Opinion No. 1222

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Tax Division

FILED

1111 19TH STREET ASSOCIATES,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

Tax Docket No. 3096-82

OPINION AND ORDER

This matter came before the Court for trial on the merits December 13, 1983. The parties submitted proposed findings and conclusions on January 6, 1984.

The petition in this case challenges assessments made for tax years 1980 and 1981, characterizing improvements as "omitted property" within the meaning of D.C. Code §47-712 (1973), now §47-831 (1981). The petitioner's primary contention is that the assessments were improper in that the District government was aware of the construction and completion of improvements on the subject property. Despite this fact, at the time of the initial assessment the government failed to attribute any value for improvements. The subject property was then taxed as to land only. Petitioner then made the tax payment pursuant to the tax bill rendered, thus precluding reassessment. The respondent argues that the fact that there was no value attributed to improvements is indicative of an omission that may be remedied under the statute.

The Court exercises jurisdiction over this case by authority of D.C. Code §§11-1201 and 47-3305 (1981).

Upon consideration of the trial and record of this case, the Court makes the following:

FINDINGS OF FACT

1. The petitioner is 1111 19th Street Associates, of which D.F. Antonelli is general partner, and is a limited partnership organized under the laws of the District of

2. Petitioner owns the subject property, consisting of real estate identified as Lot 90 in Square 140, with premises known as 1111 19th Street. Petitioner is obligated to pay all real estate taxes assessed against the property.

3. On or about March 1, 1979, petitioner received a notice of annual assessment for the subject property pursuant to D.C. Code §47-645 (1973), now §47-824, reflecting a valuation of $4,715,100 as of January 1, 1979. No appeal of the assessment was filed, and petitioner timely paid taxes in the amount of $86,286.34. The assessment record card did not show any value assigned to improvements for that tax year. The assessment record included notations that building plans were submitted February 7, 1977, the property was inspected December 17, 1977, and construction was in progress on June 20 and November 20, 1978.

4. On or about March 1, 1980, petitioner received a notice of annual assessment for tax year 1981 reflecting a valuation of $5,762,900.00 as of January 1, 1980. No appeal of the assessment was filed, and petitioner timely paid taxes in the amount of $122,749.78. The assessment record card did not show any value assigned to improvements for that tax year. Sometime between January 1, 1979, to January 1, 1980, the valuation dates for tax years 1980 and 1981, the following notation was made on the assessment record: "6-15-79 50% complete."

5. On or about March 1, 1981, petitioner received a notice of annual assessment for tax year 1982 reflecting a valuation of $5,762,900.00 as of January 1, 1981. No appeal was filed with respect to the assessment. Petitioner never received a tax bill based on the assessment, which would require a payment of $122,749.78. Sometime between January

1, 1980, and January 1, 1981, the valuation dates for tax years 1981 and 1982, the following notation was made on the Department's assessment record: "100% complete . . . 5/29/80."

6. On or about September 3, 1981, petitioner's management agent was notified by the agent for the lender-mortgagee[1/] that the annual taxes listed for the first half of tax year 1982 were in the amount of $444,675.84.

7. On September 11, 1981, petitioner received a "Notice of Property Assessment for Tax Year 1982," dated September 8, 1981. The notice indicated an increase in the tax year 1982 assessment, from $5,762,900.00 to $20,876,800.00 and stated, "Reason for Change: Permit Work." The notice informed petitioner that an appeal to the Board of Equalization and Review could be filed "between September 1 and September 30," a right provided by Section 47-710, which authorized supplemental assessment based upon new structures erected or roofed since the previous assessment valuation .

8. Counsel for petitioner conferred with Robert L. Klugel, then Acting Supervisor of the Department of Finance and Revenue's Standards and Review Unit. They discussed the possibility of restoring the assessed value to the original tax year 1982 figure contained in the notice of assessment that petitioner had received in March. This discussion was pursued because the facts indicated that no new construction had occurred since the January, 1981, valuation date.

