SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

DISTRICT PAVING CORP.

v. Tax Docket No. 7268-97

DISTRICT OF COLUMBIA

ORDER

Following the issuance of a decision on the merits of this case, the Court now must adjudicate the contested Motion for Entry of Judgment. This particular Motion was filed by the Petitioner for the purpose of stating the precise amount of the judgment. This filing was directed by the Court.

Based upon the following analysis of the points raised by the District in opposition to the Motion, the Court finds that the taxpayer's articulation of the correct amount of the judgment is meritorious. Judgment will be entered herein.

The Court will address the contested points separately as follows.

Correction of the Memorandum Opinion. The taxpayer has recognized accurately that there is an inadvertent error in this Court's Memorandum Opinion that was filed on April 25, 1999. The Court herein will correct the Opinion to reflect that the taxpayer is entitled to a refund for the three-year period preceding, not "following" the date of October 22, 1996.

Basic Entitlement to Interest. In its Opposition to the Motion for Entry of Judgment, the District squarely contended that the taxpayer in this case is not entitled to an award of any interest at all. This Court had awarded interest "at the statutory rate until paid." For the following reasons, the District's position is mistaken.

In a nutshell, the District assets that this taxpayer is not entitled to interest because of the prohibition against interest on refunds grounded upon tax exempt sales. The District cites only D.C. Code 47-2006 only generally for this proposition.

The Petitioner has quoted the Code in its full context, and a fair reading of the statute yields only the principle that interest is not payable on refunds for taxes that incorrectly imposed for sale of a certain type that is not relevant in the instant case.

Section 2006 reads in pertinent part: "The exemption provided for in §47-2005(19) shall apply to sale made on or after January 1, 1978. Any tax collected by the District of Columbia from a vendor on **such exempt sales** and any reimbursements collected by a vendor from purchasers **on such exempt sales** shall be refunded in accordance with §47-2020; provided that no interest shall be allowed or paid on any amount refunded pursuant to this section. [Emphasis supplied]"

The references quoted above as to "such exempt sales" clearly relate specifically to the exemption found in subsection 19. That subsection exempts from sales tax the sale of food and drink at senior citizen residences to residents, employees, and guests of residents. This class of sales is not involved in the instant case at all.

The Petitioner correctly points out that the Code contains no broad disallowance of interest under D.C. Code §47-2020. To the contrary, this law explicitly refers to refunds that are made pursuant to an application for relief from any "tax, penalty or interest complained of . . . " D.C. Code §47-2020(c).[1]

[1] Historically, the Court of Appeals has never recognized a broad prohibition against interest on refunds of exempt taxes, but has recognized interest as an integral part of complete relief from unlawful collection of taxes. *See, e.g. District of Columbia v. Acme Reporting Company*, 530 A.2d 708 (D.C. 1987)(refund with interest ordered by the Court of Appeals as to taxes on reporting services).

Scope of Entitlement to Refund. The District argues that the amount of refund in question is less than the basic refund that was ordered by this Court. In its Opposition to the instant Motion, the District contends, "Although the amount sought in its petition totaled $27,977.69, petitioner requested a refund of only $17,117.69 ($8,193.66 from PEPCO, $8,924.03 from Washington Gas) in its filing with the District's Audit Division. (Petitioner filed a refund request with the District for only one of two locations; in the petition filed with the Tax Division, it claimed a refund for both)." Opposition at page 1.

The District does not cite any legal points and authorities to support its implicit argument that full relief for denial of an exemption is limited to the dollar amount that was originally cited as the measure of damages at the administrative level. Here, there is no doubt that in this de novo appeal, the taxpayer explicitly sought the full amount of the refunds in its Complaint that was filed in the Civil Division, later certified to the Tax Division. The District has always been on notice of the scope of the problem in the Superior Court litigation. Moreover, the problem of denial of exempt status is much broader, inherently, than the appeal of a tax assessment that is discretely tied to only one period of time. Moreover, there is no

administrative body to whom a demand for exempt status must be brought in order to exhaust explicit administrative remedies as a prerequisite to a Superior Court Appeal. An exemption case is a precise analog to an appeal of real property taxes. There is no such thing as being partially entitled to an exemption. By definition, a tax exemption is total shield from taxation. Thus, any tax that was collected in derogation of a proper exemption is tax that must be refunded in order to provide complete relief.

