WARREN K. MONTOURI, et al.,

Petitioners,

v. Tax Docket Nos. 6810-96; 6804-96; 6840-96; 6854-96; 6892-96; 6894-96; 6988-96

DISTRICT OF COLUMBIA,

Respondent.

MEMORANDUM OPINION AND ORDER

In these consolidated cases, the parties have raised an issue of first impression, in the context of the District's Motions to Dismiss part of the Superior Court Petition in each case. The issue is whether the Superior Court has subject matter jurisdiction over a demand for a refund of so-called "vault rent," when a taxpayer includes such a request for relief as part of its appeal of an annual tax assessment on the corresponding real property.

The term "vault" refers to "a structure or an enclosure of space beneath the surface of the public space, including but not limited to tanks for petroleum products. . . ." D.C. Code § 7-1001(8)(1995). The most familiar example of vault space is the

area found beneath public sidewalks that abut downtown office buildings and other commercial structures.

The amount of annual "vault rent" is specifically calculated based upon the portion of the assessed value of the real property that is attributable specifically to land (not the improvements). This value is then multiplied by the square footage of the vault space and is then subject to a particular rate.[1]

In these consolidated cases, and in a large number of other tax assessment appeals, the District of Columbia filed a pleading styled as, "Motion to Dismiss That Portion of the Petition Seeking Any Refund of Vault Rent Payments."[2]

The taxpayers contend that a Superior Court tax appeal is the proper vehicle through which to litigate this rent overpayment issue because a reduction in vault rent is an integral part of affording complete relief, if and when the taxpayer wins an assessment appeal or achieves a settlement that results in a downward change of the land portion of the assessment.

The District argues that there is no recourse whatsoever for these taxpayers, relying on the premise that if the taxpayer signed a lease for the particular rent amount, the taxpayer is forever bound by the lease. The District of Columbia elaborates that since

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[1]This formula itself is not disputed.

[2] There is another group of cases involving the same issue pending before the Hon. Kaye K. Christian. A single oral argument was convened, because counsel are identical for each side in all of the cases. The motions are being decided independently by each assigned judge.

the taxpayer's agreement to pay such rent for the leasing of "vault" space is "contractual," no part of the rent can ever be refunded **even if** the Court invalidates the land assessment upon which it was calculated.

The Government also emphasizes that the Tax Division of the Superior Court utterly lacks what it calls "jurisdiction" to entertain a dispute about the proper rent level for vault space, because the portion of the Code relating to appeals of real property assessments does not specifically mention the litigation of vault rent disputes and does not explain how a tenant can obtain relief from alleged overpayment. Consequently, the District argues, this silence means that no relief whatsoever can be afforded by the Judicial Branch.

Based upon the records in these cases and applicable legal concepts, this Court has concluded that the Superior Court itself does indeed have subject matter jurisdiction to decide disputes over the refund of vault rent, and that it is appropriate that such disputes be heard in the Tax Division of the Superior Court as part of the appeal of tax on the related real property. The taxpayers herein have a fundamental due process right to seek a judicial remedy for overpayment of vault rent, because this type of refund is ancillary to providing complete relief from the incorrect or illegal assessment. The silence of the tax appeal statute on this point is not fatal to the Petitioners' cause.

In order to put the District on notice of this particular claim, the Court finds that fair notice requires the inclusion of

a specific demand for vault rent refund in the tax appeal Petition.

To be sure, this Court does not endorse the Government's constricted contract theory as the best template for the adjudication of these cases. The issue at the heart of these cases is whether the Court has the ancillary power to afford relief that is inextricably bound to the basic refund of the property taxes. Nevertheless, with the District having opened the door to the discussion of contractual issues, the Court concludes that the common law of contracts can provide an avenue of relief that is simply different from a tax appeal. Such relief is found in the opportunity of the aggrieved taxpayers to file a civil action for rescission or restitution of overpayments, based upon mistake of fact. This relates to the ultimate invalidation of the very keystone of the rent calculation -- the land assessment.

For good cause, however, the Court concludes that the filing of such a civil action in the Civil Division of the Superior Court is an inappropriate and inefficient way in which this unique type of dispute should be litigated. Vault rent disputes belong in the Tax Division as part of assessment appeals, for a number of sound reasons.

The jurisdiction of the Superior Court itself is not diminished or enlarged in any way, based upon the Division in which the Court adjudicates the dispute.

The Motions to Dismiss must be denied. The following facts and analysis compel the Court's ruling herein.

