SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

TAX DIVISION

ACME REPORTING COMPANY :

Petitioner :

v. : Tax Docket No. 3326-84

DISTRICT OF COLUMBIA :

Respondent :

O P I N I O N

I. Introduction

This case comes before the Court on cross-motions for summary judgment. Upon consideration of the pleadings, petitioner, Acme Reporting Company's (Acme), Motion for Summary Judgment, respondent, the District of Columbia's (the District), Motion for Summary Judgment, the memoranda in support thereof, petitioner's Memorandum of Points and Authorities in Opposition to Respondent's Motion for Summary Judgment, oral argument from both sides heard on September 24, 1984, respondent's Supplemental Memorandum, petitioner's Memorandum in Response to Respondent's Supplemental Memorandum, and the record herein, the Court has determined that both said Motions should be denied. Neither party has shown that it is entitled to judgment in its favor nor met its burden of establishing the absence of genuine issues of material fact. Rather, there are important factual issues left to be resolved at trial before a decision can be rendered in favor of either side.

II. Background

Petitioner is engaged in the business of providing court reporting services. Such services are comprised of the recording of official court and other governmental proceedings and the preparation of transcripts thereof. Sales of these transcripts are made by petitioner to parties interested in the proceedings it has covered. Petitioner received a "Notice of D.C. Tax Due," dated July 1, 1983, assessing against it sales and use taxes amounting to $47,454.60 for the period from

December 1, 1979 through November 30, 1982. The assessment also included a penalty of $11,863.65 and interest of $13,965.28.[1] Petitioner paid the taxes on September 14, 1983 and brought suit for a refund and other relief thereafter. The validity of all but $1,762.13 of the taxes paid pursuant to the above mentioned Notice of Tax Due are challenged.

The Gross Sales Tax and the Compensating-Use Tax laws of the District are substantially similar in relation to the issues currently before this Court. Under D.C. Code Sec. 47-2002 (1981), a sales tax is imposed on the retail sale of "certain selected services." See also D.C. Code Sec. 47-2202 (1981) (similar use tax provision). Exempted from the definition of "retail sale" or "sale at retail", and, therefore, not taxable under Sec. 47-2002, are professional or personal service transactions which involve sales as inconsequential elements for which no separate charges are made. D.C. Code Sec. 2001 (n)(2)(B) (1981); see also D.C. Code Sec. 2201 (a)(2)(B) (1981) (similar use tax provision). Certain service transactions, however, are specifically excepted from this exemption. Sec. 2001 (n)(2)(B); see also Sec. 2201 (a)(2)(B) (1981) (similar use tax provision). Included among these excepted transactions are "public stenographic services." D.C. Code Sec. 47-2001 (n)(1)(J) (Supp. 1984); see also D.C. Code Sec. 47-2201 (a)(1)(H) (Supp. 1984) (identical use tax provision). "Public stenographic services," therefore, are taxable under the Code. This statutory scheme existed throughout the period of the deficiency assessment levied in this case.

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1. The District has advised the Court in its Supplemental Memorandum that the imposition of penalty and interest has been waived.

Petitioner, in essence, argues that the phrase "public stenographic services" is ambiguous.[2] An application of the rules of statutory construction, it contends, yields the conclusion that the term does not encompass court reporting services. In addition Acme complains that it has never been put on notice, either through clear statutory language or otherwise, of the necessity to collect these taxes.[3] This, according to petitioner, raises serious questions over fairness and due process. Finally, Acme asserts that, because it has never had reason to be aware of the District's ostensible interpretation of the statute in the past, any claimed long-standing administrative interpretation by respondent should be accorded little, if any, weight.

Respondent rejoins that the term "public stenographic services" is unambiguous and that petitioner's activities clearly fall within its plain meaning. Moreover, respondent argues that its interpretation of the phrase is a long-standing one to which the Court must pay substantial deference.