Here, the Petitioner has submitted all invoices for taxes that were paid pursuant to the exempt status for which the taxpayer was qualified. This is the proper measure of damages, to which the Court must add interest.

WHEREFORE, it is by the Court this 8th day of August, 2000

ORDERED that the Motion for Entry of Judgment is granted; and it is

FURTHER ORDERED that this Court's Memorandum Opinion and Order filed on April 25, 2000 is hereby amended to reflect the following correction: on page 27 the phrase "for the three-year period following the date of October 22, 1996" is stricken and the phrase "for the three-year period preceding the date of October 22, 1996" is substituted therefor; and it is

FURTHER ORDERED that judgment is hereby entered against the District of Columbia in favor of District Paving Corporation in the amount of $27,977.69 for discrete refunds of taxes, plus the sum of $4,249.54 for discrete interest on such refunds prior to appeal of the denial of refund, for a grand total of **$32,227.23**; and it is

FURTHER ORDERED that post-judgment interest on the grand total amount shall accrue at the statutory rate until paid, commencing with the docketing date of the instant order.

Cheryl M. Long
Judge

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

DISTRICT PAVING CORP.

v. Tax Docket No. 7268-97

DISTRICT OF COLUMBIA

MEMORANDUM OPINION AND ORDER

This litigation presents a case of first impression, focusing upon three significant issues affecting collection of gross sales tax: (1) whether the taxpayer (rather than exclusively the vendor) has any standing to request a refund of gross receipt taxes and to appeal the denial of such request; (2) whether an unsworn request for refund can be cured by the subsequent submission of a written oath; and (3) whether statutorily exempt purchases of utility power for manufacturing purposes which are manifestly not for "resale" may be subject to refunds where the taxpayer had not yet acquired an exemption certificate prior to those discrete sales.

In this tax appeal, the Petitioner seeks a refund of certain sums ($29,920.29) that were paid as gross sales taxes, for the period of November, 1991 to August, 1995.[1]

The Petitioner herein is unquestionably engaged in the

[1]Such taxes are sometimes known as "gross receipts" taxes.

business of manufacturing asphalt. The purchases upon which the taxes were collected were the sales taxes imposed upon certain of the Petitioner's purchases of gas and electric power from two local utility companies, Washington Gas Light Co. and Potomac Electric Co. (PEPCO). The utilities had collected the taxes as part of their regular billings for utility service.

The crux of Petitioner's appeal is that its particular business activity is statutorily exempt from taxation of certain purchases and that no certificate from the Department of Finance and Revenue (hereinafter "DFR") was needed at the time that the disputed taxes were collected. Petitioner relies upon the three-year statute of limitations for demanding refunds, retroactively from the date of actually obtaining an exemption certificate.

The District opposes the instant Motion and seeks summary judgment in favor of the Government. The key contentions of the District are: that Petitioner (as a non-vendor) has no standing to seek a refund of this particular kind of tax; that the request for the refund is facially defective because it was not initially submitted under oath; and that the taxpayer's failure to produce a DFR "resale" exemption certificate at the time of each sale precludes any refund as a matter of law.

This Court has parsed all relevant statutes and applicable case law, from both the District of Columbia and from Maryland. This is a case of first impression, and the Court herein has attempted to afford the Government a degree of deference as to how it administers its own statute. However, in light of due process

considerations and instructive common law from Maryland, this Court is constrained to rule in favor of the taxpayer on all issues.

Based upon the undisputed material facts of record and based upon applicable law, this Court concludes that the taxpayer's Motion for Summary Judgment must be granted. The only lingering issue is the exact calculation of the judgment for the refund, which can be addressed through Rule 14 of the Superior Court Tax Rules.

I. SUMMARY OF RULINGS

A. The taxpayer does have standing to sue for a refund of these sales taxes, because the Code plainly provides that the person who is entitled to demand a refund is the person "upon whom such tax was imposed and who has actually paid the tax." D.C. Code § 47-2020(a) (1997). The utilities were merely pass-through agents for purposes of collecting the tax. For a variety of reasons, forcing a taxpayer to rely upon a vendor to avenge that taxpayer's interest in the refund process would constitute a denial of due process.