9. On September 16, 1981, Mr. Klugel wrote to Assistant Corporation Counsel Richard L. Aguglia, chief of the Taxation Section, requesting an opinion as to whether an omitted

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1/ This agent performs the function of maintaining escrow funds and issuing payment of real estate taxes for the subject property from such funds.

property assessment pursuant to D.C. Code §47-712 (1973) would be justified for the subject property. Mr. Klugel inquired whether such an assessment could be made after withdrawal of an untimely supplemental assessment made pursuant to Section 47-710 (1973). After responding to the request, counsel for the respondent conferred with Mr. Klugel. Subsequently, a determination was made to withdraw the purported supplemental assessment and impose an omitted property assessment to take account of the value of improvements.

10. Petitioner on November 9, 1981, and counsel for petitioner on November 12, 1981, received by mail a letter dated October 19, 1981, from Robert L. King as Acting Associate Director of the Department of Finance and Revenue. The letter stated that the notice of supplemental assessment for tax year 1982 pursuant to Section 47-710 was being withdrawn, and further that an omitted property assessment was being levied. Specifically, petitioner was informed that the Department had "concluded that the improvements to the property have never been assessed since construction began in 1977. Therefore, pursuant to §47-712, we have assessed the improvements to the subject property for tax years 1980, 1981 and 1982." Tax bills were enclosed, indicating that payment would be required within 30 days. Subsequently, extensions were obtained from the Department of Finance and Revenue. Petitioner paid the disputed taxes on December 31, 1981, as permitted by the Department.

The bills received with the October 19 letter contained the following language:

(a) "Payor's Receipt;" "Fiscal Year 1980;"
"Total Assessed Value 12,232,100;"
"Total Tax 137,561.10;"

(b) "1981 SECOND HALF TAX BILL CLASS III;" "IMPS ADDED;" "ADMIN. ERROR;" "TOTAL ASSESSMENT AT MARKET VALUE 20,797,000;" "FIRST HALF 22,148,805;" "SEP 15 81 FULL YEAR 32,022,632;"

(c) "1982 FIRST HALF TAX BILL CLASS III;" "IMPS ADDED;" "ADMIN. ERROR;" "TOTAL ASSESSMENT AT MARKET VALUE 20,797,000;" "FIRST HALF 22,148,805;" "SEP 15 81 FULL YEAR 44,297,610." (Punctuation added.)

11. After receipt of the Department's letter, petitioner, through counsel, filed an administrative appeal from the Section 47-710 assessment which had been previously noticed and withdrawn. (A filing date of September 10, 1981, was used.) At an administrative hearing held November 19, 1981, counsel for the District stated that the Section 47-710 assessment had been withdrawn and argued that the Board lacked jurisdiction over the appeal. By letter dated December 7, 1981, the Board informed Petitioner that it would take no action on the administrative appeal in reliance on the District's position.

12. On or about July 15, 1982, the actual assessment record card was changed by addition of a notation that an omitted property assessment had been made for the second half of tax year 1980, and for tax years 1981 and 1982. In trial testimony, Mr. Klugel stated that the notation as to tax year 1980 should have been for the full year.

13. The instant petition was filed timely in the Tax Division. The testimony of Mr. Klugel established that the petitioner had filed all appropriate documents with the District government, including a construction permit which was noted and attached to the assessment card.

ANALYSIS AND CONCLUSIONS

Resolution of this case principally requires interpretation of D.C. Code §47-712 (1973), now §47-831 (1981) [language change in brackets], governing taxation of "omitted" property which provides:

> If the board of assistant assessors [Department of Finance and Revenue] shall learn that any property liable to taxation has been omitted from the assessment for any previous year or years, it shall be their duty at once to reassess this property for each and every year for which it escaped assessment and taxation, and report the same through the assessor, to the collector of taxes who shall at once proceed to collect the taxes so in arrears as other taxes are collected: Provided, That no property which has escaped assessment and taxation shall be liable under this section for a period of more than three years prior to such assessment, except in the case of property involved in litigation. In addition to the duties of the assessor hereinbefore provided, it shall be the duty of the assessor upon reassessment as herein provided to notify the taxpayer by writing of the fact of such reassessment. Emphasis added.)