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2. For purposes of these cross-motions for summary judgment, respondent has not opposed petitioner's contention that, if Acme's interpretation of "public stenographic services" is correct, the sale of transcripts to persons who are parties to the proceedings recorded falls within the general professional service exemption to taxation of Secs. 47-2001 (n)(2)(B) and 47-2201 (a)(2)(B). The District, however, has not conceded this argument for purposes of trial. Its Answer denies Acme's averment on this point. For its part, Acme does not take issue with the taxation of sales of transcripts to uninterested parties. Petitioner apparently views such sales as falling outside the exemption of a Secs. 47-2001 (n)(2)(B) and 47-2201 (a)(2)(B), irrespective of how one defines the "public stenographic services" exception thereto. In any event, Acme claims that the only sales it has made during the time period in question are to interested parties.

3. Both the sales and use taxes imposed by the District are collected by the vendor from the purchaser. D.C. Code Secs. 47-2003-2004 (Supp. 1984)(sales tax); D.C. Code Sec. 47-2203 (Supp. 1984)(use tax).

III. Analysis

Motions for summary judgment may be granted only when it is demonstrated that no genuine issues of material fact exist and that the party seeking summary judgment is entitled to prevail as a matter of law. Super. Ct. Civ. R. 56(c); Wallace v. Warehouse Employees Union #730, No. 83-885, slip op. at 20 (D.C. Oct. 12, 1984); Taylor v. Eureka Investment Corp., No. 82-1694, slip op. at 7 (D.C. Sept. 19, 1984); Swann v. Waldman, 465 A.2d 844, 846 (D.C. 1983). In considering such motions the Court must always be mindful that summary judgment is an extreme remedy which is to be granted only if it is "quite clear what the truth is." McCoy v. Quadrangle Development Corp., 470 A.2d 1256, 1258-59 (D.C. 1983) (quoting Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944)). Movant has the burden of establishing that genuine issues of material fact do not exist. Reynolds v. Gateway Georgetown Condominium Association, Inc., No. 83-988, slip op. at 7 (D.C. Oct. 24, 1984). If the record is unclear or doubt exists as to the existence of such issues, the motion must be denied. Id.; McCoy, supra, 470 A.2d at 1259; Doolin v. Environmental Power Ltd., 360 A.2d 493, 496 (D.C. 1976).

Crucial to the determination of the correctness of either party's position in this case is the question of what deference, if any, should be paid the District's interpretation of this statute. Generally, the interpretation which an agency has used in administering and enforcing a statute is controlling unless "plainly erroneous or inconsistent with the statute." Weaver Brothers, Inc. v. District of Columbia Rental Housing Comm'n, 473 A.2d 384, 388 (D.C. 1984) (quoting Totz v. District of Columbia Rental Accomodations Comm'n, 412 A.2d 44, 46 (D.C. 1980)(per curiam)). Great weight is to be given the agency's interpretation, if not unreasonable in view of the record or relevant law. Hockaday v. D.C. Department of

Employment Services, 443 A.2d 8, 12 (D.C. 1982); Thomas v. District of Columbia Department of Labor, 409 A.2d 164, 169 (D.C. 1979); 1880 Columbia Road, N.W., Tenants' Association v. District of Columbia Rental Accomodations Comm'n, 400 A.2d 333, 337 (D.C. 1979). A court must also be aware of the facts and circumstances surrounding an agency's construction of such a statute. An interpretation never publicly expressed or actually applied or enforced may well not be accorded the same weight as one consistently and explicitly publicized and enforced by the agency since the inception of the statute.

In resolving a dispute between a private party and an administrative agency over the meaning of an administered statute, therefore, a court must know if the agency has interpreted the statute in a particular way in the past and, if so, the factual background surrounding the implementation of that interpretation. The materials provided by the parties in this case fail to sufficiently delineate the existence (or non-existence) or background of the claimed long-standing administrative interpretation. Instead, they present genuine issues of material fact on this point.

The only indication of a long-standing administrative interpretation presented by the District is an affidavit by Edward M. Many, Manager of the Tax Audit and Liability Division of the City's Department of Finance and Revenue. Mr. Many states that, "since the enactment" of the provision on October 31, 1969, court reporting services have been "taxed" as "public stenographic services." However, when asked at oral argument the extent and scope of such taxation, counsel for respondent was equivocal. He conceded that enforcement takes the form of audits and, as such, is somewhat spotty. Upon this record, then, it is far from clear whether Mr. Many's statement reflects a long-standing unspoken or, at least, unacted upon

intention to tax, or a consistent pattern of across-the-board collection and enforcement.[4] The materials on file, then, simply do not show that either moving party is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56 (c); Wallace, supra, slip op. at 20.