The "pass through" tax payment system is no more than an accommodation to the Government's operational interests and is not dispositive on the question of who suffered the loss due to the obligation to pay the erroneous tax. No utility vendor has suffered a loss that is attributable to submitting the taxes to the District.

B. The supplementation of the original Request for Refund with a separately submitted oath was sufficient to satisfy the requirement that the request for refund be made under oath. The District is estopped from complaining about the supplementation because it did not cite the original, inadvertent omission of the oath as the basis for denying the refund. In any event, supplementation of a request for refund is not prohibited by any applicable law.

To the extent that the lack of an oath was cured without any protest, comment or rejection by the District, such curative measures would only serve to modify the window of time that would be covered by the refund. In other words, entitlement to a refund would be calculated from the date of the filing of the oath, not the date of submission of the original request. This conclusion, of course, is only relevant where the taxpayer is otherwise entitled to a refund.

C. Based primarily upon the Maryland appellate ruling in F.& M. Schaefer Brewing Co. v. Comptroller of the Treasury, 257 A.2d 416 (Md. 1969), (hereinafter "Schaefer"), this taxpayer's statutory exemption alone (without a pre-sale certificate) is sufficient to entitle it to a refund. This principle must apply where, as here, the Government does not dispute that the utility power for which the taxes were collected was indeed used for the tax-exempt purpose. For this reason, the ruling herein is limited to the undisputed material facts in this particular case.

The nature of this taxpayer's business and its statutory exemption sets it entirely apart from taxpayers such as those who claim exemption because of their purchases for "resale." The instant litigation is virtually on all fours with the facts, statute, and regulations that were pivotal in Schaefer.

II. THE STATUTORY SCHEME OF TAXATION OF GROSS RECEIPTS

The Code requires that the District collect a gross sale tax from all vendors that are engaged in selling at retail certain goods and services. D.C. Code § 47-2002(1)(1997).

Vendors have an affirmative duty to collect the sales tax from purchasers buying certain goods and services at retail, as well as an affirmative duty to remit those taxes to the District. D.C. Code § 47-2003(a)(1997).

The Code exempts from tax liability any sales of natural gas, oil, electricity, and solid fuel if such fuel is directly used in manufacturing tangible products. D.C. Code § 47-2005(11)(1997). The Code provides further,

> It shall be presumed that all receipts from the sale of tangible personal property and services mentioned in this chapter **are subject to tax until the contrary is established, and the burden of proving a receipt is not taxable hereunder shall be upon the vendor or purchaser as the case may be.** Except as provided in 47-2005(3), unless the vendor shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchase and the number of his registration certificate **to the effect that the property or service was purchased for resale**, the receipts from all sales shall be deemed taxable. **The certificate herein required shall be in the form the Mayor shall**

> **prescribe and, in case no certificate is furnished or obtained prior to the time the sale is consummated, the tax shall apply as if the sale were made at retail** [emphasis supplied].

D.C. Code § 47-2010 (1997). Note that Section 2005(3) refers to sales "to semipublic institutions."[2] Here, this is not relevant.

The applicable regulations clearly require that a vendor must collect a sales tax even from "entities claiming exempt status . . . unless the vendor is presented with an exemption certificate." 9 DCMR § 417.8 (1969).

The refund statute provides in pertinent part:

> Any tax that has been erroneously or illegally collected shall be refunded if application under oath is filed with the Mayor for such refund within 3 years from the payment thereof. . . . Such application may be made by **the person upon whom such tax was imposed and who has actually paid the tax.** When an application is made by a vendor who has collected reimbursement of such tax, no actual refund of monies shall be made to such vendor, until he shall first establish to the satisfaction of the Mayor, under such regulations as the Mayor may prescribe, that the vendor has repaid to the purchaser the amount for which the application for refund is made.

D.C. Code § 47-2020(a) [emphasis supplied].

III. FACTS NOT IN DISPUTE

The following material facts are not in dispute between the taxpayer and the District.

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[2]Passages of this quoted language are highlighted because of their importance to the arguments of the parties herein.

The taxpayer herein purchased utilities for direct use in its manufacturing of asphalt. None of these purchases were for "resale" of any kind.

