SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

LOREN KIEVE and ANNE H. KIEVE,

Petitioners

v. Tax Docket No. 7254-96

DISTRICT OF COLUMBIA

Respondent

MEMORANDUM OPINION AND ORDER

Petitioners herein have filed a Motion for Partial Summary Judgment, as part of their appeal of income tax assessments for Tax Years 1991, 1992, and 1993. The District opposes this Motion, and counsel submitted additional pleadings following oral argument, as directed by the Court.

The key issue raised in the Motion is, as the District describes it, a "frontal attack" on the authority of the District of Columbia Council to enact legislation to eradicate the effects of an appellate court ruling that recognizes and permits the use of a certain tax credit. Petitioners were adversely affected by the legislation, because they desire to claim this disputed credit in order to lower their tax liability.

The heart of the Motion is Petitioners' contention that the legislation is void because of the Mayor's failure to comply with

a certain statutory requirement of providing an explanatory letter to the Council when transmitting proposed tax legislation.

After a full review of the law and the record, this Court is compelled to deny the instant Motion, for the reasons that are set forth as follows.

I. BACKGROUND OF THE CASE

This case essentially concerns the District's decision to obtain the return of a refund that it had already issued to these taxpayers. The taxpayers contend that they are entitled to keep the money.

Petitioners filed a Petition in which they seek a refund of the tax deficiency assessment that they paid and declaratory relief in the form of a ruling that the statute under which the District assessed the deficiency is void for lack of compliance with D.C. Code 1-§ 243. This statute requires that when the Mayor submits proposed revenue legislation, such a bill must be accompanied by a "detailed statement with supporting data concerning the direct and indirect impact of the measure or bill upon those taxpayers who will be directly or indirectly affected by the measure or act." D.C. Code § 1-243 (1981).

Petitioners also seek declaratory relief in the form of a ruling that the Department of Finance and Revenue has denied petitioners "equal protection" of the laws due to the Department's alleged refusal to divulge whether the statute in question has been

applied to other taxpayers.[1] The equal protection issue effectively has been eliminated as part of this Court's ruling denying a Motion to Compel certain documents, finding that any alleged different treatment of other taxpayers is not relevant to whether these particular petitioners are liable for their own taxes.

The crux of the controversy is that Mr. Kieve is an attorney whose income tax liability (jointly with that of his spouse) was subject to the provisions of legislation apparently enacted in response to the appellate ruling in District of Columbia v. Califano, 647 A.2d 761 (D.C. 1994).

The taxpayer in Califano was a local attorney who worked as a partner for the Washington office of a law firm based in New York. As a partner, he paid his share of the New York City unincorporated business tax (UBT). He applied this sum as a credit against his District of Columbia income tax.

In Califano, the Court of Appeals held that the UBT is an individual income tax for which the appellee was entitled to such a "credit" on his District of Columbia income taxes under D.C. Code § 47-1806(a). Id. at 764.

The legislation that is the basis for the deficiency

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[1]Petitioners also included a demand for punitive damages. However, in its order of June 11, 1997 (denying a Motion to Compel production of certain documents), this Court noted that the Superior Court does not have authority to grant compensatory or punitive damages in appeals of tax assessments. While the District has not yet filed a Motion to Dismiss this aspect of the Petition, judicial examination of that issue was necessary to the adjudication of the Motion to Compel.

assessment is a 1995 bill, enacted by the District of Columbia Council, that provides in pertinent part that no "unincorporated business tax" paid to another jurisdiction "shall qualify as a credit under this section" beginning with "any taxable year after December 31, 1990." 42 D.C. Reg. §§ 114, 3684, 3697 (1995).

The prior version of Section 1806.4 merely referred to "income tax" paid to another jurisdiction, with no distinction being made as between so-called "unincorporated business tax" or any other form of income tax. See Califano, 647 A.2d at 764.

In other words, the new legislation was aimed specifically at neutralizing the effect of the appellate holding in Califano.

The Petitioners herein filed amended District of Columbia income tax returns for the years 1991, 1992 and 1993 on October 5, 1994. They assert that they did so in reliance upon the decision in Califano. They received refund checks on or about November 2, 1994.

On December 18, 1995, the District demanded in writing the return of such refunds, pursuant to the 1995 legislation that effectively abolished this UBT credit. The sums demanded were repaid, albeit (in the Petitioners' terms) "under protest."[2]

Mr. and Mrs. Kieve contend that the District of Columbia was not entitled to issue a deficiency in its effort to regain the refunded money pursuant to the new legislation. They say that the

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[2]Payment of an entire, disputed amount is a pre-requisite for maintaining a tax appeal in Superior Court. D.C. Code § 47-3303 (1981).

new tax law itself is invalid.[3]

II. MATERIAL FACTS NOT IN DISPUTE

The material facts that are not disputed embrace (1) recitation of the legislation that is the subject of this litigation and (2) the Mayor's transmittal letter that accompanied the proposed legislation.