Moreover, petitioner has raised genuine issues of material fact on this point. An essential premise to its position is the claim that it has never received notice nor had any reason to be aware of the District's claimed interpretation. Among the exhibits which Acme attached to its motion for summary judgment is an opinion letter provided to it by an accounting firm in 1973. This letter indicates that the firm failed to discern any taxation of sales of transcripts by court reporters to interested parties under the subsection in question. Acme also attached as an exhibit a District of Columbia Courts Memorandum to "All Court Reporters" from Arnold M. Malech, Executive Officer of the District of Columbia Courts, dated November 8, 1972. This Memorandum states that a sales tax "will not be collected" by the reporter on orders of transcripts by the government or a party where an attorney orders the transcript on behalf of his client but will be collected from non-parties. These materials are sufficient to raise reasonable questions as to whether the District has viewed "public stenographic services" as including court reporting services in the past and, if so, whether such an interpretation has ever been acted on, either through statement or enforcement. This being the case, genuine issues of material fact exist in this suit. Super. Ct. Civ. R. 56 (c); McCoy, supra, 470 A.2d at 1259; Franklin Investment Co. v. Huffman, 393 A.2d 119, 121-22 (D.C. 1978); International Underwriters, Inc. v. Boyle, 365 A.2d 779, 782-84 (D.C. 1976).

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4. Further doubt is cast upon the meaning of the Many affidavit by the fact that taxes could not have been collected on court reporting services, as public stenographic services, "since" October 31, 1969. This provision did not become effective until the first day of the first month beginning on or after the 30th day after the enactment date of October 31, 1969. Notes under D.C. Code Secs. 47-2601 and 47-2701 (1973 Edition). Actual taxation, therefore, could not have begun until December 1, 1969 at the earliest.

From the pleadings and other materials on file, then, it is far from "clear what the truth is." See McCoy, supra 470 A.2d at 1258-59. The existence or non-existence of facts crucial to a determination of the legal issues presented has not been made apparent. Moreover, there are genuine issues of material fact in dispute between these parties. Absent a resolution of these factual questions, the Court cannot determine which party's claim entitles it to judgment in its favor under the applicable law. To grant the extreme remedy of summary judgment to either side in this case, therefore, would be improper.[5]

IV. Order

WHEREFORE, for the reasons set forth above, it is, by the Court, this 14th day of November, 1984,

ORDERED, that:

(1) Petitioner's Motion for Summary Judgment be, and the same is hereby, denied;

(2) Respondent's Motion for Summary Judgment be, and the same is hereby, denied;

(3) This cause shall be set for a full trial on the merits in accordance with the standard procedures of the Tax Division of this Court.

BRUCE S. MENCHER, JUDGE

Copies to:

William Neff, Esquire
Richard G. Amato, Esquire

5. The Court senses from the parties' unsuccessful efforts to settle this case, even after the oral arguments of September 24, 1984, that the case is ultimately destined for appellate review. Because of the impact the decision in this case may have upon the extensive court reporting business in our nation's capitol, the record at trial should be fully developed. This will provide the appellate court with an adequate and complete record for review.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Tax Division

ACME REPORTING COMPANY,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

Tax Docket No. 3326-83

O R D E R

I.

This matter came before the Court for trial on March 25, 1985. Petitioner Acme Reporting Company appeals from a deficiency assessment against it for sales and use taxes based upon its gross receipts for performing court reporting services within the District of Columbia. The taxes in controversy total $47,454.60 for the period from December 1, 1979, through November 30, 1982. This Court has jurisdiction to hear this appeal pursuant to §§11-1201 and 47-3503 (1981 ed.).

Upon consideration of the arguments of counsel and the entire record herein, the Court makes the following:

FINDINGS OF FACT

1. The petitioner, Acme Reporting Company ("Acme"), is a Maryland corporation engaged in the business of providing court reporting services in Maryland and the District of Columbia.

2. In a notice of assessment dated July 1, 1983, the District of Columbia assessed sales and use tax deficiencies in the amount of $47,454,60 against petitioner covering the period December 1, 1979, through November 30, 1982. All but $1,762.13 of this $47,454.60 amount is in dispute.

