FILED

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

TAX DIVISION

FEB 18 4 42 PM '92

Cable & Wireless Communications, Inc. Petitioner v. District of Columbia Respondent	Tax No. 4091-88
American Telephone & Telegraph Company, AT&T Communications Of D. C., Inc. Petitioner v. District of Columbia Respondent	Tax No. 4092-88
U. S. Sprint Communications Company Limited Partnership Petitioner v. District of Columbia Respondent	Tax No. 4348-89
ITT Communications Services, Inc. Petitioner v. District of Columbia Respondent	Tax No. 4349-89

Contel Office Communications, Inc. Petitioner	:	
v. District Of Columbia Respondent	:	Tax No. 4363-90
Cable & Wireless Communications, Inc. Petitioner	:	
v. District of Columbia Respondent	:	Tax No. 4650-90
Allnet Communication Service, Inc. Petitioner	:	
v. District of Columbia Respondent	:	Tax No. 4693-91
Long Distance of Service Washington, Inc. Petitioner	:	
v. District of Columbia Respondent	:	Tax No.5000-91

OPINION AND ORDER

Before the Court are cross motions for Summary Judgment. The Petitioners are long distance telephone carriers asking for

judgment declaring the Gross Receipt Tax Amendment Act of 1987 and its accompanying emergency act to be unconstitutional and otherwise invalid and for refund of moneys collected thereunder by the District of Columbia. The Respondent, the District of Columbia asks for affirmance of the Acts and for judgment in its favor.

These cases are the most recent episode in the convoluted tax litigation which has followed AT&T's divestiture of its local operating companies in connection with the antitrust suit United States v. American Telephone and Telegraph Company, 552 F.Supp. 131 (D.C.D.C. 1982) aff'd memo 460 US 1001 (1983).

The present issues require a preliminary background review. Prior to the 1984 divestiture a District of Columbia subscriber paid the charge for a long distance call to the Chesapeake and Potomac Telephone Company (C&P) AT&T's wholly owned subsidiary which was the local operating company in the District of Columbia. C & P in turn paid the sum received to AT&T. AT&T computed the share owed to C&P for the part it played in the operation and paid such sum to C&P, a procedure called "the division of revenues." The District of Columbia then taxed C&P on that amount under the gross receipt tax of 1939.[1]

One variety of long distance call constituting a relatively small part of the market, however was not taxed. This concerned calls handled by non affiliated carriers such as Sprint and MCI

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[1]53 Stat. 1107 Ch. 1352, Title IV No. 2(a) codified in the 1986 Supp. of the D.C. Code at 47-2501. For a description of the procedures followed see footnote 2, Barry v. American Telephone & Telegraph Co., 563 A.2d 1069 (DC App. 1989).

(called OCC's). These companies paid a charge to C&P for use of its local network in connecting a telephone in the District with an OCC's system. The "access charges" by a Tax Court decision[2] were held not to be within the operative term of the gross receipts tax act of 1939 i.e. "... gross receipts for the sale of public utilities services or commodities within the District of Columbia." Following the 1984 divestiture, the District of Columbia Court of Appeals in District of Columbia v. Chesapeake and Potomac Telephone Company, 516 A.2d 181 (D.C.App. 1986) (called hereafter C&P. IV) not only reaffirmed the prior tax court decision but also held that by virtue of the divestiture AT&T's payments to C&P were now free of liability under the 1939 Act. Accordingly the combination of the divestiture and C&P (IV) deprived the District of Columbia of all the funds which had been obtained under the Gross Receipts Tax from AT&T and C&P's division of revenues. The reaction of the District of Columbia City Council was to pass the "Gross Receipts Tax Amendment Act of 1987" with an accompanying emergency act[3]. The new legislation extended the coverage to gross receipts received from the sale of toll communications services that originate from or terminate on telecommunications equipment located in the District and billed to a District telephone. There was no longer any distinction between AT&T and the former OCC's. Gross

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[2]C&P Telephone Company v. District of Columbia, Docket No. 1756, Opinion 1000, July 17, 1962 90 WLR No. 175, Aff'd in part Chesapeake & Potomac Telephone Co., 117 US App.DC 21 (1963)(C&P III).

