OPINION NO. 1119

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

TAX DIVISION

THOMAS CIRCLE LAND COMPANY,
Petitioner

v. Docket No. 2254

DISTRICT OF COLUMBIA,
Respondent

FILED

APR 29 1975

Superior Court of the District of Columbia Tax Division

INTERNATIONAL INN,
Petitioner

v. Docket No. 2255

DISTRICT OF COLUMBIA,
Respondent

MEMORANDUM OPINION

These companion cases come before the Court pursuant to Rule 10 of the Tax Division of this Court on motions for entry of decision in cases submitted without trial. Petitioners are seeking refunds of certain unincorporated business franchise taxes paid to the District of Columbia.

STATEMENT OF THE CASE

On January 16, 1975, the parties entered into joint stipulations pertinent to each case. These stipulations, together with the joint exhibits attached thereto, were admitted into evidence when the cases were called for trial on January 20, 1975. At that time both parties presented oral argument to the Court and separately made motions for entry of decision in cases submitted without trial. After setting dates for the submission of memoranda in support of the Rule 10 motions, the

Court took the matters under advisement. The facts pertinent to the two suits are undisputed and as taken from the joint stipulations may be briefly summarized as follows:

Petitioner in Thomas Circle Land Company (Docket No. 2254) is an Illinois partnership with its principal office in Chicago, Illinois. The members of the partnership are the beneficiaries under a joint venture and trust agreement wherein the trustees are Illinois residents. At all times material to the complaint, the partnership held title to land located at 1 Thomas Circle, N.W., Washington, D. C., which land is leased under a net-net-net lease whereby the lessee pays any and all expenses including real estate taxes. The lessee is unrelated to petitioner.

Petitioner in International Inn (Docket No. 2255) is an Illinois partnership with its principal office in Chicago, Illinois. The members of the partnership are the beneficiaries under a joint venture and trust agreement wherein the trustees are Illinois residents. At all times material to the complaint, the partnership held title to a hotel building located at 1 Thomas Circle, N.W., Washington, D. C., which land is leased under a net-net-net lease whereby the lessee pays any and all expenses including real estate taxes. The lessee is unrelated to petitioner.

During the period January 1, 1962, through December 31, 1969 (Docket No. 2254) and the period January 1, 1966, through December 31, 1969 (Docket No. 2255), the only income each petitioner received within the District of Columbia was from the foregoing lease. The unincorporated business franchise tax returns filed by petitioner, Thomas Circle Land Company (Docket No. 2254), for the years 1962 through 1972 and by International Inn (Docket No. 2255) for the years 1966 through 1972 showed that the nature of the business of petitioners was land investment (Docket No. 2254) or as a lessor (Docket No. 2255),

that they incurred little or no expenses other than interest, ground rent and depreciation, that they had no employees and that the income of petitioners was entirely from rentals of real property.

The tax in controversy in Thomas Circle Land Company (Docket No. 2254) is the unincorporated business franchise tax for the period January 1, 1962, through December 31, 1969, in the amount of Thirty-Seven Thousand Eighty Dollars and Seventy-Six Cents ($37,080.76), together with interest. The specific amounts of tax and the dates these taxes were paid are as follows:

Period Covered	Amount	Date Paid
1/1/62 to 12/31/62	$1,276.66	On or about 5/15/63
1/1/63 to 12/31/63	6,958.62	3/31/64
1/1/64 to 12/31/64	6,950.00	On or about 4/ 5/65
1/1/65 to 12/31/65	4,625.00	On or about 4/6/66
1/1/66 to 12/31/66	4,680.00	4/3/67
1/1/67 to 12/31/67	3,710.00	On or about 3/8/68
1/1/68 to 12/31/68	4,435.68	On or about 4/7/69
1/1/69 to 12/31/69	4,444.80	4/9/70

In addition, this petitioner paid unincorporated business franchise taxes for the years 1970, 1971 and 1972 in the aggregate amount of $14,094.74. (See Joint Exhibit 1-A.)