The District issued to the Petitioner on August 31, 1995 a tax exemption certificate with an effective date also of August 31, 1995. The document is titled, "Certificate of Specific Exemption." It does not bear any reference to "resale" and does not purport to be a "resale certificate." It is undisputed that the Petitioner did not possess any exemption certificate on any of the dates for which a refund was denied and which is the subject of this appeal.

The claim for refund was submitted to the District of Columbia in a letter of September 18, 1996. In a follow-up letter of October 22, 1996, counsel for the taxpayer noted that he had inadvertently failed to file the request for refund "under oath," but that he was submitting therewith the appropriate oath. He added,

> Because of this inadvertent oversight, we will wait an additional thirty (30) day period for your response. Failing a response, we will at that time presume that you have denied our application and file our further appeal in the Superior Court.

In a letter issued on October 23, 1996, the Department of Finance and Revenue denied the claim for refund, based upon two reasons: (1) that only the vendor (the utility PEPCO), not the taxpayer, could request a refund; and (2) that the sales tax exemption certificate that was issued effective August 31, 1995 "is not retroactive." The reference to the certificate was mentioned in further explaining why the Department did not expect to see

PEPCO apply for a refund on behalf of the taxpayer. This letter was signed on behalf of the Department by Mark I. Gripentrog, then the Acting Associate Director.

Recalling the initial, inadvertent omission of the oath from the taxpayer, the record reflects that the District did not raise this as a basis for denying the request for refund. The Court recognizes that the District's response letter came only one day after the mailing of the oath. However, the District did subsequently contact the taxpayer to reiterate the denial of the request for refund.

In a letter issued on December 23, 1996, Mr. Gripentrog noted that the taxpayer had contacted the Mayor in a further effort to obtain a refund. The Acting Associate Director stated:

> As previously stated to you in our letter dated October 23, 1996, District Paving Corporation ("DPC") can not file the refund claim because it is not considered a vendor for collecting the sale tax and paid to the District of Columbia. DPC has no appeal rights regarding this matter and can not file a petition with the D.C. Superior Court.

He further wrote:

> Mr. Kerwin spoke to you several times in the past regarding this matter. He also advised you that the sales tax exemption on manufacturing, assembling, processing or refining is not retroactive.

Letter from Gripentrog to Petitioner dated December 23, 1996.

Nothing further was included or cited in this letter as the basis for denial of the request for refund. Nothing was stated about the oath, either as to its original absence or its later submission. It is evident, then, that the claim for refund was not

denied because it had been submitted originally without being under oath.

In an attempt to comply with this rejection letter, the taxpayer submitted a further letter to PEPCO, asking the utility to demand a refund on its behalf or to permit the taxpayer to sue the District in the name of PEPCO as a petitioner. This letter of March 6, 1996 was sent by Christopher M. Kerns, and is appended as part of Exhibit 4 to the Motion for Summary Judgment.

PEPCO refused all of these requests, in a letter of March 26, 1996 signed by John J. Sullivan, the Associate General Counsel. In his letter, he wrote that PEPCO agreed with the taxpayer that District Paving had standing to pursue its own claim for refund, but that PEPCO in any event would not participate in any such claim. He stated,

> Insofar as it is our position that District Paving may pursue its refund claim without PEPCO's participation, we are not inclined to participate with District Paving as a party to the process.

This letter is found in the record as an attachment to the "Opposition of Petitioner to Respondent's Cross-Motion for Summary Judgment and Reply of Petitioner to Respondent's Opposition to Petitioner's Motion for Summary Judgment."

It is undisputed that Washington Gas never responded at all to a similar request from the taxpayer. This request for help was embodied in a letter of March 6, 1996 to John Jay Keane, Jr., Esq., Vice President and General Counsel of Washington Gas. A copy of this letter is appended as part of Exhibit 4 to the Motion for

Summary Judgment.

IV. DISPOSITION OF THE CROSS-MOTIONS FOR SUMMARY JUDGMENT

A. **The Standing Issue**.

The taxpayer has standing to file the instant Superior Court petition, as well as standing to seek a refund at the agency level. This principle is elucidated in two ways.

1. Statutory Interpretation.

First, the Code itself provides that an application for refund "may be made" by the "person against whom such tax was imposed and who has actually paid the tax." D.C. Code § 47-2020 (1997). Without question, this is the taxpayer herein.