[3]34 DC Reg. 6536 and 5068-5073; DC Code 47-2501(a)(2)(A) (1988 Supp.)

receipts in respect of any of them were now taxable. The tax was retroactive to July 1, 1986. The carriers promptly filed suit either as plaintiff or intervenor asking for Preliminary Injunction and Declaratory Judgment (Tax Docket 4011-87; CA 10080-87). Since now there was no question of coverage under the statute the thrust of the carriers attack was that the Act is unconstitutional. The charges were canister-like. The violations alleged were of the Commerce Clause, the Due Process Clause, the Origination of Revenue Bills Clause, the Congressional jurisdiction over the District of Columbia Clause and the Supremacy Clause. Violations of the Home Rule Act were likewise charged. On December 3, 1987, Judge Iraline G. Barnes issued a preliminary injunction halting attempts to collect the tax. Appeal was taken therefrom and on October 6, 1988 the District of Columbia Court of Appeals remanded directing the trial Court to file more detailed findings of fact or in the alternative to rule on the merits. The Judge preferred the latter course. After a final hearing Judge Barnes found that the Act violated the Due Process Clause in the imposition of a retroactive tax without adequate notice. She further found that the Act violated the Commerce Clause centrally because it was unapportioned and subjected the taxpayer to double taxation. The Court was not impressed by the argument that the City Council lacked the authority to enact tax legislation. Judge Barnes' Order was dated November 14, 1988. It was appealed and on July 19, 1989 the D. C. Court of Appeals rendered its opinion. The appellate court considered itself in something akin to a "catch 22"

situation.[4] Since the plaintiffs had not paid the assessed taxes they were not entitled to pursue the suit under the District's "pay before suit" in tax cases statute[5] unless it had been shown beyond debate that the claims of unconstitutionality were valid. Since the Court did not find such to be the case, jurisdiction over the subject matter was considered lacking. The case was remanded with directions to vacate the judgment. In 1989 the 1987 Tax Act was superceded by the Toll Telecommunications Act of 1989, (D. C. Act 8-48; D.C.Code Sections 47-3801 through 3821, 2005, 1508 and 2501). This Act inter alia added provisions crediting taxes paid to other jurisdictions on long distance calls and facilitating means of determining data necessary for computing the tax. Measures of this kind had been found by Judge Barnes as necessary but wanting in the 1987 tax. Late in 1988, AT&T paid the tax and filed a new action for refund. (Tax Docket 4092-88). Seven other carriers followed course, (4091-88, 4348-89, 4349-89, 4363-89, 4650-89, 4693-91, 5000-91). In June of 1991, Judge Emmett Sullivan dismissed all of the previous litigation (Tax Docket 4011-87; CA 10080-87) which had been subject to the appellate remand and direction to vacate. Appeal thereto was noted and the District of Columbia Court of Appeals stetted its consideration thereof pending determination of this second clutch of cases. Such posture brings this Court to the pending cross motions for Summary Judgment.

First of all the Court agrees with the parties after a review

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[4]Barry v. American Tel.&Tel., supra.

[5]DC Code 47-3307, 3303.

of the entire record that there is no genuine issue of material fact and that the case depends on resolution of questions of law.

The attack upon the validity of the statute rests on nine claims. These, however, may be found clustered around three major contentions why the carriers should not be required to pay the tax.

The first major contention is that the City Council lacked authority under the Constitution and the Home Rule Act to enact revenue legislation in general and the challenged tax in particular. This is so, plaintiffs argue, because 1) Congress under the Constitution has exclusive legislative jurisdiction over the District and all bills for raising revenue must originate in the House of Representatives; 2) that since long distance calls are interstate the legislation is not "within the district" as required by D.C.Code 1-233 (a)(3); 1-202; and that the statute imposes a tax on the federal government which is specifically prohibited by Article VI, Clause 2 of the Constitution.

The second major claim is that the tax fails to apportion gross revenues from interstate commerce between the several jurisdictions and discriminates against out of state competitors violating both the Commerce and the due process clauses.

The third claim is that the retroactive features of the Act violate the due process clause.

The arguments have been carefully crafted and earnestly pressed but this Court is not persuaded by them.