The legislative chronology is summarized as follows.

On December 27, 1994, Mayor Sharon Pratt Kelly approved the D.C. Resident Tax Credit Emergency amendment Act of 1994. This was passed by the Council. 42 D.C. Reg. 13 (1995). This legislation was effective for 90 days from the date of approval.

On January 18, 1995, the Mayor approved the D.C. Resident Tax Credit Emergency Temporary Amendment Act of 1994, which was also passed by the Council. 42 D.C. Reg. 518 (1995). This legislation became effective for a period of 225 days, beginning on March 23, 1995, as D.C. Law 10-397.

Sections 2 and 3 of both the Emergency Act and the Temporary Act were identical and provided, in pertinent part, as follows:

> Sec. 2 Section 5(a) of title VI of the District of Columbia Income and Franchise Tax Act of 1947, approved July 16, 1947 (61 Stat. 345; D.C. Code § 47-1806.4(a), is amended by adding a new sentence at the end to read as follows:

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[3]In their Motion for Partial Summary Judgment, filed on May 28, 1997, the Petitioners assert that the 1995 bill was "constitutionally" flawed because the Mayor's letter accompanying the proposed legislation did not comport with the Code requirements for such a referral. See further discussion, infra, in text.

> "No . . . unincorporated business tax . . . or any tax characterized as such by the other taxing jurisdiction, even if applied to earned or business income, shall qualify as a credit under this section."
>
> Sec. 3. Section 2 of this act shall apply to any taxable year beginning after December 31, 1990.

42 D.C. Reg. §§ 2-3, 13 (1995); 42 D.C. Reg. §§ 2-3, 518 (1995).

On July 13, 1995, the Mayor approved D.C. Law 11-94, the Omnibus Budget Support Act of 1995. 42 D.C. Reg. 3684. The Council later renumbered the law to D.C. Law 11-52, and it became effective as permanent legislation on September 26, 1995. 42 D.C. Reg. 5604. Section 114 of this permanent legislation combines the language of the previously-cited enactments to result in the addition of a new sentence at the end of the afore-cited Section 5(a). It reads, in pertinent part, as follows:

> Beginning with any taxable year after December 31, 1990, no . . . unincorporated business tax . . . or any tax characterized as such by the other taxing jurisdiction, even if applied to earned or business income, shall qualify as a credit under this section.

42 D.C. Reg. § 114, 3684, 3687 (1995).

The Emergency Act was accompanied by a transmittal letter signed by Mayor Sharon Pratt Kelly, as well as a draft resolution.[4]

The Mayor's two-page letter, addressed to the Chairman of the Council, commenced with the explanation that the Mayor was

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[4]A copy of the letter is found in the record in several places, such as Exhibit L attached to the Petition, and as an attachment to the Motion for Partial Summary Judgment.

transmitting "draft emergency, temporary, and permanent legislation" that was specifically designed to counter the effects of the Court of Appeals decision in District of Columbia v. Califano.

In further discussion of the underlying concepts of the proposed law, then-Mayor Kelly wrote the Chairman:

> The Department of Finance and Revenue has not permitted a dollar-for-dollar tax credit against the resident-partner's District of Columbia individual income tax liability under D.C. Code s 47-1804.(a), because a partnership tax paid in another jurisdiction is not considered an individual income tax by the Department. Therefore, the Department has only permitted the taxpayer to take a tax deduction for partnership taxes paid; a less generous reduction in tax liability than the dollar-for-dollar tax credit sought by the plaintiffs in Califano. As a result of the Califano ruling, the District of Columbia will have to refund money to the resident-partners in that case who were given a tax deduction instead of a tax credit; the refund by the District to the Califano litigants will be approximately $80,000. However, the decision is expected to cost the District approximately $1 to 1.2 million annually when applied to other persons similarly situated and will require the District to refund as much as $3 million for taxes collected during the past three years.
>
> The draft legislation I am transmitting to you today would reverse the effect of the court's ruling as applied to those tax years beginning after December 31, 1990. The draft legislation clarifies the current statutory language by explicitly stating that unincorporated business taxes (or similar taxes) paid in another jurisdiction by a D.C. resident cannot be taken as a credit against the resident's individual income tax liability. This interpretation has been applied by the District since tax years beginning after December 31, 1990.