The provision further states that any person "aggrieved" by "reassessment" pursuant to this section may appeal in the manner provided by D.C. Code §§47-2403 and 47-2404 (1973), now §§47-3303 and 47-3304 (1981).

The Court must determine in this case whether -- as the District contends -- The District properly characterized the subject property as "omitted," or whether -- as petitioner argues -- the property had been finally assessed and taxed in view of the statutory scheme. The significant facts are that the District's records did contain clear evidence of the construction and existence of improvements, yet only the land was assigned a value for the tax years in issue.

Before turning to the question stated, the Court finds it useful to review briefly the statutory scheme to establish valuation of real estate for assessment purposes. The process is described generally in D.C. Code §47-821(a) (1981), as follows:

> The Mayor shall assess all real property, identifying separately the value of land and improvements thereon, and administer and collect the real property tax within the District. The Mayor shall also notify owners of real property of assessments and of appeal procedures. In addition, he shall maintain adequate records relating to the administration of the real property tax in the District, and provide appropriate public information concerning such tax.

More specifically,

> (a) The assessed value of all real property shall be listed on the assessment roll for real property taxation purposes annually as provided in §§47-820 to 47-828. The assessed value for all real property shall be the estimated market value of such property as of January 1st of the year preceding the tax year, as determined by the Mayor. In determining estimated market value for various kinds of real property the Mayor shall take into account any factor which might have a bearing on the market value of the real property . . . . Assessments shall be based upon the sources of information available to the Mayor which may include actual view.
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> (b) All real property shall be assessed no less frequently than once every 2 years, and as soon as practicable such assessment shall be made annually. [F]or fiscal year 1978, and for each fiscal year thereafter, all real property shall be assessed on an annual basis.

D.C. Code §47-820 (1981).

Thus, taxable properties are to be identified and their assessed value listed on assessment rolls, which along with data used for assessment are required to be made available for public inspection. D.C. Code §§47-820, -822, -823 (1981). Notices of annual reassessment are to be conveyed to the taxpayer no later than March 1st of each year, including the reason for any changes in assessment and a statement of applicable appeal procedures. D.C. Code §47-824 (1981).

New structures, and additions or improvements of pre-existing structures which vary the basis or provide a new basis for taxation, are to be listed on July 1st of each year and valued for purposes of supplemental assessment. D.C. Code §47-829 (1981). Further pursuant to that provision, an assessment must be reduced after property has been damaged or destroyed. Id. New structures completed during a tax year are to be identified and assessed prior to each January 1st in order to impose a "second half" assessment. D.C. Code §47-830 (1981). Finally, any property found to have been "omitted from assessment," or to have "escaped taxation" is required to be taxed as soon as possible after the determination is made, with certain exceptions related to the passage of time not applicable here. D.C. Code §47-821 (1981), formerly §47-712 (1973).

Referring to the question presented, the central issue of this case is whether the valuation of land but not improvements constituted assessment of the subject property in light of the omitted property statute.

The term "real property" is defined by D.C. Code §47-820 (1981) as "real estate identified by plat on the records of the District of Columbia Surveyor according to lot and square together with improvements thereon." (Emphasis added.) From this wording, two interpretations are possible. The first is that once a taxpayer has been notified of and paid annual real estate taxes on the property, no further real estate assessment may be made. Under this view, property can be considered "omitted" only if both land and improvements have

escaped taxation. A different reading would be that the property tax obligation has been fulfilled only if a taxpayer has satisfied an assessment reflecting both the elements of "real property."

Because the literal approach to the statute does not resolve the issue, the Court resorts to the intent of the legislature as reflected by the statutory scheme and previous judicial interpretations of the same or similar language.