I

The City Council with approval of the Mayor has the authority to enact proper revenue legislation for the District of Columbia in general and had the authority to enact the Gross Receipt Tax Amendment of 1987 and the Toll Telecommunications Act of 1989 in particular.

It is manifest that by the Self Government Act of 1973, D.C. Code 1-204 et seq. (called popularly and in this opinion, the Home Rule Act), the delegation of powers was virtually plenary. "The legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of the Act subject to all the restrictions and limitations imposed upon the States by the 10th Section of the first article of the Constitution of the United States." (D.C. Code 1-204).

The limitations on the powers were specifically set forth. As far as the power to tax was concerned, the prohibited areas were the commuter tax and functions or property of the Federal Government (D.C. Code 1-233(A)(3) and (a).

Congressional oversight was provided by requiring the legislation to be laid before the Congress for a period of thirty (30) days prior to its effective date.

There was no question about the intent of Congress in enacting the statute. In the course of debates Senator Thomas Eagleton, chairman of the Senate District Committee and manager of the bill explained:

> "We will find in the bill the right of the City Council and the Mayor to enact into law

> ordinances relating to taxation, excluding at least two very important things that they cannot act upon: The taxation, of course, of any Federal property is prohibited by the constitution, and we prohibit them from the imposition of an income tax on nonresidents of the District of Columbia. But with those two exceptions, one constitutional and one that we impose statutorily, the City Council and an elected Mayors [sic], elected by the three-quarters of a million people of the city, can decide in what way and how much to tax their citizens, can enact local ordinances into law, and can begin to shape their own destiny as should be the right of all American citizens."[6]

The D. C. Court of Appeals has endorsed the legislative scheme by sharply preventing any attempt by the Council to intrude into specifically forbidden areas Bishop v. District of Columbia, 411 A.2d 997 en banc, cert.den. 446 U.S. 966 (1980) while endorsing the broad grant of power and refusing to adopt any restrictive view of the delegation. District of Columbia v. Greater Washington Labor Council, 442 A.2d 110, cert.den. 460 U.S. 1016.

The argument of the carriers in these premises is that regardless of its intention the Congress was prohibited from delegating the taxing power to the City Council by a combination of the Constitution's Article I, Section 8, Clause 17 which gives the Congress exclusive power to legislate over the District of Columbia and Article I, Section 7, Clause I which provides that revenue measures originate in the House of Representatives. This latter measure followed the seventeenth century British tradition[7] or

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[6]119 Cong.Rec. 22947 (1973).

[7]Commons, House of, Vol.3, New Encyclopedia Britannica, Micropedia p. 494.

perhaps one of even earlier orgin that money bills must originate in the House of Commons and not in the House of Lords or the Crown.

The levy of moneys for the crown without the grant of parliament had been a matter of serious contest between the Stuart Kings and the Parliament and was condemned by the Bill of Rights of 1689. Toward the end of that century the House of Commons rejected any attempt by the the House of Lords to assume the power of initiating money bills. The complete means of enforcing this prerogative has always been with the lower house itself simply by refusing to pass the offending upper house bill.[8] No case has been cited suggesting that the prerogative of the House of Commons or Representatives had the purpose of preventing the legislatures from delegating local or parochial taxing powers to subordinate institutions. The concept has never prevented such delegations as far as the District[9] or for the territories,[10] where the same

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[8]For the House of Representatives see 99 Cong.Rec. 1897-98 (March 12, 1953) where the house voted to refuse and return a senate bill making appropriation. For the House of Parliament see the much earlier incident reported by Macaulay in History of England, Book IV, Chapter XIX. "The land-tax was not imposed without a quarrel between the Houses. The Commons appointed commissioners to make the assessment. These commissioners were the principal gentlemen of every county, and were named in the bill. The Lords thought this arrangement inconsistent with the dignity of the peerage. They therefore inserted a clause providing that their estates should be valued by twenty of their own order. The Lower House indignantly rejected this amendment, and demanded an instant conference. After some delay, which increased the ill-humor of the Commons, the conference took place. The bill was returned to the Peers with a very concise and haughty intimation that they must not presume to alter laws relating to money."

[9]Congress, in incorporating the City of Washington in 1802, gave the municipal corporation "full power and authority to pass all by-laws and ordinances," and the power "to lay and collect taxes." Act of May 3, 1802 Incorporating the City of Washington,

considerations apply, are concerned. The lack of authority for the argument does not persuade this Court to follow it.