The vendor (any utility herein) certainly was not the person who "actually" paid the tax, because the vendor is nothing more than a mere collection agent. The reference to the person "who actually paid the tax" is a common sense reference to the person who suffered the financial loss. The money collected for the tax was a financial loss to the purchaser of the utility power, but not a loss to the utility company.

The Court recognizes parenthetically, as neither party appears to do in this case, that the Code provides that vendors are equally entitled to seek refunds. The Code speaks separately as to those who "actually" pay the tax and those who collect such tax. Section 2020(a) contains the second provision that "when" a vendor is the entity that seeks a refund, no refund will be made until the vendor

can prove that he, she or it has already reimbursed the affected taxpayer. The use of the term "when" means that there may be occasions on which the vendor is not in fact the entity or person who will be seeking the refund.

This alternative reference to vendors as persons who can seek refunds would be totally superfluous if the only person entitled to do so was the vendor. In that event, the Code would simply state that only a vendor can apply for a refund, and there would be no need to refer to those "upon whom such tax was imposed and who has actually paid the tax." If anything, this Court interprets Section 2020(a) to underscore (not obfuscate) the fact that individuals who pay sales taxes do indeed have the right to appeal the collection of sales taxes. This is not a close question.[3]

Although the District has tendered very cogent and logical reasons as to why vendors, rather than purchasers, are charged with the responsibility of collecting sales taxes, the District has never offered any rationale to explain why individual purchasers should be barred from pursuing their own refunds.

For example, the District refers to the vast multitudes of persons and entities who make purchases of all types of goods and

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[3]The provision for the option of a vendor to seek a refund of taxes paid by a customer is not difficult to understand. There may be situations in which sales taxes are erroneously collected from a purchaser who is unquestionably exempt, where the collection was made through the personal negligence of a vendor's employee. In that event, a large corporate vendor might determine that good customer relations would justify reimbursing the client immediately and seeking a refund at the vendor's own expense. Thus, allowing (but not requiring) vendors to seek refunds is a reasonable option enacted by the legislature.

services. Surely, it would be impossible for the Government to effectively collect gross receipts taxes by having to chase down members of the general public or myriad individual businesses.[4] By contrast, however, the District has never proffered that this type of catastrophic numerosity problem actually exists at the opposite end of the taxation process, i.e. requests for refund and pursuit of court appeals. There, the taxpayer (not the Government) is the only protagonist. In these kinds of tax appeals, the District will always be dealing with a discrete party opponent (not a proverbial cast of thousands).

The District has never claimed that it would be prejudiced by having to respond to requests for refunds of sales taxes simply because the requester is the affected taxpayer. The Court independently does not discern that there is any such prejudice.

At oral argument, this Court asked the District whether it was aware of any District vendor that had ever sought a refund for any purchaser. Counsel for the District knew of none. Moreover, the District has not cited proof that any jurisdiction in the United States precludes taxpayers from pursuing refunds of their own sales taxes.

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[4]The District has correctly pointed out: "The purpose of the laws is to streamline the procedures involved in the payment to and collection from vendors of sales taxes. . . . This eliminates the potential nightmare of dealing individually with each purchaser, and places the responsibility on each vendor." Respondent's Memorandum of Points and Authorities in Opposition to Petitioner's Motion for Summary Judgment, at 2. Clearly, this rationale applies to the collections process, but not to the refund process (where the taxpayers individually must approach the District rather than the District pursuing hundreds of thousands of taxpayers).

2. Due Process Considerations.

Secondly, purely as a matter of due process, it would be unconstitutional to require that taxpayers rely upon vendors in order to pursue their right to a refund for illegally collected taxes. The District has not addressed the due process issue, even though the Petitioner has amply highlighted how due process is comprised by the District's approach.

The principles of due process, as they apply to taxation, are very straightforward. Due process is a matter of having clear and reliable access to justice, an avenue of redress against the Government.

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).

Furthermore, Fifth Amendment rights apply to the Government's taking of personal property as well as land. See, e.g., Haldeman v. Freeman, 558 F.Supp. 514, 518 n.11 (D.D.C. 1983)(taking of documents). Money is certainly personal property. For these reasons, the taking of money through taxation always implicates the right to due process of law. This is fundamental to any scheme of taxation.