I. BACKGROUND OF THE CONSOLIDATED CASES

The rental of vault space is not a recent phenomenon of the local economy. The District's collection of rent for vault space originated prior to the advent of Home Rule. When the District was managed by a Commissioner, Congress passed a law to regulate the rental of vault space. This law was known as the District of Columbia Public Space Rental Act, Pub. L. No. 90-596, 82 Stat. 1156 (1968). The original law provided that:

> public space in the District which the Commissioner finds is not required for the use of the general public may be made available by him for use, for business purposes, by or with the consent of the owners of private property abutting such space, upon payment to the District of compensation for the use of such space, and on the condition that such use will be discontinued in whole or in part whenever the Commissioner determines that all or part of the public space is required for the use of the general public.

The principles embraced in the 1968 law remain in force at the present time and are codified in the present edition of the District of Columbia Code in Section 1001 et seq. of Title 7.

The rental rate is fixed by the Council of the District of Columbia. D.C. Code § 7-1009 (1995).

Historically, prior to the filing of the instant Motions, the District of Columbia willingly had negotiated refunds of vault rent as a typical part of negotiating global settlements of property tax appeals in the Superior Court.

Furthermore, the District has previously negotiated vault rent refunds as the sole form of relief in a certain subset of tax appeal cases. The taxpayers cite, as an example, the settlement

order filed in the case of International Monetary Fund v. District of Columbia, Tax Docket No. 5503-92, based upon a stipulation for entry of decision filed jointly by the parties. A refund of vault space rent was ordered in that particular case, because the Superior Court had determined at trial that the assessment of the property had been incorrect -- and because **the only relief that could be provided to the IMF was a reduction in the vault rent.** Because the International Monetary Fund itself was a tax-exempt entity, no property taxes, as such, had ever been collected.

Where the IMF was concerned, this entity was affected by the annual tax assessment literally in only one way: the calculation of its vault rent. The District therein never protested that the Superior Court had no "jurisdiction" to provide this relief.

The Government's position has changed radically in recent times. Just prior to the filing of the instant tax appeals, it appears that the Government had begun to resist efforts of taxpayers to negotiate reductions in vault rent -- but only if such a demand had not been specifically included in the Petition.

Certain taxpayers (such as those herein) responded to the District's new approach by taking the precaution of specifically including this demand for relief in their Petitions. Apparently, however, their accommodation to the District was not enough.

Despite the inclusion of express demands for refund of vault rent as part of their tax appeal Petitions, the Government now contends that the taxpayers herein are totally foreclosed from such relief, regardless of what they include in the Petitions.

II. ARGUMENTS PROFFERED BY THE GOVERNMENT

The Government argues that the Superior Court has no jurisdiction to hear the demand for these refunds. The District equates the Tax Division with the Superior Court itself, where judicial power is concerned. Respondent contends that the Code has created authority of the Tax Division to include only "appeals" from assessments. Arguing that the issue of refunding the rent is not **facially** a separate "appeal" from the assessment, the Government takes the position that the Superior Court has no power whatsoever to hear the dispute or to grant the relief.

At oral argument, the Court inquired of Government counsel as to exactly how any taxpayer could challenge the accuracy of vault rent during the occupancy of such space. This is a critical question, because the vault tenant certainly cannot be expected to force the issue by refusing to pay rent in order to interpose a defense of prior overpayment. The statutory scheme covering vault rent does not contemplate that the failure to pay rent will be litigated through the ordinary eviction process in the Landlord-Tenant Branch of the Superior Court.[3]

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[3]The Code provides a remedy for the municipal landlord that is in the nature of another, discrete tax and which is far in excess of what an ordinary landlord is entitled to obtain from a non-paying tenant. Instead of granting the District the right to re-occupy the property peaceably or to obtain possession through eviction, the Code allows the District to first levy a "tax" on the entire abutting property (not the vault space) and, ultimately, to sell the property for any amount of money that will cover the rent arrearage and other costs. See D.C. Code § 7-1013(b)(1995). Conceivably, the entire property might be seized over non-payment of a comparatively paltry sum. This could happen entirely outside the court system, there being no requirement of seeking advance judicial approval for the initiation of the levy. See further

The Government gave various responses to the Court's question. First, the Government suggested that the vault tenant could file an unspecified civil action in a Division of this Court other than the Tax Division. The Government did not rely upon any statute that provided such an option. Yet, the Government ultimately resorted to a contention that the Superior Court totally lacks the power to provide refund relief in the absence of a statute that literally grants such authority.

Later in the oral argument, additional representations were made by the Deputy Corporation Counsel who is in charge of the Government Operations Division, and by another supervisory attorney as well. The Deputy and the supervisor argued that there was actually no way of any kind for a taxpayer to demand a refund through court litigation. The Deputy's firm position was, "It's contractual." This was an oblique statement that contract prices (such as negotiated rents) are categorically beyond judicial remedy and can never be questioned.