The next argument is that the delegation of taxing power is prevented by Article VI, Clause 2 which provides that a state may not, consistent with the Supremacy Clause, lay a tax directly on

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Section 7, 2 Stat. 195. Ten years later, Congress gave additional power to the city government, "to lay taxes on particular wards, parts or sections of the city, for their particular local improvements." Act of May 4, 1812 Amending the Charter of Washington, Section 5, 2 Stat. 721. Shortly thereafter, Congress gave authority to the Levy Court for Washington County for certain enumerated purposes "and all other general county purposes, annually [to] lay a tax on all the real and personal property in the said county." Act of July 1, 1812 Relative to Levy Court of Washington County, Section 8, 2 Stat. 771. In later reorganizations of the city and county governments in the District of Columbia, Congress delegated authority to enact tax measures. See Act of May 15, 1820 Reorganizing the Government of the City of Washington, Sections 7, 8, 13, 2 Stat. 853 (reprinted D.C. Code Section 1-70 (1981); Act of May 14, 1848 Reorganizing the Government of the City of Washington, Sections 2, 3, 9, 11, 9 Stat. 233 (reprinted at D.C. Code Section 1-70 (1981)); Act of March 3, 1863 to Define the Powers and Duties of the Levy Court of Washington County, Sections 3, 4, 12 Stat. 799 (reprinted at D.C. Code Section 1-83 83 (1981)); Act of February 21, 1871 To Provide a Government for the District of Columbia, Sections 14, 18, 20, 21, 22, 23, 29, 37, 16 Stat. 419 (reprinted at D.C. Code Section 1-92 (1981)).

[10]Territorial Organic Acts of: Louisiana, Section 4 (March 26, 1804, 2 Stat. 283, 284); Wisconsin Section 6 (April 12, 1863, 5 Stat. 10, 12-13, Iowa Section 6 (June 12 1838, 5 Stat. 235, 237); Oregon Section 6 (Aug. 14, 48, 9 Stat. 323, 324); Minnesota Section 6 (March 3, 1849, 9 Stat. 4-3. 405); New Mexico Section 7 (Sept. 9, 1850, 9 Stat. 446, 449); Utah Section 6 (Sept. 9 1850, 9 Stat. 453, 454-55); Washington Section 6 (March 2, 1853, 10 Stat. 172, 175); Nebraska and Kansas Section 6 (May 30, 1854, 10 Stat. 277, 279); Colorado Section 6 (Feb. 28, 1861, 12 Stat. 172, 174); Nevada Section 6 (March 2, 1861, 12 Stat. 209 211); Dakota Section 6 (March 2, 1861, 12 Stat. 239, 241); Arizona Section 2 (same powers as New Mexico Territory) (Feb. 24, 1863, 12 Stat. 664, 665); Idaho Section 6 (March 3, 1863, 12 Stat. 808, 810); Montana Section 6 (May 26, 1864; Section 13 Stat. 85, 88); Wyoming Section 6 (July 25, 1868 Section 6 (May 26, 1864, 13 Stat. 85, 88); Wyoming Section 6 (July 25, 1868, 15 Stat. 178, 180); Oklahoma Section 6 (May 2, 1890, 26 Stat. 81, 84); Virgin Islands, 48 U.S.C. Section 1574(a).

the United States and by Section 23(a)(3) of the Home Rule Act which prohibits any act which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District. The argument arises generally out of statements in the record that if the District passed a sales tax as have many of the states enacting telecommunications laws it would find that about half of the intended taxpayers were exempt i.e. the Federal Government, the District Government, Foreign Embassies and chanceries and a number of charitable and educational foundations - hence the need for a gross receipts tax. The carriers adroitly counter by charging that pass-through provisions in reality then mean that the tax is sought to be imposed on the United States as prohibited by the Constitution and the federal function provision of the Home Rule Act. The law however is that the Constitution permits a State to tax the gross receipts of those who do business with the United States, James v. Dravco Contracting Co., 302 U.S. 134, 149, 160, (1937); Silas Mason v. Washington Tax Commission, 302 U.S. 186, 190, 210, (1937) even if the total reciepts of a contractor are from the United States and the tax will be borne by the Government, United States, v. New Mexico, 455 U.S. 720, 735, 741, (1982). See also, California State Board of Equalization v. Sierra Summit, Inc., 490 U.S. 844, (1989).