> The limited retroactive measure is proposed to prevent a potential revenue loss resulting from the Califano ruling by barring the individual income tax credit for those taxpayers who are within the statutory period to amend their returns for the purpose of seeking a refund based on Califano.

Letter of Mayor Kelly to Council Chairman Clarke of November 22, 1994 at pages 1-2 [underlining in original].

III. ANALYSIS OF THE ISSUES AND CONTENTIONS OF THE PARTIES

The Petitioners assert that the disputed legislation (in all three of its forms) is void because the Mayor's letter did not comply with the requirement of D.C. Code § 1-243. They argue that the Mayor's letter did not sufficiently set forth how the legislation would impact persons such as themselves, i.e. those who had already received refunds and who retroactively would be identified for attempts to collect repayment of the refund. They state in the Motion for Partial Summary Judgment, "There is no detailed statement of anything in the Mayor's letter. There are no supporting data. There is no mention of the direct and indirect impact on affected taxpayers like the petitioners." Motion at 7.

The two pivotal contentions briefed and argued by the parties are: (1) the District's assertion that the Petitioners lack standing to complain about the level of detail or lack thereof in the Mayor's letter; and (2) the Petitioners' argument that the very act of passing this legislation was an impermissible "violation" of a "Charter Amendment" to the Home Rule Act, and that any such amendment may only be effectuated legally by directing voting of

the citizens of the District of Columbia.

Based upon the following important considerations, this Court concludes as a matter of law that the Petitioners do not in fact have standing to complain about the level of detail or content of the Mayor's letter. Further, the Court concludes as a matter of law that the passage of this legislation did not constitute an impermissible amendment to the Home Rule Act, and that it does not contradict any "Charter Amendment" of the Act.

1. **The Standing Issue**: It is useful to clarify what the "standing" issue really is and what it is not.

As a general, threshold matter, a taxpayer certainly has standing to challenge the validity of a tax if he or she is adversely affected by it. The District does not appear to dispute this fundamental principle. However, the District's articulation of the standing issue is a more sophisticated matter.

In the unique context of the instant case, the standing issue is the question of whether an individual taxpayer is the real party in interest, for whose benefit the statute exists and who should have the right to complain if the statute is violated. Here, the statute that was allegedly violated is <u>not</u> the tax statute itself. Rather, the statute about which the Petitioners complain is Section 243 of Title 1 of the D.C. Code. It relates to the process and format for the transmission of proposed legislation from one branch of government to the other. Case law on standing to challenge tax statutes, as such, are unhelpful to the Petitioners.

Having drawn this distinction, the Petitioners' lack of standing to complain about the content of the Mayor's letter is rather obvious. There is no legislative history on this subject, undoubtedly because the relevant principle is something that is so basic that it need not be formally announced in legislative history. That basic principle is the concept that the transmission of proposed legislation is strictly the business of the sender and the addressee, i.e. the Mayor and the District of Columbia Council.

Undoubtedly, the common sense purpose of requiring the Mayor to provide explanation for proposed legislation is to give the Council an introductory understanding of why any change or addition to the Code is needed. A proposal for changing the Code is such a serious matter that it should not appear in the mail, mysteriously, as a non-sequitur. The use of transmittal letters is a standard procedure throughout the business world, when a new matter is being proposed in written form from one entity to the other. Thus, the mandate for a Mayor's letter is actually rather routine, although the Petitioners seek to inflate its importance.

The real party in interest is the Council of the District of Columbia. If the Mayor does not provide sufficient detail in the Mayor's letter, the Council's remedy is either to ignore the proposed legislation, or to ask for more substantiation through staff correspondence, hearings or otherwise. These choices of how to react to a letter of transmittal are squarely within the prerogative of the legislative branch. They are not the business of individual citizens.

This Court, at oral argument on this Motion, directed the parties to perform additional research, in order to advise this Court as to whether there is any other jurisdiction in the United States that grants to taxpayers or any citizens the right to veto the sufficiency of a legislative transmittal letter from the relevant Chief Executive, such as a governor. Neither party in the instant case could find such an example. The Court has not found such an example.

It is difficult to envision the United States Congress creating a right for taxpayers of the District when such a right does not exist for any other American citizen. Clearly, there is no such right that is actionable against the President of the United States where federal taxes are concerned.

Finally, it is important to note that the Code does not require the Mayor's transmittal letter to be published in the D.C. Register. This fact is one of the most practical indicators of the fact that Section 243 was not designed to make the Mayor's letter a form of notice to taxpayers. This is significant, even though the Register does contain publication of notices of proposed legislation itself. Common sense dictates that if the intent of Congress was to force the Mayor to use such a letter as a vehicle for addressing the concerns of taxpayers, the Congress would certainly have imposed a publication requirement.