3. These tax deficiencies were asserted on the ground that receipts received by petitioner for its court reporting services are subject to District of Columbia sales and use

4. Acme paid the taxes assessed by the District of Columbia in the July 1, 1983, notice of assessment. Thereafter, Acme timely filed a Petition seeking a cancellation of the assessment and a refund of the amounts paid, with interest.

5. When petitioner first began business operations in the District of Columbia, it requested tax advice from its accounting firm on the applicability of District of Columbia sales and use taxes to its court reporting services. The accounting firm advised petitioner by letter that the services involved in recording testimony and printing it for customers were not subject to District of Columbia sales tax and that additional sales of copies of resulting documents to an "interested party" to the proceeding being recorded were not subject to sales tax.

6. Subsequently, petitioner received from its accounting firm a copy of a memorandum dated November 8, 1972, to all court reporters employed by the D.C. courts from Arnold M. Malech, the Executive Officer of the District of Columbia courts. This memorandum provided guidance concerning the applicability of the District of Columbia sales tax to the sales of transcripts reporters prepared. The memorandum concluded that the District of Columbia sales tax did not apply to sales of transcripts by court reporters except when a transcript is purchased from a court reporter by a non-party to the proceeding being recorded, such as a newspaper reporter.

7. In light of its accounting firm's opinion and this memorandum from Mr. Malech, petitioner determined that the District of Columbia's sales and use taxes did not apply to the receipts it earned from its court reporting services.

8. Petitioner is or has been the official court reporter for the Civil Aeronautics Board, the National Labor Relations

Board, the Securities and Exchange Commission, the Department of Defense, the Department of Labor, the U.S. House of Representatives, the U.S. Senate, the U.S. Claims Court and the U.S. Tax Court. In addition, petitioner frequently is hired to provide court reporting services in other litigation settings such as pretrial depositions. Except when petitioner's services involve the reporting of pretrial depositions, all of its court reporting services are performed pursuant to contracts with the federal government.

9. The services provided by petitioner's court reporters include attendance at and the recording and transcription of legal proceedings such as judicial trials, pretrial depositions, and hearings before administrative agencies. Each court reporter is responsible for producing an accurate and full recording of the legal proceeding he or she attends so that the tribunal and parties to the proceeding are protected by a complete record.

Acting as an officer of the court or administrative tribunal, they administer oaths in order to swear in witnesses. Further, they ensure that an accurate record of legal proceedings is obtained. During the course of the proceedings, petitioner's court reporters may be required to read portions of the transcript back to the tribunal at the request of the judge or one of the parties to the proceeding. Petitioner is also charged with responsibility for all exhibits constituting part of the record and are required to testify to the accuracy of the record.

10. The final product of petitioner's court reporting services is a verbatim transcript of the proceeding petitioner was hired to report. All of the transcripts of legal proceedings prepared by petitioner are furnished to either the court or government agency holding the proceeding, or parties to the proceeding.

11. A certain amount of tangible personal property is used by petitioner to produce transcripts of the proceedings it reports. This tangible personal property includes such items as paper, bindings and covers. The cost of this tangible personal property constitutes less than four percent of the amount petitioner charges its customers for court reporting services. No separate charge is made to customers for the cost of these materials.

12. Mr. Edward M. Many, Manager of the Tax Audit and Liability Division of the District of Columbia Department of Finance and Revenue ("Department"), testified that the Department has always taken the position that the term "public stenographic services" includes court reporting services, but did not specifically refer to any written or oral interpretation by the Department which included court reporters within the term "public stenographic services."

13. In November, 1969, the Department sent a notice to all registered sales and use tax taxpayers concerning the 1969 amendments to the sales and use tax provisions, including the provision imposing sales and use taxes on public stenographic services. This notice did not define the term "public stenographic services."

14. The Department promulgated a regulation to define the term "public stenographic services." This regulation simply indicates that "the term public stenographic services includes typing services." D.C. Mun. Regs. tit. 9, §468.3.

15. In 1981, the Department initiated sales and use tax audits of law firms. During the course of these audits, the Department observed that law firms were not being charged sales tax on amounts paid for court reporting services. Therefore, the Department audited several companies engaged in the business of providing court reporting services.