First, it seems apparent that the system of assessment established by statute is designed to inform the taxpayer fully and timely of tax obligations and their basis. This purpose is evident from the statutory requirements of notice and opportunity to inspect documents, described earlier. Second, the statute also is intended to provide finality. It is on this ground that petitioner persuasively argues no further assessment is permitted once a taxpayer has received notice of assessment setting forth the valuation, then obtained and paid the tax bill without appeal. With respect to both goals, notice and finality, there are public interest considerations which may compete from time to time, chiefly arising from the government's obligation to obtain tax revenue, to protect against taxpayer avoidance of the tax obligation, and to assign equal values to like properties.

Judicial interpretations of the various omitted property statutes have taken account of the above-mentioned policies, as reflected by precedent in the District of Columbia and in jurisdictions with similar statutes.

No specific ruling in District of Columbia has interpreted the omitted property statute s interpretation in precisely the context presented by the instant case. One

local court opinion contains extensive discussion of the matter in dicta.[2/] District of Columbia Redevelopment Land Agency v. District of Columbia, Tax Docket No. 2298, 106 D.W.L.R. 793 (D.C. Super. Ct., March 13, 1978) (Penn, J.). The D.C. RLA case concerned an addition to existing improvements which had not been calculated into the value assigned for assessment purposes. The Court there held that the District could not rely upon the omitted property provision to retroactively increase the assessment by assigning a higher value to improvements, thereby accounting for the value of the addition.

Judge Penn distinguished the case before him from a fact situation in which no value -- rather than a low value -- had been assigned to improvements. He stated that if assessment records demonstrated that improvements had not been valued at all, then an omitted property assessment could be upheld. Judge Penn's apparent rationale was two-fold. First, the absence of any improvements value on the face of assessment records would provide notice to the taxpayer of an omission. Second, the record would contain the type of omission reflecting a lack of prior judgment by the assessor. Later assessment consequently would represent an original valuation, rather than a prohibited revaluation based upon further exercise of judgment. As Judge Penn

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2/ Although the Court is not required to follow dicta in prior opinions which foreshadow the resolution of an issue, the Court may by independent analysis reach the same conclusion, and may be persuaded by the merits of previous, non-binding statements of the Court. See Punch v. United States, 377 A.2d 1353, 1360 (D.C. 1977). Accord, Coco Corp. v. Coleman, 441 A.2d 940, 953 (D.C. 1982).

stated, "A change in judgment does not open the door to the making of an escaped property assessment." Id. at 797.

Another D.C. RLA case confronted the judgment question in a context closer to the facts of the instant case, but involving the additional and supplemental tax provisions. D.C. RLA v. District of Columbia, Tax Docket Nos. 2460, 2461, 2462 and 2517, 107 D.W.L.R. 949 (D.C. Super. Ct., April 27, 1979) (Penn, J.). That case involved the situation in which the proper construction permits had been obtained and, later, a certificate of occupancy had issued. The assessor was fully conscious of construction when it occurred. He made a "subjective judgment" to postpone assessment of added improvements, based on his personal interpretation of when the statute required an additional or supplemental assessment. Id. at 953. The later assessments were ruled untimely and therefore invalid by Judge Penn, upon a finding that

> [t]he assessor here waited until he felt the property's income was at a point where he could put on a "finished assessment" but his actions were inconsistent with the statute and the regulations . . . . This court rules then that an assessment under Section 47-711 can only be made and must then be made when the property is "erected" or "roofed and under roof" . . . when the Certificate of Occupancy for the entire structure is issued.

Id. (Emphasis added.)

Case authority from other jurisdictions similarly focuses on the concepts of taxpayer notice and the "judgment exercised" theory. Florida cases involve a statute comparable to the District's omitted property statute, providing for taxation of "property" -- defined as land and improvements -- which has escaped taxation. In contrast is a Washington state provision from which case authority was cited in D.C. RLA, Tax Docket No. 2298. The Washington statute provides specifically for assessing improvements which have escaped taxation.

