT OF COLUMBIA,
Respondent.

Docket No. 1302

D E C I S I O N

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof and of the evidence adduced at the hearing on said petition, it is, by the Court, this 23d day of July, 1952,

ADJUDGED AND DETERMINED, That the deficiency assessment of franchise tax against petitioner, The Virginia Hotel Company for 1947, in the amount of $4,255.43, and interest thereon in the amount of $1,059.80, be, and it is, hereby canceled, and that said petitioner is entitled to a refund of said taxes and interest, amounting in all to $5,315.23, with interest thereon at the rate of 4 per centum per annum from May 19, 1952 until the date of payment of such refund.

Jo. V. Morgan,
Judge

Findings of Fact & Opinion
and Decision served as follows:

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Mildred Jones
Acting Clerk

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