16. Petitioner first learned that the Department interpreted the term "public stenographic services" to include court reporting services during the Department's sales and use tax audit of petitioner in 1982.

17. District of Columbia Court Reporter Rule 17, which was formally promulgated and became effective on March 22, 1973, provides that sales of transcripts by court reporters are not subject to District of Columbia sales tax except when a transcript is sold to a non-party to the proceeding being recorded, such as a newspaper reporter.

18. The Department has never conducted a sales tax audit of a court reporter employed by a District of Columbia court.

II.

CONCLUSIONS OF LAW

Petitioner's principal argument is that its court reporting services cannot be equated with "public stenographic services" within the meaning of either the District of Columbia Gross Sales Tax Act, D.C. Code §47-2001 et seq. (1981 ed.), or the District of Columbia Compensating-Use Tax, D.C. Code §47-2201 et seq. (1981 ed.), and hence those services are not taxable. D.C. Code §47-2001(n)(1)(H) (1981 ed.) includes within the definition of "retail sale" and "sale at retail:"

> the sale . . . of any tangible personal property or service under the terms of this chapter . . . For the purpose of the tax imposed by this chapter, these terms shall include but not be limited to . . . [t]he sale of or charges for . . . public stenographic services[.]

Respondent argues that since the sale of public stenographic services is specifically taxed by the Act, petitioner's contention that its court reporting servcies are exempt from sales and use taxation pursuant to D.C. Code §§47-2001

(n)(2)(B) and 47-2201(a)(2)(B) (1981 ed.) as "personal services transaction" not taxed by the Act must fail. The plain meaning of the statutory phrase "public stenographic services" includes court reporting services. The Court does not find D.C. Code §§47-2001(n)(1)(H) and 47-2201(a)(1)(G) (1981 ed.) so clear or broad in meaning as respondent would have them, and therefore concludes petitioner's court reporting services were improperly taxed.

A. Lack of Definition and Long-Standing Administrative Interpretation

Respondent claims that the Department has always interpreted the term "public stenographic services" as including court reporting services. Significantly, however, the testimony by Mr. Edward Many, of the Department did not establish that the Department had made any interpretation of this provision. The Court concludes that in fact, the vast weight of the evidence related to the factual background surrounding the Department's interpretation of the term "public stenographic services" establishes that the Department never had such an interpretation, or if it did, it did not make its interpretation publicly known.

In November 1969, the Department issued a Notice to All Sales and Use Taxpayers explaining the new sales and use tax provisions, including the provisions concerning public stenographic services. The Court finds this departmental statement did not define the term "public stenographic services" at all, much less inform taxpayers that the term was intended to include court reporting services. Subsequently in 1970 the Department promulgated a formal regulation to define the term "public stenographic services." The Department's regulation, however, simply defined the term to include "typing services." D.C. Mun. Regs. tit. 9, §468.3.

In November, 1972, Mr. Malech, the Executive Officer of the District of Columbia courts, issued a memorandum that provided guidance to all Superior Court and Court of Appeals court reporters concerning the applicability of the District of Columbia sales tax to the sales of transcripts they prepared. The memorandum instructs court reporters to contact Mr. James Andy, who was employed by the Department at that time, for further information concerning the collection and remittance of sales tax. From this instruction petitioner draws the conclusion that the Department worked with Mr. Malech. While this has not been confirmed, the Court can conclude that, at the very least, the Department must have had some input into the memorandum. That document concluded that sales of transcripts by a court reporter to a party to the proceeding being reported are not subject to sales tax.[1/] Similarly, Court Reporter Rule 17, which adopts the position first set forth in the 1972 memorandum, must have involved consultation between the Department and the relevant officials of the District of Columbia courts. Thus, if the District of Columbia did in fact interpret the term "public stenographic services" as including court reporting services, then its failure to object to Mr. Malech's conclusion could only lead to the belief by petitioner and the District Courts as well that respondent agreed with that conclusion. This belief becomes all the more reasonable in light of the fact that respondent has never before attempted to collect sales

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1/ At oral argument and at trial respondent argued that the memorandum's conclusion might be explained on the basis of some sort of agency relationship between D.C. court reporters and the D.C. government; thus, following this reasoning, petitioner might still be subject to sales and use tax unless a similar agency relationship exists between petitioner and the federal government. In light of the Court's following conclusions in favor of petitioner, the Court need not address that argument.

taxes from Superior Court or Court of Appeals court reporters for sales of transcripts to parties to the proceedings recorded.