Next comes the carriers' claim that the tax legislation is illegal because long distance calls are interstate and the District of Columbia may not "enact any act... which is not restricted in its application exclusively in or to the District," D.C. Code 1-233

(a)(3); 1-202. This is too cramped a reading of the Home Rule Act. The Act was intended to delegate to the District the same character of legislative power as that held by a state except where specifically prohibited. And, the legislative history clearly indicates that the "Congress intended in 1-233(a)(3) to withhold from local officials the authority to affect decisions made by federal officials in administrating federal laws that are national in scope as opposed to laws that relate solely to the District of Columbia" The District of Columbia v. Greater Washington Labor Council, supra. at 116. The limitation of legislation to District purposes cannot be held to prevent the District from enacting the same kind of law as the Illinois statute approved in Goldberg v. Sweet, Direct of Illinois Revenue, et al., 488 U.S. 252 (Jan. 10, 1989).

II

The legislation presents no undue burden upon interstate commerce and is not unconstitutional.

The second issue concerns the charges of the carriers that the legislation violated the due process and commerce clauses of the Constitution. The contention was persuasive to Judge Iraline Barnes in Tax Docket 4011-87. The Judge now sitting has the highest respect for his former colleague but notes that two events, occurring well after Judge Barnes' Opinion and Order were docketed, have significantly altered affairs. The first of these is the decision of the United States Supreme Court in Goldberg v. Sweet,

Director, Illinois Department of Revenue, et. al., supra.; second, the enactment of the Toll Telecommunications Act of 1989 adding two provisions which Judge Barnes had found fatally wanting in the 1987 Act.

Goldberg affirmed the Illinois Excise Tax Act imposing a tax on gross charges of interstate telecommunications which originated or terminated in the state and were charged to an Illinois service address. The case was not simply an addition to the "tangled underbrush"[11] of commerce clause decisions. It was instead an opinion of sharp insight and great clarity. The Court saw that prior decisions in the telecommunications field had been based upon the perception that long distance systems operated through a complex of wires and switchboards bearing a ready analogy for tax purposes to railroad lines and bus routes, whereas modern communication technology actually operated through a complex of satellites, fiber optics, microwave radios, electronic impulses and computerized networks having little if any relationship to older techniques[12].

With this fresh perspective the Supreme Court measured the Illinois statute by the four pronged test it had established in Complete Auto Transit, Inc. v. Brady, 430 US 274 (1977). Such a procedure is obviously the one to be followed here.

Under Complete Auto a state tax will withstand Commerce Clause

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[11]Northwestern State Portland Cement v. Minnesota, 358 US 450, 457 (1987).

[12]Goldberg 488 US 254, 255.

scrutiny if

> ...the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce and is fairly related to services provided by the state.[13]

Since there is no question about the nexus of the District of Columbia the initial measure is in respect of the second prong, fair apportionment. Apportionment is determined by examining whether a tax is internally and externally consistent.[14] This Court concludes that the D. C. Tax statutes of 1987 and 1989 are internally consistent "...for if every state taxed only those interstate calls which only charged to an in state service address only one state would tax each interstate call".[15]

"The external consistency test asks whether the state has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in state component of the activity being taxed"[16]

Goldberg then notes that, "we doubt that states through which the calls electronic signals merely pass have a sufficient nexus to tax that call" and "we also doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a state to tax a call."[17]

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[13]Complete Auto, 488 US 279.

[14]Goldberg, 488 US 261.

[15]Goldberg, 488 US 261.

[16]Goldberg, 488 US 261.

[17]Goldberg, 488 US 263.

The Court added, "We recognize that if the service address and billing location of a taxpayer are in different States some interstate telephone calls could be subject to multiple taxation. This limited possibility of multiple taxation, however, is not sufficient to invalidate the Illinois statutory scheme." "To the extent that other States' telecommunications taxes pose a risk of multiple taxation, the credit provision contained in the Tax Act operates to avoid actual multiple taxation.[18]"

To the present Court the combination of the Goldberg opinion and the credit provision of the 1989 Act have destroyed the charge that there is a failure fairly to apportion the tax.