III. CONTENTIONS OF THE TAXPAYERS

The conceptual emphasis of the taxpayers is that any court having jurisdiction to rule upon the legality of a tax assessment is a court that retains "ancillary" power to resolve all factual

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discussion, infra, in text.

and legal disputes that are dependent upon the adjudication of the tax assessment appeal. In other words, they argue that there is a menu of forms of relief available to the taxpayer, depending upon the facts of a particular case. The choices from the menu would be selected by the Court to correspond to the particular injury that flows from the incorrect or illegal tax assessment.

The Petitioners herein contend that a vault rent refund is an intimate, second layer to the process of obtaining a refund of the real property tax itself. Thus, if an illegal land assessment was used to set the rent level, the only concrete remedy for making the taxpayer-tenant whole is to mandate a refund of some portion of the rent. This is done by inserting the de novo valuation into the prescribed formula for calculating the rent.

In context, the Petitioners have revealed a problem that amounts to a due process issue. They suggest that the retention of vault rent based upon an illegal tax assessment would be, regardless of its label, a "taking" that cannot stand without compensation. The quest for compensation implicates the right to sue.

Lastly, the Court is urged to find that the Code's silence on specific recourse for these unique taxpayers does not mean that due process concerns automatically evaporate.

IV. CONCLUSIONS OF LAW

This Court concludes as a matter of law that the Superior Court does have subject matter jurisdiction over disputes

concerning the refund of vault rent, and that such issues can be included in appeals from real property assessments. The clear connection between the assessment and the setting of the rent level is the primary reason why such litigation belongs in the Tax Division as a practical matter.

Since the Superior Court does have jurisdiction to hear these cases, the only remaining question is whether the Court is acting outside the bounds of its statutory or discretionary power in permitting the vault rent issues to be litigated in the Tax Division. Upon consideration of all pertinent points and authorities, this Court concludes as a matter of law that the litigation of a claim for vault rent is properly maintainable in the Tax Division. This is logical for several key reasons.

First, the appeal of a real property tax assessment is a necessary, threshold issue to any request for refund of vault rent.

Second, a court-ordered rent refund is a form of ancillary relief that can be provided -- and which may be demanded -- in order to give complete relief from the incorrect or illegal tax assessment.

A. **Ancillary Jurisdiction and Concepts of Due Process**:

While the arguments of the parties have spanned numerous subjects, the true nub of these cases is that the Superior Court retains what is known as "ancillary jurisdiction" to grant the refunds in the context of providing full relief to the taxpayers as part of a basic assessment appeal. The District resists this approach and relies upon certain side issues that serve to make

these cases more complex than they need to be.

The principles of ancillary jurisdiction are well-established. The United States Court of Appeals for the District of Columbia Circuit has stated:

> [A]ll courts, absent some specific statutory denial of power, possess ancillary powers to effectuate their jurisdiction. . .

Morrow v. District of Columbia, 135 U.S.App.D.C. 160, 169, 417 F.2d 728, 737 (1969). "Ancillary matters have been broadly defined as matters 'auxiliary, accessorial or subordinate' to the main matter." Id. at 172, 417 F.2d at 740.

There is a four-pronged test for determining whether a court has ancillary jurisdiction, and this test still governs the Superior Court of the District of Columbia.[4] That test is summarized in Morrow as follows:

> [A]ncillary jurisdiction should attach where: (1) the ancillary matter arises from the same transaction which was the basis of the main proceeding, or arises during the course of the main matter, or is an integral part of the main matter; (2) the ancillary matter can be determined without a substantial new fact-finding proceeding; (3) determination of the ancillary matter through an ancillary order would not deprive a party of a substantial procedural or substantive right; and (4) the ancillary matter must be settled to protect the integrity of the main proceeding or to insure that the disposition in the main proceeding will not be frustrated.

Id.[5] Here, the facts easily satisfy all four requirements. These

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[4]See M.A.P. v. Ryan, 285 A.2d 310 (D.C. 1971).

[5]Despite the age of the opinion in Morrow, its impact retains its vitality today. See Oliver v. United States, 682 A.2d 186, 189 (D.C. 1996)(finding that the Superior Court has ancillary power to

consolidated tax appeals present a classic instance of the need to invoke ancillary jurisdiction. This is not a close case. The facts and circumstances that satisfy the four prongs are illustrated as follows.

First, the issue of whether a refund is due is a dispute that arises squarely and exclusively from the property tax assessment that is already subject to appeal.

Second, the refund demand can be adjudicated without any new fact-finding whatsoever. Any fact-finding occurs only with respect to a successful de novo appeal from the underlying assessment itself. Unlike the trials that are typically seen in condemnation cases (where fair market value must be litigated), the amount of the refund (if any) would be determined after trial merely by inserting the de novo valuation of the land portion of the tax assessment into a pre-existing formula. This is a purely arithmetic process that involves no judicial determinations of credibility or weighing of new facts. Naturally, if the taxpayer does not prevail at the trial of the assessment appeal, the bifurcated refund matter instantly becomes moot.