Contrary to respondent's position, the evidence establishes that the Department did not have a strong consistent administrative practice or interpretation, if any, to the effect that court reporting services should be considered taxable public stenographic services. Even if the Department was considered to have such an administrative practice or interpretation, under the facts of this case, it would be entitled to little or no deference by this Court.

It is true that as a general rule, courts owe deference to an agency's interpretation of the statute it administers. Motor Vehicles Manufacturers v. Ruckelshaus, 719 F.2d 1159, 1165 (D.C. Cir. 1983); Chesapeake & Potomac Telephone Co. v. Public Service Commission, 378 A.2d 1085, 1089 (D.C. 1977), quoting Udall v. Tallman, 380 U.S. 1, 16 (1965). However, it is equally well-established that the ultimate responsibility for interpreting a statute rests with the courts, Tenants of 3039 Q Street, N.W. v. District of Columbia Rental Accommodations Commission, 391 A.2d 785, 787 (D.C. 1978), and that in determining the proper deference to be accorded an administrative interpretation, various factors should be considered. See Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981). The factors to be considered were examined in detail in Comptroller of the Treasury v. John C. Louis Co., 404 A.2d 1045 (Md. 1979), a case which is virtually indistinguishable from the present controversy. In John C. Louis the issue presented was whether the term "price" as used in the Maryland sales tax provisions included certain delivery charges. The only evidence supporting the Comptroller's interpretation was

oral testimony by an employee of the Retail Sales Tax Division that that was the way the term had always been interpreted. 404 A.2d at 1049. Significantly, "the Comptroller had never promulgated any formal regulation nor publicized this interpretation in any way." Id. Moreover, there had never been an audit prior to the audits before the court that had resulted in a deficiency assessment based on the Comptroller's interpretation.

One issue presented to the court was the degree of deference to be accorded to the Comptroller's interpretation of the term "price." Relying on longstanding U.S. Supreme Court precedents, the court stated that various factors must be considered to determine the proper deference to be accorded to the Comptroller's administrative interpretation or practice.

According to the court, one factor to be considered is the thoroughness, breadth, and validity of the considerations underlying the agency interpretation. The court explained:

> The method by which the agency established its interpretation or practice reflects varying degrees of study and evaluation of the particularized problem. Certain methods indicate less thoroughness and breadth than others. Thus, if an administrative interpretation has not resulted from a contested adversary proceeding . . . or from a promulgated administrative decision, rule, regulation, or departmental statement, it is entitled to relatively little weight . . . Similarly, if the administrative practice has not been publicly established, it is not entitled to substantial weight.

Id. at 1056 (emphasis in original) (citations omitted).

An additional "significant" factor considered by the court was the consistency and length of the administrative interpretation or practice. The court explained:

> Like an affirmative act, a failure to act can create inconsistency. When an agency fails to implement or enforce a statute in accordance with its own interpretation, it is acting inconsistently. Its failure to enforce diminishes the

> impact of the administrative interpretation. Accordingly, that interpretation is entitled to relatively little weight.

Id. (citations omitted).

Applying these factors to the facts before it, the court concluded that the Comptroller's interpretation and administrative practice with respect to the term "price" were "entitled to little, if any, weight." Id.

> [T]he record shows that the only evidence to establish the Comptroller's administrative interpretation and practice consisted of the statement of the Assistant Director of the Retail Sales Tax Division . . . . Yet, the record shows that since the Act became effective in 1947, no administrative decision, rule, regulation, or statement regarding the taxability of delivery charges . . . has been promulgated. It further shows that the Comptroller . . . failed to enforce [its] interpretation from 1947 until the instant audits in 1973.

Id.