In Korash v. Mills, 263 So. 2d 579 (Fla. 1972), the assessment for the subject property did not increase from one year to the next, despite construction of a motel on the land in the intervening period. No value was placed on the improvements. The omission was attributed to clerical error; the assessment card containing a record of the bare land inadvertently became separated from a newer subsequent card noting the existence of improvements. Under those circumstances, the court found that a back assessment was not properly characterized as an impermissible "increase" in that it did not represent an assessor's "change in judgment." The court explained:

> We must keep in mind the distinction between changes and "miscalculations" by the assessor which "up" the amount previously assessed after tax roll certification, and the situation here where there has been no billing at all on the improvement . . . which has been completely excluded from the tax roll.
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> The "back assessment" here was in fact the initial and original assessment never theretofore assigned to the principal value of the property, a new . . . motel. There has been no reevaluation, no recalculation and no reassessment of the property in this sense.

Korash, 263 So. 2d at 581. (Emphasis added.)

A lower Florida court had made a seemingly contrary ruling the year before Korash was decided, holding that "improved land, taxed as unimproved land, has not escaped taxation and is not the same as 'omitted property.'" Markham v. Friedland, 245 So. 2d 645, 648 (Fla. Dist. Ct. App. 1971). That court made clear, however, that the challenged assessment represented the assessor's attempt at exercising judgment differently than the previous assessor. The original levy represented a conscious determination that the improvements were not "substantially complete," as re-

quired for taxation. The next assessor, obviously viewing this determination as an error in judgment, attempted to compensate by making an omitted property assessment.

The court touched briefly on the scope of back assessment in answer to the argument that the landowner must have known no improvements value had been included and was therefore on notice of property having escaped taxation. The key concern was not whether tax had been avoided, but rather in what manner, the court determined. The lower court read the Florida statute authorizing omitted property assessment to mean that "only clerical errors may be corrected and not mistakes of judgment."

A broader construction was contemplated in a local case involving an omitted property assessment challenge. Trustees of St. Paul Methodist Episcopal Church v. D.C., 94 U.S.App. D.C. 78,81 (1954). The court observed that the case presented

> a serious question whether realty which has been duly determined to be exempt may later be assessed as omitted; for it was not overlooked by the authorities who made the original assessment of all taxable property, and was not omitted from that assessment through oversight or clerical error.

Id. at 81. (Emphasis added.)

The case was resolved without deciding that question, but the court's phrasing of the issue reveals an interpretation which would permit an omitted property assessment in the instant fact situation.

The D.C. RLA case, Tax Docket No. 2298, primarily relied on a Washington case with a comparable fact situation, Tradewell Stores, Inc. v. Snohomish County, 418 P.2d 466 (Wash. 1966). In D.C. RLA the assessor had failed to account for an addition to existing improvements and tried to compensate through an omitted property designation. In Tradewell, a new building replaced older structures that had been on the

land, but for unknown reasons the higher value determined for the new building was not posted on assessment records. The Tradewell court emphasized that any taxable omission must appear on the face of the assessment roll, and that the omitted property assessment could not be employed to correct "[i]nappropriate" valuations. The impact of this approach was acknowledged when the Tradewell court stated:

> The fact that this interpretation allows a taxpayer to escape payment of taxes as a result of error or oversight of the assessor or even because of his inability to keep constantly informed of new construction . . . is unfortunate, but is immaterial.

418 P.2d at 467.

If adopted in this jurisdiction, such a view would not necessarily require the Court to invalidate the omitted property assessment made here. As observed in the above-cited D.C. RLA opinion,

> In Tradewell Stores, Inc., the official tax documents revealed that both land and improvements had originally been assessed for the taxable year, therefore it was impossible to determine, based solely upon those records, that the assessor had not taken the additional improvements into consideration when making the assessment . . . . On the other hand, had the assessment in Tradewell Stores, Inc. been only on the land and had that fact been clear from the written record, as for example where the tax documents show a value assigned to the land but none to the improvements, then based upon that official tax record, the court could have found that the improvements had in fact escaped assessment.

85 D.W.L.R. 797. (Emphasis in original.)

Thus, consideration of the nature of the assessor's oversight, and whether there is notice of omission from the record, may lead the Court to uphold an assessment like the one in the instant case.