The District argues that the United States Congress, in enacting Title 1 of our Code, logically could not have intended to constrict the ability of the Council to change the tax laws by

allowing gadfly lawsuits to raise complaints that an individual citizen's personal plight was not addressed in a Mayoral transmittal letter.[5] Since taxpayers can be presumed to take positions in opposition to any increase in tax liability, such a system would virtually guarantee that no such changes could ever be made to our tax code. The Court agrees with the District that the Congress could not have intended to grant the citizenry such a wholesale vice grip on the tax code.

Even if this Court were convinced that the Petitioners have standing to complain about the sufficiency of the Mayor's letter, this Court finds beyond any doubt that the letter does comply with Section 243.[6]

That Section plainly does not require that individual scenarios be set forth, so that all possible ramifications of the law would be spelled out or predicted. The Code only mandates that the Mayor's letter contain data "concerning" the impact upon taxpayers.

The word "concerning" is very broad. It allows and invites the Mayor to exercise his or her own discretion in determining how much detail is sufficient to illustrate the justification for the proposed law and the likely impact on taxpayers. Potential

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[5]The Petitioners, of course, are certainly not gadflies. Their concerns are legitimate and earnest.

[6]Recognizing the concept of separation of powers, it is not the Court's place to pass judgment on the sufficiency of the Mayor's letter. However, since there may be an appeal in the instant litigation, it is preferable for the trial court to make comprehensive, alternative rulings to avoid any unnecessary remand, in the event of error.

episodes that are idiosyncratic to individual taxpayers need not be anticipated or eliminated in a mere letter.

The content of the Mayor's letter in the instant case is more than sufficient to comply with Section 243. The Mayor cited facts and figures "concerning," for example, how much money is or would be lost by the District annually without the proposed change in the Code. Inversely, this translates to an estimate of how much money the affected taxpayers, collectively, have been able to save (or would be able to save) as to their tax liability. The letter is informative and sends the fundamental message of why the Mayor believed the new law would serve the best interests of the District. This was an issue of foreclosing a particular type of fiscal loss, and the need for the legislation as a policy matter was articulated clearly and concisely.[7]

The Court is unimpressed with Petitioners' argument that the explanations on the face of the Mayor's letter are insufficient to put the Petitioners on notice as to how they would be affected by the new law. The Petitioners do not need any further explanation from the Mayor as to what the impact really is. They are in the perfect position to note that the legislation is designed to be retroactive (clearly a red flag for Mr. and Mrs. Kieve), and that their future tax liability probably will be higher because of the elimination of the New York tax as a credit, rather than a deduction.

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[7]This Court certainly will not intrude into policy issues surrounding the merits of the legislation, because that underlying policy issue is not appropriately before this Court.

The Kieves, like all other taxpayers, can simply do their own arithmetic, to figure out more precisely the dollars and cents impact of this new law on their personal finances. They should not be heard to pretend that they are incapable of doing so.

The Petitioners have proffered a personal wish list of what they believe should be included in a Mayor's letter that accompanied this legislation. They say, for example, that the letter should have included facts and figures on such topics as: "how many taxpayers would be affected by it;" " how the legislation would work in actual practice;" and "an estimate of the number of taxpayers that would actually file amended returns based on the Califano decision."[8]

Many of the topics suggested in this list manifestly have no bearing on the tax liability of the Petitioners. For example, their own tax liability is not affected by the raw number of other people who might otherwise attempt to use the forbidden tax credit. Moreover, when they complain that the Mayor must announce how the elimination of the credit will "work" in actual practice, they are suggesting that they cannot figure out the obvious: that they can no longer rely on the old deduction as against taxable income.

The whole premise of the Petitioners' case is that the Mayor's letter does not suit their particular taste and, therefore, any tax laws that were enacted because of this letter are automatically void. This is not an objective standard by which to void a

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[8]The entire list of topics appears in Petitioners' Reply to the District's Opposition to the Motion for Partial Summary Judgment, at 9-10.

statute. Thus, the Court must deny the instant Motion.

In their Reply to the District's Opposition, the Petitioners make a fatal admission. They state, ". . . we would not presume to tell the District how it should comply with 1-243."[9] If the Petitioners are not prepared to "presume" to tell the District how it should comply with Section 1-243, then the Court should likewise not presume to do so. Yet, this is exactly what the Petitioners are attempting to achieve through this lawsuit. The Court would not be justified in dictating details that the Petitioners are reticent to impose.

The Petitioners have not come forward with any convincing arguments to counter the District's position.