Third, the determination of a refund will not deprive the District of any substantive right, because no landlord has the right to keep rent money that has been overpaid (a fact conveniently ignored by the District as a guiding concept). Moreover, the District has the same right as the taxpayer to appeal

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impose drug testing as a condition of a defendant's release, even though the Code does not specifically enumerate this option in its listing of release conditions).

any aspect of the trial proceedings, if a judgment is ever entered against the District.

Fourth, the ancillary issue of rent refunds must be resolved in order to protect the integrity of the tax appeals themselves. This is because it makes no common sense for a taxpayer to gain relief from an incorrect or illegal assessment while still being required to suffer the consequences that flow from the very same illegality that compels a tax refund. The integrity of any court judgment in the tax appeal is significantly diminished if the Government can reap the financial benefit of its own negligence or wrongdoing that is the basis for a judgment for tax refund.

The need to provide a judicial remedy for overpayment of vault rent is especially critical for those taxpayers, such as eleemosynary entities, that are "tax-exempt" but which are tenants of vault space nonetheless. The Code is silent as to their particular plight. Yet, the District admits that it has agreed to rent refunds for the IMF and also to Woodward & Lothrop Department Store (in another such case related to special considerations of a bankruptcy proceeding).[6]

It is important for the Court to spell out more fully why the invocation of ancillary jurisdiction is compelled by the basic concepts of due process. This relates to the fourth prong of having to insure that the disposition of a successful tax appeal is not frustrated by allowing continuing economic injury from the

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[6]The docket number for the matter involving Woodward & Lothrop was not placed on the record. That case was mentioned by Government counsel at oral argument.

illegal tax to remain unabated.

The due process rights of these taxpayers evolve from those that already relate to the taking of money and property by the Government. The right to basic procedural due process is the Constitutional foundation of the tax appeal system itself. In fact, the law of the District of Columbia (through statutes and case litigation) has firmly established that both taxpayers and landowners do have full rights of procedural due process when their land or money is taken illegally by the Government. For the reasons that follow, the Court is convinced that a taxpayer has a due process right to compensation for overpaid rent, as well as the concomitant right to sue the District in order to enforce this demand.

The entire vault rent scheme in the Code is emersed in the language of taxation, which itself triggers the right to due process. For example, the District's remedy for non-payment of rent is not eviction -- but automatic levy of a punitive tax on the entire property abutting the vault space. This undeniable relationship to taxation also supports the taxpayers basic right to litigate a dispute over vault rent. See further discussion, infra.

Aside from the due process culture of tax appeals, the right to trial and appeal is already well-entrenched where the outright condemnation of realty is concerned.

It is a basic tenet of procedural due process (under the Fifth Amendment) that property cannot be taken from a citizen by the Government without just compensation. See United States v.

Reynolds, 397 U.S. 14, 15-16 (1970); Sittenfeld v. Tobriner, 148 U.S.App.D.C. 113, 115, 459 F.2d 1137, 1139 (1972).

The District of Columbia Court of Appeals has observed, "Where the government takes property by eminent domain, it is required to pay just compensation under the Fifth Amendment. Even absent a statute, the right to interest attaches automatically to the right to an award of damages arising out of condemnation." District of Columbia Redev. Land Agency v. Dowdey, 618 A.2d 153, 164 (D.C. 1992)(citations omitted). All of the facets of procedural due process are reflected in the discrete, local statutory scheme for the institution of condemnation proceedings and the litigation of those matters. See D.C. Code § 16-1311 et seq. (1997).

Furthermore, Fifth Amendment rights apply to the Government's taking of personal property as well. See, e.g., Haldeman v. Freeman, 558 F.Supp. 514, 518 n.11 (D.D.C. 1983)(documents). Money is certainly personal property.

The Court does not endeavor to draw a perfect analogy between the instant fact pattern and the type of "taking" contemplated in classic condemnation cases. There, the Government at least is asserting that it needs the disputed property in order to perform a public function. Here, however, the Government is only asserting a right to keep rent money that allegedly is not owed.

Since neither condemnation of realty nor taxation can escape the guarantees of due process, there is no sound reason why the Government should be able to keep a sum of money that was mistakenly or improperly paid to it, without having to account for

the overage as compensation to the tenant.

The Supreme Court has observed, "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Matthews v. Eldridge, 424 U.S. 319, 333 (1976)(citations omitted). Where vault rent refunds are at stake, there is no better time and place for due process to be provided than the appeal of the underlying tax assessment that controls the entire dispute.