For the same reasons cited by the John C. Louin court, this Court must give little or no deference to the Department's administrative interpretation of the term "public stenographic services." First, the evidence establishes that little or no thoroughness or breadth accompanied the Department's consideration of its interpretation. Like the situation in John C. Louin, the only evidence of the Department's administrative interpretation is the testimony of a government official that such an interpretation exists. Since the sales and use tax provisions concerning public stenographic services became effective in 1969, no administrative decision, rule, regulation, or departmental statement dealing definitively with the taxation of court reporting services has been promulgated by the Department. The regulation or statement that has been issued has failed to specify the meaning of "public stenographers," thus leaving the statute shrouded in vagueness. Respondent's position simply has not been publicly established.

Further, respondent's claimed interpretation shows no consistency. The 1972 memorandum and Court Reporter Rule 17, the only publicly available authorities concerning the sales tax treatment of court reporting services, are inconsistent with the administrative interpretation respondent now asserts. In addition, respondent has failed to enforce its interpretation until the instant audit in 1982. Finally, the Department's interpretation has never been enforced against court reporters employed by the District of Columbia courts.

However, even without strong or consistent administrative interpretation from respondent to guide the Court in resolving whether petitioner was properly taxed, the Court finds statutory and common law support for exempting petitioner's court reporting services from sales and use taxation.

B. Sales and Use Tax Exemption for Service Transactions

District of Columbia sales and use taxes apply to retail sales of certain tangible personal property and certain enumerated services. D.C. Code §§47-2002 and 47-2202 (1981 ed.). Unless specifically enumerated by statute, "professional" and "personal" service transactions involving sales of tangible personal property as inconsequential elements for which no separate charges are made are specifically exempt from these sales and use taxes. D.C. Code §§47-2001(n)(2)(E) and 47-2201(a)(2)(B) (1981 ed.).

Acme's court reporting services satisfy all of the requirements for exempt service transactions under the District of Columbia's sales and use tax laws. Such services (1) are personal or professional services; (2) involve the sale of inconsequential amounts of tangible personal property for which no separate charge is made; and (3) are not specifically enumerated as a taxable service.

Although there is no District of Columbia law directly on point,[2/] courts and administrative bodies in at least five different states have directly considered the issue of whether court reporting services constitute professional or personal service transactions. All of these authorities are in agreement. The sale of a court reporter's services, including the sale of transcripts, constitutes the sale of personal or professional services rather than the sale of tangible personal property. See, e.g., Askew v. Bell, 248 So. 2d 501 (Fla.D.Ct. 1971); Booth v. City of New York, 268 App. Div. 502, 52 N.Y.S.2d 135 (1944), aff'd 296 N.Y. 573, 68 N.E.2d 870 (1948); Ruling 82-185-1 [New Mexico] St. Tax Rep. (CCH), 91 400-742 (January 14, 1982); Wash. Admin. Code 458-20-224 [1 Washington] St. Tax Rep. (CCH) 91 60-624; Admin. Dec. 80-31-C [West Virginia] St. 8 Loc. Taxes (P-H), ¶21,928.

In accord with these cases is District of Columbia v. Universal Computer Associates, Inc., 465 F.2d 615 (D.C. Cir. 1972), where the issue was the taxability of computer software. Software was transferred to the taxpayer on prepunched cards. The court held that Universal paid for the information stored on the cards rather than the material comprising the cards which was of insignificant value.

Similarly, in Human Events, Inc. v. District of Columbia, Tax Docket No. 2602 (D.C. Sup. Ct., April 12, 1979), the issue was the taxability of mailing lists provided to customers on either computer tapes or labels. The court held that the lease of mailing lists was a service transaction, i.e., identifying and furnishing names and addresses of potential and likely subscribers and customers. Id. at 9.

2/ However, the issue was addressed indirectly by this Court and the District of Columbia Court of Appeals in Mr. Malech's memorandum dated November 8, 1972.

The Human Events court, like the court in Booth, adopted the New York Court of Appeals' reasoning in Dun & Bradstreet, Inc. v. City of New York, 276 N.Y. 193, 205, 11 N.E.2d 728, 731 (1937) and explained that when the value of a transaction is information or knowledge, customers are paying for the information, not for the written medium in which it is transferred.