For a host of practical reasons, vendors are a totally unreliable avenue of redress against the Government. For example, since they are not the real parties in interest, they have

absolutely no impetus to voluntarily spend their own time and resources to represent customers. Here, PEPCO flatly refused to do so, and Washington Gas assertedly would not even condescend to respond at all to the taxpayer's request for help.[5]

Since the Code does not require vendors to pursue tax refunds (even though this is permitted), a taxpayer would not have a legally cognizable cause of action against any vendor that refuses to seek a refund on its behalf.[6] Even though the Code explicitly burdens vendors with the obligation to collect the tax, the Code creates no concomitant duty to pursue refunds or appeals.

In addition, vendors would have a built-in conflict of interest in pursuing appeals or demanding refunds because vendors are compensated by the District for serving as collection agents.

Furthermore, the District's position is predicated on the assumption that the same vendor that collected the disputed tax would still be in existence at a time when the taxpayer would want to demand a refund. There is no factual basis for making such a broad presumption.

Vendors come and go. Vendors, both large and small, sometimes declare bankruptcy or go out of business for legitimate reasons.

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[5]The Petitioner's assertion to this effect has never been challenged by the District.

[6]Interestingly, it is not clear that the utility companies are aware of this litigation, even though they were on notice of the taxpayer's initial efforts to obtain refunds at the agency level. No vendor has sought to participate as an intervenor or as amicus curiae. They may be unaware that the District is touting them as the salvation for customers who desire to obtain refunds of sales taxes.

All vendors do not necessarily continue to exist in perpetuity, and they all do not necessarily leave a successor in interest, with the resources to finance potentially thousands of tax appeals. Thus, an entity that stands in the shoes of the taxpayer (under the District's argument) may disappear in a serendipitous way. This is surely a threat to due process. Under the District's theory, the personal generosity and financial fate of a vendor is the keystone to a taxpayer's ability to seek redress of its grievance against the tax authority. This is utterly intolerable from a due process standpoint.

Other problems abound as well. Under the District's theory of vendor-dependence for refunds and appeals, taxpayers would suffer at the whim of vendors who make mistakes, such as those lawyers who commit malpractice, or who would not necessarily exercise good judgment in pursuing cases or settling them. This putative web of dependence upon vendors as forced fiduciaries and tax avengers is untenable as a matter of law.

The instant case portrays a classic example of a taxpayer left in the lurch because of the unwillingness of two vendors to have any connection to a tax appeal or to request a refund. The District has never explained why the right of any taxpayer to seek redress against the government should be forestalled in this capricious manner.

For all of the reasons set forth herein, there is no doubt that taxpayers do have standing to seek refunds from the District and to resort to the courts when such requests are denied.

B. **The Supplementation of the Oath**.

The taxpayer does not dispute that a request for refund must be made under oath. The District argues that since the original request was not made under oath, the taxpayer is entitled to no relief whatsoever, regardless of other arguments and contentions.

The record is clear that the taxpayer realized its inadvertent error in not providing an oath in its original letter requesting a refund. That omission was remedied in a subsequent mailing to the District. It is a fact that the DFR never rejected the request for a refund based upon the oath issue at all. Since the District cites no legal authority that precludes supplementation or amendment of initial requests for refunds, the District is estopped from complaining now about the supplementation.

C. **The Certificate Issue**.

The taxpayer contends that the refund issue concerns only the question of whether District Paving was operating within its statutory exemption at the time of these prior purchases.

The unique issue in the instant case is that the Code's references to certificates relates only to certificates that denote purchases that are for "resale." In other words, the only exempt sales for which a pre-sale certificate is clearly required are those that relate to purchases from wholesalers who provide goods destined to be sold once again at retail prices.

The Code does not expressly speak to the requirement of re-sale certificates for purchases that can be determined to be exempt

for purposes of their "end use," e.g. manufacturing.

The District argues that Petitioner herein is not entitled to a refund because of a municipal regulation that assertedly required District Paving to present an exemption certificate for each and every sale for which it now seeks a refund.

From two different standpoints, the taxpayer herein is entitled to summary judgment.

This Court will address herein as follows (1) the common law basis for rejecting the District's argument and (2) the correct application of the regulation upon which the District relies.