There are other reasons why the Court should exercise its ancillary jurisdiction to the instant cases, so that due process is provided. At oral argument, for example, the Government declined to recognize that vault tenants could apply a credit for overpaid rent when the next rental payments become due in a subsequent year. Moreover, there is no guarantee that a vault tenant would still be paying rent to the Government at a time that is subsequent to any one assessment appeal that is successful.

B. **The Forum of the Tax Division Specifically:** The District appears to premise part of its "lack of jurisdiction" argument upon the portion of the Code that directs all tax appeals to be filed in the Tax Division of the Superior Court.

The Code plainly states, in pertinent part, that the Tax Division "shall be assigned exclusive jurisdiction of -- (1) all appeals from and petitions for review of assessments of tax (and civil penalties thereon) made by the District of Columbia. . . ." D.C. Code § 11-1201 (1995).[7] The District has placed far too much

[7]The remainder of Section 1201 relates to criminal tax cases.

importance on the word "jurisdiction," as relevant case law demonstrates.

Reference in the Code to those matters "assigned" to the Tax Division is no more than a general management tool, to denote a division of labor within a large, unitary court system. This quoted language in the Code has nothing to do with basic judicial power. It merely directs that tax assessment appeals be filed in a particular Division. While prescribing where these particular cases should be docketed initially, the Code does not preclude any other tax-related cases from being litigated in the Tax Division. Ironically, the tax assessment statute itself says nothing about the Tax Division, but merely states that assessment appeals are to be filed in the "Superior Court." D.C. Code § 47-3303 (1997). No section of the Code contains the kind of language of exclusion argued by the District.

In several appellate opinions, the District of Columbia Court of Appeals has recognized that the "jurisdiction" of the Superior Court itself is not limited to particular Divisions within this court system. The concept of a separate kind of "divisional" jurisdiction has been thoroughly discredited by the Court of Appeals, even though the District now seeks to revive it with no points and authorities to support this position. It is instructive to review the extant case law on this topic.

First, in Andrade v. Jackson, 401 A.2d 990 (D.C. 1979), the District of Columbia Court of Appeals determined that a suit to annul a marriage and to declare the existence of a common law

marriage could be - and should be - brought in the Probate Division even though the Code facially provides that the Family Division is the designated Division in which actions to declare marriages void are to be filed. D.C. Code § 11-1101. The Court of Appeals stated,

> While the Superior Court by statute has five divisions, Civil, Criminal, Family, Tax, and Probate, D.C. Code 1973, § 11-902, each division possesses the undivided authority of the Court.

Id. at 993. This is but another way of saying that the Code's references to divisional assignments are inconsequential where the actual "jurisdiction" of the Superior Court is concerned.

The Court of Appeals in Andrade recognized that on one hand "orderly judicial procedure" would be best served if the question of a person's marital status is considered "in the first instance by the division of the Superior Court established for that purpose." Id. (citation omitted). On the other hand, however, the appellate court ultimately found that the involvement of a decedent's estate in the Andrade litigation was a compelling reason for the litigation of the case in the Probate Division. Id.

Subsequently, in Clay v. Faison, 583 A.2d 1388 (D.C. 1990), the Court of Appeals visited this subject for the second time in a controversy concerning whether a judge in the Civil Division had the power to hear a suit to enforce a separation and property settlement that arose in a divorce case previously filed in the Family Division. In Clay v. Faison, the Court of Appeals reiterated, "While the Superior Court is separated into a number of

divisions, 'these functional divisions do not delimit their power as tribunals of the Superior Court with general jurisdiction to adjudicate civil claims and disputes.'" Id. at 1389-90, quoting Andrade, supra, 401 A.2d at 993.

Most recently, in Ellis v. Hoes, 677 A.2d 50 (D.C. 1996), the Court of Appeals reversed the dismissal of a complaint for possession that had been filed in the Landlord-Tenant Branch of the Civil Division, where the action was a common law suit for ejectment. Such an action could have been filed and litigated on a regular Civil Division Calendar. The appellee had somehow convinced the trial judge in the Landlord-Tenant Branch that there was a failure of jurisdiction merely because ejectment is not the same cause of action as the more familiar "summary" matters that are heard in the Landlord-Tenant Branch.

The appellate court noted that an action in ejectment can be brought in either sub-part of the Civil Division of the Superior Court, although certain circumstances may justify transfer to a regular Civil Division calendar (from Landlord-Tenant Branch) if "broad defenses" are involved. Id. at 51. Again, the Court of Appeals relied upon the practicalities of the particular litigation as the basis for examining where the case belonged.

By now it should be clear that any claim that is predicated upon a tax appeal, but which otherwise could be filed anywhere in the Superior Court is a demand for relief that indeed can be included as part of a tax appeal Petition. The jurisdiction of the Superior Court itself is not diminished in any way by this

practical or tactical choice of the protagonist, nor by the Court's own exercise of discretion in keeping the vault rent cases in the Tax Division.[8]

In these consolidated cases, this Court notes that the Petitioners are not making a casual tactical choice. Rather, they are doing the obvious and the necessary. It makes no sense to file a civil action for rescission or restitution that is dependent upon the resolution of an issue that normally is not handled by the Civil Division and where there is an explicit, statutory framework and set of deadlines for litigating the real nub of the case in the Tax Division.