Under the District of Columbia tax statutes, the assessor was obligated to, within a designated period,

consider information from the best sources, arrive at the approximate market value as of a date certain, identifying land and improvement value separately, and levy a tax on the whole property based upon the valuation. If new construction occurred, the assessor was required to make supplemental assessment under D.C. Code §47-829, formerly §47-710, or second half assessment under §47-830, formerly §47-711. As a general matter, it appears in the instant case that the District could and should have assessed the improvements earlier, under the above provisions. But this observation does not resolve the issue at hand. The District has conceded that it was too late to employ the above-mentioned statutory provisions when the omitted property assessment was made. What is important is that in valuing the subject property for the years in question, the assessor did not make any use of information relating to construction in the Department's own records. The assessment record contains notations that a building was under construction on June 20, 1978, and November 20, 1978, was 50 percent complete by June 15, 1979, and was 100 percent complete by May 29, 1980. Yet no value whatsoever was assigned to improvements. Nor is there any evidence that the responsible assessor considered assigning a value to them and declined to do so. The District's effort in making an omitted property assessment was not with the intent to raise the amount of an assessment deemed to be too low in value. The facts indicate that the construction and existence of improvements simply had not been noticed by the assessor charged with valuation for the tax years 1980 and 1981. This Court cannot conclude that this is a case involving a previous exercise of judgment concerning improvements value.

Neither is this a situation in which notice to the taxpayer was lacking. Where the operable facts regarding taxability are apparent on the face of the record, the taxpayer should not be permitted to avoid his share of the tax burden by invoking the finality principle. This policy is not inconsistent with the rule that "[w]hen property has once been finally assessed it cannot again be assessed. It is not the policy of the law to favor reassessments." Tumulty v. District of Columbia, 69 U.S.App.D.C. 390, 397 (1939) (omitted personal property assessment invalid where District failed to comply with statutory requirements of written notice to taxpayer).

The philosophy underlying the omitted property provision is one of fairness in apportioning the tax burden, a concept broadly articulated in D.C. Code §47-801 (181), which provides in relevant part:

> It is the intent of Congress to revise the real property tax in the District of Columbia to achieve the following objectives: (1) Equitable sharing of the financial burden of the government of the District of Columbia . . . .

It follows logically that a taxpayer, having notice that his property has escaped taxes which would properly be due, should not stand to benefit by avoiding payment of an equitable share of the tax burden.

In the instant case, where the omission was clear from the record -- particularly the notice of assessment sent to the taxpayer -- the Court cannot reward the taxpayer and punish the District for an error involving no new exercise of judgment by an assessor. The Court cannot impose on the taxpayer an affirmative duty to come forward with suspected errors by assessment authorities. Nonetheless, the Court perceives compelling inequities as an inevitable result of

the kind of case presented in this action. Here, the taxpayer accepted and paid an assessment which clearly reflected that property had escaped taxation. The taxpayer then proceeded to contest the government's correction of the error. Yet other property owners are required to pay real estate taxes reflecting the value of their property, including land and improvements.

Based upon a thorough review of the evidence and the governing statutes and policies in this case, the Court concludes that the omitted property assessments for the subject property for tax years 1980 and 1981 were imposed validly.3/

Wherefore, it is this __/____ day of May, 1984,

ORDERED that the tax year 1980 and 1981 assessments for the subject property made under authority of D. C. Code §47-712 (1973), now §47-831 (1981), be, and hereby are, affirmed.

JUDGE IRALINE G. BARNES

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3/ Contrary to the petitioner's assertions, the omitted property assessment in this case was not untimely. The statutory three year limitation period runs from the date that the property escaped taxation -- the time when the assessment that should have been made was not made. The earliest date on which improvements on the property may be said to have escaped tax liability would be January 1, 1979, the valuation date for tax year 1980. The notice of omitted property assessment was dated October 19, 1981 and received in November 1981, less than three years after the valuation date.

The Court finds it unnecessary to reach constitutional