The tax in controversy in International Inn (Docket No. 2255) is the unincorporated business franchise tax for the period January 1, 1966, through December 31, 1969, in the amount of Thirty-Eight Thousand Two Hundred Forty-One Dollars and Eighty-Two Cents ($38,241.82), together with interest. The specific amounts of tax and the dates these taxes were paid are as follows:

Period Covered	Amount	Date Paid
1/1/66 to 12/31/66	$7,259.82	4/13/67
1/1/67 to 12/31/67	8,294.00	On or about 3/8/68
1/1/68 to 12/31/68	10,791.00	On or about 4/7/69
1/1/69 to 12/31/69	11,897.00	4/9/70

In addition, petitioner paid unincorporated business franchise taxes for the years 1970, 1971 and 1972 in the aggregate amount of $30,560.00. (See Joint Exhibit 1-A.)

In October, 1973, petitioners became aware for the first time of the decision of the United States Court of Appeals for the District of Columbia Circuit rendered in 1949 in District of Columbia v. Pickford, 86 U.S. App. D.C. 17, 179 F. 2d 271, which held that where a non-resident owned a hotel in the District of Columbia which he leased to a corporation in which he had no interest, the owner was not engaged in a trade or business for purposes of the unincorporated business franchise tax. Petitioner in each suit thereupon filed a claim, dated December 14, 1973, for refund of the unincorporated business franchise taxes paid for all years through 1972. Subsequently, respondent issued an authorization to refund said taxes for the years 1970 through 1972 to each petitioner on the ground that they are an "entity not subject to the unincorporated business franchise tax." (See Joint Exhibit 3-C.) At the same time, respondent declined to refund the taxes paid for the years 1962 through 1969 by Thomas Circle Land Company (Docket No. 2254) and for the years 1966 through 1969 by International Inn (Docket No. 2255) on the ground that "We are without authority to consider your claims for refund of taxes paid" for those years "since they were not filed within the statutory three year period." (See Joint Exhibit 2-B.) On June 26, 1974, petitioners filed these suits for refund of taxes paid.

STATEMENT OF ISSUES PRESENTED

1. Whether this Court has jurisdiction to entertain a suit for refund of an overpayment of taxes when petitioners' claims for refund were filed more than three years after the tax was paid.

2. Whether, in the event this Court has jurisdiction to entertain the companion suits, the respondent is estopped from asserting the actions are barred due to petitioners' failure to comply with the statutory requirements.

I

JURISDICTION

At the outset, we note that jurisdiction over the subject matter is a threshold question to be resolved in every proceeding. Whitney Nat. Bank v. Bank of New Orleans & Trust Co., 116 U.S. App. D.C. 285 (1963); Green v. Obergfell, 73 U.S. App. D.C. 298 (1941). The Court may, of course, at any stage of the proceedings consider whether the jurisdictional prerequisites have been met for a defect in jurisdiction cannot be ignored. Nestor v. Hershey, 138 U.S. App. D.C. 73 (1969); United States v. Anderson, 150 U.S. App. D.C. 336 (1972).

The jurisdictional issue in these cases is governed by statutory provisions applicable to the refund of taxes and the jurisdiction of this Court depends upon whether petitioners have complied with the statutory requirements. First National Bank of Omaha, et al. v. District of Columbia, D. C. Tax Court No. 1788 (1968); Rosenman v. United States, 323 U.S. 658, 89 L. Ed. 535 (1945). It is the District's position that this Court simply lacks jurisdiction because petitioners have failed to file timely claims for refund. Respondent's contention that it was without authority to refund the unincorporated business franchise taxes paid for the years prior to 1970 is based on the provisions of D. C. Code (1973) §47-1586j. This section provides in pertinent part as follows:

> (a) Refund to taxpayers.--Except as to any deficiency taxes assessed under the provisions of §47-1586d, where there has been an overpayment of any tax imposed by this subchapter, the amount of such overpayment may be credited * * *.
>
> No such credit or refund shall be allowed after three years from the time the tax was paid unless before the expiration of such period a claim therefor is filed by the taxpayer, and no tax or part thereof which the Assessor may determine to have been an overpayment shall be refunded after the period prescribed therefor in the Act appropriating the funds from which such refund would otherwise be made.

Petitioners, however, contend that respondent's reliance upon §47-1586j is misplaced since the provision applies only "where there has been an overpayment of any tax imposed by this subchapter," whereas the unincorporated business franchise taxes here in question were in fact erroneously paid and collected without authority by respondent and thus did not constitute an overpayment within the meaning of §47-1586j.