There are several reasons why it is preferable for taxpayers who are appealing their assessments to include the rent refund demands in their tax Petitions.

First, the factual and legal issues of the correctness of the assessment must be decided first, as a necessary prelude to any so-called "contract" dispute that would be raised in a civil action. All assessment appeals are tried by the judges of the Tax Division.

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[8]Ordinarily, a demand for relief should be couched in a formal Complaint. However, under the totality of circumstances in these consolidated cases, the Court can excuse the fact that the demand for rent refund was not filed in a separate Complaint. It is part of a Petition, which is functionally the same vehicle. Moreover, the inclusion of this demand in the Petition was the product of the Government's own initial complaint that the demand was only verbally raised during settlement discussions. The District is fairly on notice of the allegations and the legal basis for the demand for relief in all of these consolidated cases and others as well. The labels used or the terminology used are not critical, because of the historical context in which this controversy has been developing. The parties are under no illusions about the crux of the dispute.

If the trial court determines that there is no legal or factual defect in the assessment, the vault rent dispute totally evaporates.

Second, tax appeals are litigated according to a strict time-table that is prescribed by statute. It is not possible for a taxpayer to opt unilaterally for the comparatively unstructured approach of fully litigating a civil action before deciding whether to file a Petition to appeal the tax assessment. The length of time that might elapse in the separate civil action could overtake the deadline for initiating the Superior Court assessment appeal.

Common sense dictates that a taxpayer should first utilize the route that involves the most stringent filing deadlines, and this is the basic tax appeal.[9]

Third, the right to appeal the tax assessment cannot be exercised unless and until the taxpayer exhausts all administrative remedies as prescribed by statute. This is not true where a civil action is concerned. Thus, if a civil action were to be filed separately from a tax appeal and before the exhaustion of remedies

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[9]Ironically, litigating the refund issue according to the quicker timetable for assessment appeals is a benefit to the District, when compared to ordinary civil litigation. The Code provides a general three-year statute of limitations for seeking credits and refunds of tax overpayments. See D.C. Code § 47-1812.11(b). One of the important purposes for this deadline is "to protect the District against financial instability by setting a date certain by which the District may know the precise extent of its liability for refunds." Kleiboemer v. District of Columbia, 458 A.2d 731, 735 (D.C. 1983). Accordingly, if a taxpayer includes the demand for the vault rent refund as part of the Petition in the assessment appeal, no one can say that the issue has not been raised at the earliest possible time. This is exactly the protection that the District deserves.

had occurred for a tax appeal, the plaintiff could be subject to a motion to dismiss relating to the failure to exhaust the administrative appeal process as to the underlying assessment.

Fourth, cases involving both a direct tax appeal and demand for rent refund are classic instances in which the doctrine of "law of the case" requires that the decision of the Tax Division judge will totally control whether any portion of the rent must be refunded. This factor alone weighs in favor of a single lawsuit to embrace all tax-related issues.

On another note, it is not feasible for vault tenants to seek their day in court by withholding (or not remitting) a portion of future rent (as a credit for overpayment) so as to provoke a civil action in which the overpayment would be raised as a defense. There is no guarantee that the District would ever file a lawsuit against a vault tenant who defaults on rent payments. To the contrary, no lawsuit is contemplated at all in the Code, from the municipal landlord's standpoint. Rather, when a vault tenant defaults on even a penny of rent for a certain minimum period of time, the tenant is then treated as a tax scofflaw.

The resultant sanction is not eviction, but an automatic collections process (labelled as a "tax") that provides for the potential liquidation of the taxpayer's own realty, **as if** the tenant had defaulted on its own property taxes. See D.C. Code § 7-1013(b)(1995). Under these circumstances, the tactic of "self-crediting" overpayments would be a risky and buccaneering manner in which to seek due process of law. The Court could not seriously

expect any taxpayer to engage in this conduct, and the Court would not seriously expect a lawyer to advise a client to do so.

Aside from all of the other reasons that support the right to demand rent refunds in assessment appeals, it must be noted that, vault tenants do not have access to an administrative adjudication forum such as the Rental Housing Commission (relating to residential rents).

On the whole, the District's position on the so-called lack of jurisdiction has no merit.

C. Common Law Availability of Civil Remedy for an Erroneous Rental Rate - Jurisdiction of the Superior Court: This Court does not accept the District's contention that the contractual nature of a vault rent agreement automatically robs the tenant of any right to sue for a refund.