2. **The Charter Amendment Issue:** Relying on their generalized standing to contest the validity of the income tax laws of the District, the Petitioners contend that the disputed legislation was accomplished through an unlawful process that impinges upon the integrity of Home Rule.

Petitioners characterize the disputed legislation as an act of the Council passed in contravention of the [Home Rule] Act, rendering it void. This theory is woven by the Petitioners as follows.

The Petitioners rely upon a provision of the Code that states, "The Council shall have no authority to pass any act contrary to the provisions of [the Home Rule] Act." D.C. Code § 1-

[9]Petitioners' Reply, at 9.

233(a)(1981). Another one of the so-called "Charter Amendments" to the Home Rule Act provides:

> To the extent that any provisions of this Act are inconsistent with the provisions of any other laws, the provisions of this Act shall prevail and shall be deemed to supersede the provisions of such laws.

D.C. Code § 1-208(a)(1981).

The Petitioners appear to argue that because Section 243 of Title 1 is also one of the so-called "Charter Amendments," Section 243 must somehow "supersede" the tax law that is the subject of this litigation.

This logic is faulty, because the tax law itself does not in any fashion purport to eliminate the requirement of the Mayor's transmittal letter. The tax law that is in dispute is not a piece of legislation which, by its own terms, is "inconsistent" with Section 243.

This litigation is not about a law that collides with Section 243 or which purports to change it. Rather, this litigation focuses upon a single, discrete action by the Mayor that assertedly does not comply with Section 243. This is an entirely different kind of problem or issue. They must not be confused.

The proposed, new legislation could never "supersede" the amendments to the Home Rule Act, because Section 243 of Title 1 is not a tax law.[10]

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[10]The District of Columbia Court of Appeals has emphasized that the Home Rule Act is "in the nature of [a] constitutional provision[] . . . and cannot be amended or contravened by ordinary legislation." Convention Ctr. Referendum Comm. v. District of Columbia Bd. of Elections & Ethics, 441 A.2d 889, 915 (D.C. 1981).

This theory put forward by the Petitioners may, in the end, be no more than a tactic for evading the fact that they have no standing to complain about the Mayor's compliance with Section 243. This approach has no merit.

IV. OTHER MATTERS

Early in this litigation, Mr. Kieve informed the Court that there were other issues that he and his Co-Petitioner intended to brief in another dispositive Motion. While it is generally preferable for all "dispositive" issues to be litigated as a group, the Court nonetheless permitted the Petitioners to brief and argue the instant Motion, with the understanding that other issues would be addressed separately.

The Petitioners have alluded to the applicability of another case that was being litigated in the Tax Division, also challenging the same legislation.

In an opinion of August 18, 1997, the Hon. Eric Washington decided the case of McAvoy v. District of Columbia, Tax Docket No. 6368-95. In that opinion, Judge Washington declared that the retroactivity provision of this same, disputed tax law was unconstitutional. Judge Washington ruled that the retroactivity clause violated the taxpayers' right to due process.

In the instant case, the Council was not attempting to amend the Home Rule Act in any fashion at all. The provisions of Section 243 still stand. Petitioners focus upon the Mayor's letter as the fatal problem with the new tax law. Yet, the Mayor's letter is not a piece of legislation. For this additional reason, the warnings in Section 208 are irrelevant to the instant case.

If the Petitioners herein desire to rely upon Judge Washington's ruling, they may incorporate their arguments into a Supplemental or Second Motion for Partial Summary Judgment.

The Court will set a deadline for the filing of any further dispositive motions by any of the parties in the instant case.

The issue in McAvoy may or may not be the only remaining matter that is appropriate for summary disposition. However, the Petitioners must include in their next pleading all legal issues that they desire to raise. The Court will not entertain a third dispositive motion from the Petitioners.

WHEREFORE, it is by the Court this 6th day of February, 1998

ORDERED that the Petitioners' Motion for Partial Summary Judgment is hereby denied; and it is

FURTHER ORDERED that any party desiring to file an additional Motion for Partial Summary Judgment shall file such pleading no later than **March 31, 1998**. Any opposition pleadings shall be filed according to the requirements of the Rules. Courtesy copies shall be provided to chambers upon the filing of any such motions and opposition pleadings. The Court will schedule an oral argument, upon the filing of any Opposition, on a date convenient for the parties; and it is

FURTHER ORDERED that the instant decision denying the Petitioners' Motion for Partial Summary Judgment shall not be effective as a final order of this tax appeal, because it is not

yet clear whether the Petitioners may prevail on a different theory or argument that is yet to be briefed.

Cheryl M. Long
Judge

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