In Murphy v. United States, 78 F. Supp. 236 (1948), it was held that an overpayment of an internal revenue tax occurs if the remittance was made either on account of tax shown to be payable by taxpayer's verified return or in response to an assessment made by the Commissioner. See also, Rosenman v. United States, supra, and Busser v. United States, 130 F. 2d 537 (1942). "Overpayment" is a term of art and the Supreme Court in Rosenman, supra, at 659, speaks directly to this point as follows:

> Any overpayment, whether made voluntarily by the taxpayer on the original return or as a result of an additional assessment made by the Commissioner, is a tax "erroneously or illegally assessed or collected" and it may be recovered if a claim is filed within the prescribed time after the tax is paid * * *.

Northern Natural Gas Co. v. United States, 354 F. 2d 310 (1965); Mitchell v. Westover, 90 F. Supp. 278 (1950). It is apparent,

therefore, that an "erroneous or illegal collection of taxes" is included within the term "overpayment." Ohio Bell Tel. Co. v. Evatt, 51 N.E. 2d 718 (1943); Southern California First Nat'l Bank v. United States, 298 F. Supp. 1249 (1969). It was further held in Fischer & Porter Co. v. Porter, 72 A. 2d 98 (1950), that payments of income taxes in excess of the amount ultimately determined to be due are overpayments regardless of whether the excess of payment resulted from carelessness or a mistake on the part of the taxpayer or from the operation of law.

In conjunction with their contention that the taxes in issue were "erroneously paid and collected without authority" rather than "overpaid," petitioners argue that other provisions of the D. C. Code indicate a legislative intent that erroneous payments of taxes are to be treated differently than "overpayments". Petitioners thus contend that §§47-2407, 47-1016, 47-2617 and 1-903 provide specific relief in the case of taxes "erroneously" paid or collected. When these sections, however, are read in the context of all the tax provisions of the Code, they fail to support petitioners' position. The basic fallacy, of course, is that the distinction between "overpayment" and "erroneously paid" upon which their position is premised, as we have seen, is without foundation. Reference to the specific sections themselves further illustrates the incorrectness of the argument. D. C. Code §47-2407 provides in pertinent part as follows:

> Any sum finally determined by the Superior Court to have been erroneously paid by or collected from the taxpayer shall be refunded. * * *

It is clear that §47-2407 specifically presupposes that jurisdiction is properly founded in the Superior Court before any determination on the merits of the claimed refund is made.

Compliance, therefore, with the statutory requirements for bringing suit in the Tax Division of this Court is a sine qua non of any decision ultimately rendered calling for a refund under this section. For the reason then that §47-2407 presupposes compliance with jurisdictional prerequisites, petitioners' initial reliance on this section is ill-founded. The merits of the challenged refund can be proceeded to only after a determination of the jurisdictional issue has been made and it is only at that point that the provisions of §47-2407 become operable. Similarly, petitioners' reliance upon D. C. Code §1-903 is not well-founded. That section, while authorizing the Commissioner to grant relief in claims for refund of taxes paid, specifically states that its language is not to be "construed as reducing the period of the statute of limitations." Reference to D. C. Code §47-1586j, the section of the Code dealing with refunds to taxpayers of unincorporated business franchise taxes, makes clear that the applicable statute of limitations is three years. Thus, under §1-903 the Commissioner would be barred from granting any relief where the claim for refund was filed more than three years from the date the challenged taxes were paid. See Lake, to Use of Peyser v. District of Columbia, 63 U.S. App. D.C. 306 (1934). Respondent, then, is without authority to refund the taxes in controversy pursuant to §1-903. Likewise, petitioners' reliance on D. C. Code §47-1016 and §47-2617 is misplaced. D. C. Code §47-1016 is found in Chapter 10 dealing with the sale of property to satisfy unpaid real estate taxes, and §47-2617 is located in Chapter 26 dealing solely with the gross sales tax. D. C. Code §47-1016 authorizes the Commissioner to make administrative refunds of taxes in those situations where there has been

compliance with the particular limitations period and procedural requirements set forth with respect to the specific type of taxes imposed in that chapter. (See the cross-reference notations to other applicable sections.) Similarly, §47-2617 refers specifically to refunds of sales taxes. Obviously, neither of these sections is applicable to the unincorporated business franchise tax imposed in Chapter 15 of Title 47.