The carriers claim that the Gross Receipts Tax does not withstand scrutiny under the third prong of the Complete Auto test. They argue that the Act is fatally discriminatory because it allows for a credit and/or exemption from the District's personal property, sales and use taxes to the extent that property subject to such taxes is used to generate the gross receipts which are subject to tax.

The fault of the argument is that discrimination found to be invidious under the Commerce Clause is that between interstate and intrastate commerce. The third prong of Complete Auto exists to ensure that a tax "does not discriminate against interstate commerce." Complete Auto Transit v. Brady, supra. at 279. "Traditionally applied, the discrimination doctrine demands substantially equal treatment of interstate and intrastate business

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[18]Goldberg, p. 264.

under the tax laws of a given state." Shores: State Taxation of Gross Receipts and the Negative Commerce Clause. 54 Missouri Law Review 555 (1989). The 1987 Act at issue does not discriminate at all between intradistrict and interstate carriers. In fact, the Act is only applicable to interstate carriers. The Act's personal property credit/exemption provision is available to any long distance carrier, regardless of whether it is an intradistrict or an out-of-state company, insofar as it owns property in the District which is used to generate gross receipts.

Neither is the nature of the matter changed by referring to the Manufacturing/Wholesaling Acts of West Virginia and Washington treated in Armco, Inc. v. Hardesty, 467 U.S. 638 (1984) and Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987). In these cases, companies manufacturing and selling within state were taxed at a lower rate than those companies manufacturing instate and selling out-of-state or manufacturing out-of-state and selling instate. The statutes involved were facially and practically discriminatory statutes paralyzing interstate commerce and favoring local transactions. The 1987 Gross Receipts Act is facially neutral. Every long distance carrier owning property in the District of Columbia is subject to a personal property tax imposed by the District and every long distance carrier is entitled to a credit/exemption to the extent that his personal property is used to produce gross receipts. Those companies who do not own property in the District are not only unable to avail themselves of the personal property

exemption/credit, but they are also free from all personal property taxes in the District of Columbia. All of the Petitioners except Long Distance Services of Washington Inc. (which leased capacity) have taken the credit in substantial amounts regarding the taxes which are the subject of the present suit for refund. "Such a result would not arise from impermissible discrimination against interstate commerce but from fair encouragement of in-state business." Armco, Inc. v. Hardesty, supra. at 645. This credit has been preserved on the taxes against the telephone companies from the original Gross Earnings Tax of 1902 through the Toll Telecommunication Act of 1989.

Finally, the fourth and last prong of the Complete Auto test is whether the tax is fairly related to services provided by the taxing state. "Beyond the threshold requirement, the fourth prong of the Complete Auto Transit test imposes the additional limitation that the measure of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a "just share of State tax burden." Commonwealth Edison Co. v. Montana, 453 U.S. 609, 626 (1981) (quoting Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1939). The District of Columbia provides many municipal services which are accessible to the long distance companies. Telephone company employees drive to and from work on the District's roads, the water system is available for their use, and in the event of an emergency, the District's police and fire squadrons stand ready to come to their aid. The carriers

are able to avail themselves of all the amenities that the nation's capitol has to offer and the gross receipts tax represents their "just share" of the tax burden.

III

The retroactive features of the tax statutes are constitutionally permissible and are valid. The feature complained of by the companies in this respect is that the act at issue was passed July 17, 1987 with its emergency act effective that date and the permanent act effective October 1, 1987, both retroactive to July 1, 1986.

Retroactivity in legislation often renders it constitutionally suspect. However, tax statutes are a separate and distinct category. For example, Valid Retroactive Income Tax laws (as distinguished from gift taxes) are more often the rule than the exception and though the claim of " 'arbitrary retroactivity' may continue ... to rear its head in tax briefs but for practical purposes, in this field, it is as dead as wager of law."[19] Both sides in this case have advised that the law in this area has best been expressed by the opinion of Mr. Justice Stone in Welch v. Henry, 305 U.S. 134 (1938), though they differently interpret it.