Likewise parties to court and governmental proceedings in which petitioner is the official court reporter are interested in the information stored in the transcripts. Customers pay petitioner for the work performed by petitioner's court reporters; and the material of which the transcript is composed is of insignificant value. As authorities in five states demonstrate, petitioner's receipts for transcripts are receipts for skillful reporting -- a personal or professional service.

Significantly, this rationale was adopted by this Court in 1972, when, in conjunction with the D.C. Court of Appeals, it issued Mr. Maloch's a memorandum explaining that the District of Columbia sales tax applies only to the sale of transcripts sold to persons other than parties to the proceedings for which the court reporter is engaged. The memorandum did not treat the sale of transcripts prepared by court reporters as a sale of tangible personal property subject to the District of Columbia sales taxes. Thus, under the District of Columbia sales tax provisions as they existed in 1972, the only possible rationale for the memorandum's conclusions is that the sale of transcripts is a personal or professional service transaction exempt from D.C. sales tax.

Further, the sale of tangible personal property in connection with professional or personal service transactions such as court reporting services is an "inconsequential element" of the service transaction if "the sales price of the tangible personal property is less than 10% of the amount charged for the services rendered in the transaction." D.C. Tax Reg. §201.2. This standard is easily met with respect to petitioner's sales of transcripts in connection with its court reporting services. The sales price of the tangible personal property sold in connection with petitioner's court reporting services is approximately four percent of the amount charged for court reporting services. Moreover, petitioner's charge for this tangible personal property is not separately stated in the invoices sent to its customers.

Finally, court reporting services are not listed among the enumerated taxable services in D.C. Code §§47-2001(n)(1) and 47-2201(a)(1) (1981 ed.). Therefore, any of petitioner's sales being an inconsequential element of the transaction for which no separate charge is made, and their service not being specially enumerated in the relevant statutes, petitioner meets the sales and use tax exemption requirements.

C. Strict Statutory Construction

To the extent the District of Columbia is attempting to rely on D.C. Code §§47-2001(n)(1)(I) and 47-2201(a)(1)(G) (1981 ed.), which treat public stenographic services as taxable services, its reliance is misplaced. Neither the statute nor the implementing regulations (D.C. Tax Reg. §207.26) are helpful in ascertaining the meaning of the term "public stenographic services." However, the Court concludes that court reporting services are not public stenographic services.

The District's proposed interpretation violates the well-established principle that, in cases of ambiguity, tax laws are to be strictly construed against the government and in favor of the taxpayer. As the U.S. Supreme Court stated long ago:

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen.

Gould v. Gould, 245 U.S. 151, 153 (1917). This rule has retained its vitality over the years. E.g., Comptroller of the Treasury v. John C. Louis Co., 285 Md. 227, 404 A.2d 1045, 1053 (1979) (applying this rule to interpret Maryland's sales tax); see Kleiboemer v. District of Columbia, 458 A.2d 731, 735 (D.C.), rehearing denied, 466 A.2d 846 (D.C. 1983), cert. denied, 104 S.Ct. 1279 (1984) ("tax statutes are to be strictly construed").

This Court cannot read the statutory language so broadly when, not only rules of construction, but a record of non-taxation, indeed acceptance of sales and use tax-exempt status on the District's part, and petitioner's fulfillment of the requriements for exemption, all, point toward the non-taxability of petitioner's services.

III.

Wherefore, it is this 31st day of May, 1985,

ORDERED that respondent's assessment asserted against petitioner be, and hereby is, cancelled; and it is

FURTHER ORDERED that petitioner's court reporting servcies be, and hereby are, exempt from sales and use taxes pursuant to D.C. Code §§47-2001(n)(2)(B) and 47-2201(a)(2)(B) (1981 ed.) and that respondent modify its records to reflect such status; and it is

FURTHER ORDERED that petitioner is entitled to a refund of the taxes it paid including any penalties and interest; and it is

FURTHER ORDERED that petitioner shall submit a Proposed Order setting forth the amount of the refund within ten days of the signing of this Order.

JUDGE IRALINE G. BARNES

Copies to:

William L. Neff, Esquire
Patricia M. Lacey, Esquire
Crowell & Moring
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Richard G. Amato, Esquire
Office of the Corporation Counsel, D.C.

Melvin Jones, Finance Officer, D.C.

R. Stanfield
6/3/85