With respect to the specific tax returns in question, petitioners concede that they acted without duress in preparing their income tax returns and voluntarily filed them together with the payment of taxes stated to be due. It was not until October, 1973, that petitioners "purely by inadvertence" became aware of the 1949 Pickford case, supra, thereby discovering that at no time were they subject to the franchise tax. Under such circumstances, it is clear that the acts of petitioners constituted an "overpayment" of taxes as contemplated by §47-1586j.

In Rosenman, supra, at 660, the Supreme Court specifically noted that "Statutes requiring that a claim for refund be filed within a prescribed period have in general been strictly construed, and while the government may waive requirements as to form it cannot waive requirements as to time." See also, Flora v. United States, 357 U.S. 63, 2 L. Ed. 2d 1165 (1958). Thus, it appears clear on the basis of the generally accepted interpretation given the term "overpayment" of taxes and the long-established principle that statutes governing tax refunds must be strictly construed, that the provisions of D. C. Code §47-1586j apply to refunds of the unincorporated business franchise taxes in issue here.

This Court has jurisdiction with respect to suits for refund of taxes voluntarily paid only where claims for refund are timely filed with the assessing authority within the statutory period, and subsequently denied by that authority. First National Bank of Omaha, et al. v. District of Columbia, supra. See also, Kuehn v. United States, 73-2 U.S.T.C. 9550 (1973); Schrader v. United States, 73-1 U.S.T.C. 9286 (1972); Redman v. United States, 73-1 U.S.T.C. 9191 (1972). Since the filing of petitioners' claims for refund on December 14, 1973, with regard to the unincorporated business franchise taxes paid for the years 1962 through 1969 (Thomas Circle Land Company, Docket No. 2254) and for the years 1966 through 1969 (International Inn, Docket No. 2255) occurred more than three years after the taxes were paid, their claims were not in compliance with the requirements of §47-1586j. Accordingly, there is no denial from which petitioners can appeal to this Court with respect to the taxes paid for these years. Just as prepayment of most controverted District of Columbia taxes is a prerequisite for a suit seeking recovery of the taxes in this Court (see District of Columbia v. Berenter, 151 U.S. App. D.C. 196 (1972); Perry v. District of Columbia, 314 A. 2d 766 (1974); and George Hyman Construction Co. v. District of Columbia, 315 A. 2d 175 (1974)), so too the filing of a timely claim for refund is a jurisdictional prerequisite for a suit for the refund of these taxes. American Security and Trust Co. v. District of Columbia, 98 U.S. App. D.C. 260 (1956). See also, Bohn v. United States, F. 2d (8th Cir., No. 71-1679, 10/4/74); England v. United States, 261 F. 2d 455 (1958); National Newark & Essex Bank v. United States, 410 F. 2d 789 (1969); and United States v. Rochelle, 363 F. 2d 225 (1966). The date of payment of the tax alone

determines the statutory time limit for the filing of a claim for refund. Thus, upon payment by petitioners of the taxes, together with the filing of the tax returns, actions intended by the petitioners to relieve them of their self-determined tax liability, time began to run under the limitations provided in D. C. Code §47-1586j. No claims for refund having been filed within the prescribed three-year period following payment of the unincorporated business franchise taxes, these companion suits must be dismissed for want of jurisdiction.

II

EQUITABLE ESTOPPEL

In light of our determination that the Court lacks jurisdiction to entertain these suits, it is unnecessary for us to reach petitioners' argument that the respondent is estopped from asserting the failure to file timely claims for refund as a bar to these actions. Nevertheless, in view of the particular circumstances presented herein where the parties agree that the petitioners would not have been liable for the taxes in question, we believe brief consideration and comment on that argument is warranted. Petitioners contend that, in preparing and filing their returns, they relied on the instructions issued by the respondent for preparation of unincorporated business franchise tax returns applicable to the taxable years in issue. They claim that acting in reliance upon respondent's inadequate and incomplete instructions, which constitute an official interpretation of what income is subject to the tax and the exemptions available, they concluded they were liable for the tax and, for this reason, did not file a claim for refund until they discovered the Pickford decision, supra. Respondent's instructions,

petitioners argue, were so written as to tend to lull them into inaction, and were an affirmative inducement to pay the franchise taxes and refrain from requesting a refund. Consequently, petitioners were prejudiced in that taxes were paid that were not due and respondent was thereby unjustly enriched. Under these circumstances, petitioners argue that respondent is estopped from asserting any limitations period as a defense in these companion suits.