One of the crucial passages of Welch recites as follows:

> The objection chiefly urged to the taxing statute is that it is a denial of due process

[19]Ballard: Retroactive Tax Legislation, 48 Harvard Law Review 592 (1935); See also, Hochman: The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harvard Law Review 692, 706 (1960).

> of law because in 1935 it imposed a tax on income received in 1933. But a tax is not necessarily unconstitutional because retroactive. Milliken v. United States, 283 U.S. 15, 21; and cases cited. Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute.
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> In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. Nichols v. Collidge, 274 U.S. 531, 542; Untermeyer v. Anderson, 276 U.S. 440, 445 (citing Blodgett v. Holden, 275 U.S. 142, 147); Coolidge v. Long, 282 U.S. 582. Since, in each of these cases, the donor might freely have chosen to give or not to give, the taxation, after the choice was made, of a gift which he might well have refrained from making had he anticipated the tax, was thought to be so arbitrary and oppressive as to be a denial of due process. But there are other forms of taxation whose retroactive imposition cannot be said to be similarly offensive, because their incidence is not on the voluntary act of the taxpayer. And even a retroactive gift tax has been held valid where the donor was forewarned by the statute books of the possibility of such a levy, Milliken v. United States, supra. In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

In analyzing the 1987 tax to determine whether it is unconstitutionally "harsh and oppressive" it must be noted that the

District had a compelling reason to act. A loss in tax revenues of 23.6 million dollars had developed between the divestiture of January, 1984 and July of 1986 which other taxpayers had to bear.[20] It does not appear to this Court so unreasonable or oppressive when the Emergency Act accompanying the 1987 Tax Act became effective as of July, 1987 to apportion the burden for the preceding tax year to the Carriers. The interval was no longer than the tax approved in Welch and in many of the cases collected by Mssrs. Ballard and Hochman in their articles cited supra.

The Petitioners here argue that they are entitled to the same tests as were the gift taxpayers mentioned in Welch, i.e. to notice of the impending tax and sufficient time to take measures to avoid it. This Court holds that the true test for the Petitioners is the Income Tax Test i.e. whether the tax is unconstitutionally harsh and oppressive. Assuming arguendo, however that the Gift Tax test is applicable the carriers position is not improved. Circumstances can provide notice, United States v. Darusmont, 449 U.S. 292 (1981). The carriers have either been parties to or have been significantly affected by an avalanche of litigation related to the revolution in the telecommunications industry.[21]

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[20]The District had to refund 14.7 million dollars from gross receipts collections from the period January 1984 through June 1985 and 8.9 million uncollected from July 1985 through June 1986. Report of Committee on Finance and Revenue on Bill 7-186, Gross Receipts Tax Amendment Act of 1987 at 8, D.C. Exhibit #15 at 920.

[21]e.g. The drive by the OCC's to enter the market. (Bell System Tariff Offering of Local Distribution Facilities for Use by other Common Carriers, 46 FCC2d 413 aff'd sub nom Bell Telephone Co. v. FCC, 503 F2d 1250 (1974) cert. den. 422 U.S. 1026; MCI Telecommunications v. FCC 180, 188 U.S.App.D.C. 327, 580 F.2d 590,

Armed with this litigation experience it was certainly reasonable for the industry to foresee as did Judge Nebeker in C&P IV that a new tax to halt the substantive loss of revenue was inevitable.[22] Also with the failure of the tax on the local operating company (C&P) and the predisposition of the District to the Gross Receipts Tax it was certainly foreseeable that such a tax would be levied on the Long Distance Carriers covering as great a time interval as would legally be possible. The claim that if they had only known of the pendency of the tax the carriers would have closed their business in the District or would have exercised some undetailed organizational manuever to avoid the tax is not attractive. An examination of the size of the carriers' gross receipts in the Kerwin Affadavit[23] and the words of Welch (p. 148) "We cannot assume that stockholders would refuse to receive corporate dividends even if they knew that their receipt would be subject to a new tax or an increase in an old one." provide answer to this claim.