Ordinarily, this Court would not choose to cast these cases in terms of contract law, because the real issue is the narrow matter of the Court's ancillary power to order a refund if the taxpayer prevails in its underlying assessment appeal. However, for the sake of a complete record, this Court endeavors to explain why the "contractual" nature of the rent agreement still yields a due process right to sue the Government for a refund. The District's vigorous invocation of contract law invites the Court to explore the usual method by which a party to a contract can obtain relief from obligations thereunder. The concept that naturally arises is the familiar term of art, "mistake of fact." In these consolidated cases, the mistake of fact can be seen in the form of each

taxpayer's contention that the rent was calculated upon "mistaken" financial information upon which the taxpayer had relied in consummating the contract (i.e. rental agreement). It could be said that the mistaken information was the land portion of the tax assessment -- if it is later found by the trial court to have been incorrect or illegal.

It is important to remember that the end result of a successful Superior Court tax appeal is, in essence, an exercise in re-writing history. Thus, the de novo determination of an invalid tax assessment is by definition the retrospective determination that the rent formula itself was applied to erroneous factual data.

When vault rent agreements are signed, the Government and the taxpayer innocently proceed under the assumption that the tax assessment is factually and legally correct. The taxpayer has no choice but to presume so. The taxpayers and the Government may find out only months or years **after the leases are signed** that the assessments were factually erroneous or illegal. When leases are signed for vault rent, no one can predict whether a tax appeal will ever be filed or whether the Petitioner will prevail. Yet, no taxpayers can be said to have waived their right to initiate assessment appeals (or demand a later rent refund) merely by signing the leases.

The usual method of alleviating a mistake of fact is that the party adversely affected can file a civil action, demanding rescission of the contract, or other equitable relief such as restitution.

The United States Court of Appeals for the District of Columbia Circuit has observed that the concept of unilateral mistake of fact can be the basis for a lawsuit seeking rescission and cancellation of a promissory note, which is but another form of contract. See Ammerman v. Miller, 139 U.S.App.D.C. 188, 192-93, 432 F.2d 621 (1970), appeal after remand, 159 U.S.App.D.C. 385, 488 F.2d 1285, 625 (1973). Furthermore, the federal courts have recognized that restitution for financial loss is an appropriate remedy where a lease is consummated based upon a mistake of fact. See, e.g., Sawyer v. Mid-Continental Petroleum Corp., 236 F.2d 518, 521 (10th Cir. 1956)(involving the return of certain compensatory royalties that were payable to Mid-Continental in lieu of drilling an oil well on an oil and gas lease granted by the Sawyers to Mid-Continental).[10] Petitioners herein do not seek to rescind their entire rental agreements. They only demand the remedy that is tailored to the actual extent of the problem. They are not indulging in overkill.

Here, the Petitioners individually seek to combine the entire controversy into one piece of litigation, rather than filing piecemeal, successive lawsuits in both the Civil Division and the

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[10]The mistake of fact consisted of the failure of Mid-Continental and its negotiating agent to notice certain unusual language in the lease that exonerated them from having to drill a diagonal offset well. Mid-Continental simply failed to read the lease closely. Yet, the Court of Appeals affirmed that party's right to seek restitution of the unnecessary royalties. If a party to a contract can recover royalties that were overpaid because of its own negligence, there is no reason why a contracting party cannot recover rent overpayments that were based upon an inflated or illegal tax assessment that could not have been controlled by the tenant.

Tax Division.[11]

The Government essentially has argued to the Court that the District has the right to keep rent that it collected, even when the collection was based upon mistaken or illegally derived information as to land assessment. This would be a startling instance of unjust enrichment, and the District has not identified any public policy to be served by allowing the Government to benefit from such a windfall. The Government is tightly focused on the contention that the taxpayers have no permanent property interest in the vault space itself. This is correct. However, the taxpayers are avenging their interests in the return of their own money. They do not equate a refund of overpaid rent with a property interest in the vault space itself. Thus, the District's property interest concern is not pertinent.

D. **Silence of the Code on the Remedy of a Refund**: The District has emphasized that the Code itself does not specifically provide a remedy for alleged overpayment of vault rent, where the overpayment is premised solely on a disputed, underlying assessment. This observation easily flows into the matter of ancillary jurisdiction as the means through which this silence is addressed. Since the silence of the Code on the specific remedy of

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[11]Unless the Petitioners include the demand for rent refund in their basic tax assessment appeal, they still could be criticized by the Government. For example, if they wait for the completion of their tax appeals before suing the District for restitution, they could be accused of allowing judgment interest to mount up during the period in which their tax appeals were pending -- failing to mitigate liability of the Government on the interest relating to the rent refund itself.

a refund is so central to the District's position, it is useful to explore this subject in more detail.