The joint exhibits reveal detailed instructions regarding who is to file the unincorporated business franchise tax return (see Part A of General Instructions for Unincorporated Business Franchise Tax Returns) and who is excluded from such liability (see Part B of General Instructions for Unincorporated Business Franchise Tax Returns). These instructions, however, as are characteristic of most, indicate the general requirements for filing without spelling out in detail the various factors which must be considered by each taxpayer in determining whether his activities come within the purview of the statute.

The initial question to be answered by petitioners/taxpayers in determining the existence of any tax liability on their part took the form of "what constitutes the conduct of a trade or business for purposes of the unincorporated business franchise tax." That such a determination must be made by each taxpayer is evident from the following portion of the instruction:

> Whether an unincorporated business is carrying on or engaged in a trade or business within the District is determined by the nature and extent of the activities of the unincorporated business conducted by the owners or members thereof or through employees, agents or other representatives. In this determination, the activities of employees, agents or other representatives on behalf of the unincorporated business are considered to be the activities of the unincorporated business.

Thus, it is clear that the determination of tax liability can be made only by the taxpayer himself. Furthermore, the Pickford decision itself, supra, established that the determination of tax liability for nonresidents with respect to the unincorporated business franchise tax can be made only after an appraisal is made by the taxpayer of his interest in the business being conducted in the District, i.e., the nature of his interest in that business and the extent of his activity in the operation of that business. The fact that petitioners herein became aware of the Pickford decision through "inadvertence and oversight" cannot relieve the burden placed on them as taxpayers for initially making a correct determination of their tax liability. Tax instructions distributed generally to the public cannot spell out every conceivable contingency and a taxpayer who incorrectly calculates his tax liability cannot later be saved by the doctrine of equitable estoppel.

In other situations where taxpayers have relied to their detriment on instructions and guidelines issued by tax authorities, the Courts have spoken sympathetically but authoritatively on the point. In Carpenter v. United States, 495 F. 2d 175 (1974), the Court states as follows (at 184):

> We do not fault the Treasury Department for trying to provide guidelines for taxpayers confronted with the bewildering maze of our tax laws, and we sympathize with the taxpayer who in fact relies upon what he accepts as an authoritative interpretation of the laws and of the Treasury publications. But nonetheless it is for the Congress and the courts and not the Treasury to declare the law applicable to a given situation. As the Ninth Circuit has observed: "Nor can an interpretation by taxpayers of the language used in government pamphlets act as an estoppel against the government, nor change the meaning of taxing statutes; * * *." Adler v. Commissioner of Internal Revenue, 330 F. 2d 91, 93 (1964)

In the same vein, with respect to regulations and rulings erroneously promulgated by the Commissioner upon which taxpayers have relied to their detriment in preparing and filing their tax returns, it is well-settled that the doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law. Twitchco, Inc. v. United States, 72-2 U.S.T.C. 9650 (1972). See also, Automobile Club of Michigan v. Commissioner, 353 U.S. 180 (1957); First National Bank of Montgomery v. United States, 176 F. Supp. 768, affirmed, 285 F. 2d 123 (1959). The Commissioner may correct such mistakes in law even where a taxpayer may have relied to his detriment on the mistakes. See Dixon v. United States, 381 U.S. 68 (1965); Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129 (1936).

In short, the petitioners have the burden of determining for themselves whether the nature and extent of the activities of the unincorporated business constituted the carrying on, or the engaging in, a trade or business in the District of Columbia within the meaning of the statute, thus requiring the filing of appropriate tax returns. Any erroneous determinations of such tax liabilities, whether they be the product of miscalculations on the part of petitioners or as a result of incomplete tax instructions distributed by the District taxing authority, cannot be the subject of an equitable estoppel and bind the District. Clark v. Commissioner, 1966 P-H Memo T.C., par. 66022. Respondent, therefore, rightfully asserts, and this Court has found, that these actions are barred due to petitioners' failure to comply with the statutory jurisdictional requirements for the timely filing of a claim for refund of taxes paid. Accordingly, the Court lacks jurisdiction to hear and determine the subject matter of the petitions and the petitions must be dismissed.

Accordingly, it is this 28th day of April, 1975,

ORDERED that the petition in Docket No. 2254 and the petition in Docket No. 2255 be and the same hereby are dismissed.

FRED B. UGAST
Judge

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