The final and most subtle argument in this set is that

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cert. den. 439 U.S. 980 (1978)); the break up of the Bell System (United States v. AT&T, supra) and the tax cases governing the industry (C&P III and C&P IV, supra, Chesapeake and Potomac Telephone Co. v. District of Columbia, 78 U.S.App.D.C. 53, 137 F.2d 674 (1943) callled here C&P I and Chesapeake and Potomac Telephone Co. v. District of Columbia, 86 U.S.App.D.C. 124, 179 F.2d 814 (1950) called here C&P II.

[22]"We hasten to note however that the significant structure changes in the telephone industry resulting from the divestiture of AT&T (citing cases) render the tax consequences of those changes appropriate for legislative consideration." C&P IV at p. 82.

[23]Affadavit of supervising auditor Kerwin attached to the motion of the District of Columbia for Summary Judgment.

principles of public utility law prohibiting retroactive rates or surcharges render the retroactive portion of the tax between the dates new tariffs might have been filed and July 1, 1986 to be invalid.

The authorities do indeed support the proposition that a public utility may not set rates to recoup past losses nor may a carrier recover from its ratepayers past deficiencies in rates citing Nader v. FCC, 172 U.S. App. D.C. 1, 20, 520 F.2d 182, 202 (1975, citing Galveston Electric Co. v. Galveston, 258 U.S. 388 (1922), Washington Gas Light Co. v. Baker, 88 U.S. App. D.C. 115, 188 F.2d 11 (1950), Williams v. WMATC 134 U.S. App. D.C. 342, 415 F.2d 922 cert. den. 393 U.S. 1081 (1969). Taxes however are not a loss. They are ". . . neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government. . . ." Welch at p. 146. They are instead operating costs and "there is no difference in this respect between state and federal taxes or betwen incomes taxes and others." Galveston Electric Co. v. Galveston, supra at 399. All parties here seem to agree that the "pass-through" method is not feasible but they differ upon the suitability of the raising of rates. The answer to this is that before the present court is the question of the validity of a tax and not the solution to a rate case. The correct fora to determine the latter are the Federal Communications Commission and the United States Court of Appeals for the District of Columbia Circuit.[24] Retroactive rates have

[24]Communication Act of 1934, 47 U.S.C.A. #204, 204

certainly been disallowed in many circumstances but not always. Bell Telephone Company of Pennsylvania v. Federal Communications Commission,et al., 245 U.S.App.DC 386, 761, 789 F.2d(See the number of occasions when amortization has been approved for regulatory expenses, obsolete property, acquisition adjustments, inflation, and acceleration of income tax depreciation.)[25] There has been here no reference to any attempt by the petitioners to seek an adjustment by the FCC of the tax difficulties created by the break-up of the Bell System and this Court will not presume that such is impossible. The Court's task is to determine the validity of the 1987 tax and it holds the Act constitutional and valid.

IV.

Conclusion

Any other points raised by the Plaintiffs the Court considers peripheral to matters decided above and if not they are considered and found unpersuasive.

For the reasons as aforesaid the Court finds that the Respondent the District of Columbia is entitled to grant of its Cross-Motion for Summary Judgment and further finds that the Petitioners' motions for Summary Judgment must be denied.

ORDER

The Court having before it the cross motions for Summary Judgment of the above captioned parties and having found that there

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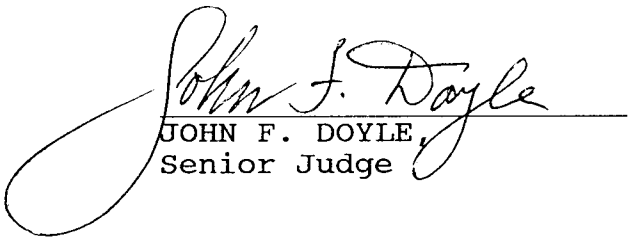
[25]1 Priest, Principles of Public Utility Regulation Ch. 3 "Elements of Rate Making."

exists in the premises no genuine issue of material fact and that the Respondent, the District of Columbia, is entitled to judgment as a matter of law, now therefore the cross motions of the Respondent for Summary Judgment is hereby GRANTED and the motions of Petitioners and each of them for Summary Judgment are hereby DENIED, and it is this 18th day of February 1992

ORDERED that the Respondent, District of Columbia is hereby granted Judgment of Dismissal on the Merits as to each and every petition filed herein, and the aforesaid petitions are dismissed with prejudice.



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