The Court pauses to note that the only statutory mention of a "refund" process of any kind relates to refunds that may be due if the taxpayer "vacates" the rented vault space "voluntarily or involuntarily" before the end of the lease period. See D.C. Code § 7-1010(b)(1995). These are the only circumstances recognized explicitly in the code as triggering factors for a rent refund. These circumstances are irrelevant in the instant cases.[12]

The Government urges the Court to infer that the Council's silence is proof that the Legislative Branch did not intend for a renter of vault space to have any right to complain about the correct or legal calculation of the vault rent. This conclusion is too momentous to extract from the void.

Moreover, silence can be ambiguous, and the silence here just as easily could be construed as the declination to prohibit common law remedies for rent overpayment.

The mere fact that the Code does not recite such a remedy does not mean that either due process or the common law do not apply to these cases. For example, the common law applies to many aspects of how the District of Columbia Government conducts itself, as to torts and other issues. Yet, the Legislative Branch certainly does

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[12]The District has not relied upon any legislative history that would demonstrate that the Council had considered the matter of potential problem of overpayments for any other reason, but that it had elected not to permit such refunds. In fact, no party in these cases has hinted that any legislative history would resolve the instant dispute. The Court has found none.

not attempt to engraft into the Code itself all conceivable facets of common law each time it amends the Code, or when it enacts a new section or subsection of one of its Titles. Thus, when the common law historically provides a certain remedy for a particular contract problem or for any other harm, it is not important that the Code fails to recapitulate such details.

Litigation in this jurisdiction is not conducted under the Civil Code system under which all law (rights, remedies, and exceptions) is published and restated ad nauseam in the statute books as the sole source of whatever the law provides. Thus, the silence of the Code on rent refund procedures is not significant.

The case law relating to ancillary jurisdiction amply illustrates why the right to due process can never depend upon whether a legislature has articulated in advance that due process should apply to a particular scenario.[13]

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[13]The silence of the Code as to the right to seek rent refunds should not be surprising to anyone who is familiar with the setting in which tax appeals are litigated in the District of Columbia. Only in 1997 did the District resist the concept that it owes refunds to vault tenants who are successful in tax appeals. Until then, refunds had been negotiated as a matter of routine. Historically, unlike what is seen in general civil litigation, local tax appeals have been filed by a rather small sub-set of lawyers and law firms within the bar, and this type of litigation typically is conducted by only a few lawyers on both sides. Thus, if any parties who normally litigate these cases had ever thought that amending the Code was the only method of obtaining these refunds, it is highly unlikely that this matter would have remained unaddressed (one way or the other) by the Council for so many decades.

The Government has not provided a convincing explanation as to why it has waited until now to complain about providing refunds and to repudiate its past practices of negotiating them. On the other hand, Petitioner's counsel related at oral argument that the impetus for this dispute is rooted in the District's doubling of

In any case in which ancillary jurisdiction has been invoked, it happened (by definition) because someone had a right to due process that could not be gleaned from the face of any statute.

In conclusion, a claim for refund of vault rent is a dispute over which the Superior Court has jurisdiction. These matters are properly brought before the Tax Division in the appeals of the underlying assessments. Moreover, judicial economy and other considerations are best served by resolution of these disputes within the Tax Division as opposed to the Civil Division. The parties can and should consider the issue of rent refunds as part of their overall mediation of these cases.

WHEREFORE, it is by the Court this 17th day of July, 1998

ORDERED that the Motions to Dismiss are hereby denied in all of these consolidated cases; and it is

FURTHER ORDERED that counsel in all of the consolidated cases shall appear before this Court for a status hearing on Monday, **September 14, 1998 at 9:30 a.m.** on the regular tax calendar for the purpose of establishing mediation dates or a schedule for further litigation as appropriate in each case; and it is

FURTHER ORDERED that the Court intends that the decision set forth herein on the merits should apply equally as a controlling decision in any and all other cases assigned to this Court wherein

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the rental rate within the last several years. Until recently, he opined, the financial impact of vault rent was not enough to warrant any controversy relating to refunds. The Government did not rise to dispute this theory.

the identical refund issue is pending for adjudication. To effectuate the intent of the Court in such cases that are not formally consolidated with those herein, counsel for Petitioners in the other cases may file appropriate motions for entry of rulings, citing the instant Memorandum Opinion and Order.

Cheryl M. Long
Judge

Copies mailed to:

David Saffern, Esq.
David Fuss, Esq.
Wilkes, Artis, Hedrick & Lane
1666 K Street, N.W., Suite 1100
Washington, D.C. 20006

Joseph F. Ferguson, Esq.
Assistant Corporation Counsel
441 Fourth Street, N.W., Room 6N75
Washington, D.C. 20001

Claudette Fluckus
Tax Officer [FYI]