1. Common law authority.

In the District of Columbia, there are no judicial opinions of any kind (from local or federal courts) that are dispositive or even relevant. For this reason, the Court looks to the common law of Maryland for legal principles and analysis that would be instructive. "Maryland, the source of the District's common law [is] an especially persuasive authority when the District's common law is silent." Napoleon v. Heard, 455 A.2d 901, 903 (D.C. 1983); see Hull v. Eaton Corp., 263 U.S.App.D.C. 311, 316-17, 825 F.2d 448, 453-54 (1987). While the taxpayer relies on Maryland law, the District has not proffered any competing or distinguishable case law from any other state.

In the instant litigation, the common law of Maryland addresses the exemption issues at hand very precisely. In fact, the relevant Code provisions in Maryland are identical to those of

the District of Columbia. In interpreting its Code and the related regulations (that are also nearly identical to ours), the highest court of Maryland has provided a logical road map for resolving this case.

The appellate decision that guides this Court is the decision in F.& M. Schaefer Brewing Co. v. Comptroller of the Treasury, supra. In this opinion, the highest court of Maryland convincingly rejects the same position argued by the District to this Court. The analogous nature of the litigation therein requires detailed analysis as follows.

The taxpayer in Schaefer had purchased electricity in the years 1964, 1965, and 1966 on which it paid sales taxes totaling $10,686.91. The taxpayer (not the vendor) demanded a refund and this request was denied by the Comptroller.[7] The denial was affirmed by the Maryland Tax Court and the Baltimore City Court. The facts in Schaefer demonstrated the following:

> Of the electricity so purchased, 94.9% was used for manufacturing and processing beer at Schaefer's Baltimore plant. The remaining 5.1% was used for nonmanufacturing purposes. During this period Schaefer did not hold an exemption certificate issued by the Comptroller pursuant to the Comptroller's Rule 24(d), nor did its utility hold a resale certificate from Schaefer.

Id. at 416.

The Maryland statute that was in effect at the time, Section 333 of Article 81 (1965), provided in pertinent part as follows:

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[7]In Schaefer, there was no contention that the taxpayer had no standing to seek a refund or to litigate the denial of a refund.

> It shall be presumed that all sales of tangible personal property and services mentioned in this subtitle are subject to tax until the contrary is established, and the burden of proving that a sale is not taxable hereunder shall be upon the vendor or the purchaser as the case may be. Unless the vendor shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser and the number of his registration certificate **to the effect that the property or service was purchased for resale**, the sale shall be deemed a taxable sale at retail. The certificate herein required shall be in such form as the Comptroller shall, by regulation, prescribe and in case no certificate is furnished or obtained prior to the time the same is consummated, the tax shall apply as if the sale were made at retail.

Id. at 417.

The language quoted above is virtually identical to the corresponding portion of the District of Columbia Code, D.C. Code § 47-2010 (1997).[8]

The Court of Appeals of Maryland examined other relevant parts of its Code that are also the same as the corresponding sections of the District of Columbia Code. The Court in Schaefer considered the role of the Comptroller's Rule 24, which was promulgated to deal with the exemption of purchases of utilities, oil and coal.

The Comptroller's Rule 24 exempts from sales tax the purchase of any "electricity consumed in manufacturing for operating machinery, lighting and heating a factory or shop." Id. at 419. Rule 24(d) provides:

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[8]The only differences are minor matters of punctuation, as well as the District of Columbia Code's references to "receipts from the sale of tangible personal property," instead of referring to "sales" of such property. These differences are meaningless.

> Exemption Certificate: Every purchaser purchasing natural or artificial gas, electricity or steam for any purpose claimed to be exempt from or not subject to tax, in order to qualify for the exemption, must present evidence satisfactory to the Comptroller that the sale is exempt under the foregoing rules and must obtain from the Comptroller an Exemption Certificate to be presented to his Vendor.

Id. This "Rule" is identical to a District of Columbia Municipal Regulation on which the District relies: 9 DCMR §444.10 (1996).

In Schaefer, the Comptroller argued that Rule 24(d) should be interpreted to mean that a "resale" certificate is required by those who purchase exempt utility service used in manufacturing, where the issue of "resale" is not relevant. In other words, the Comptroller argued that a "resale certificate" should be interpreted to mean (generically) any certificate of exemption from sale tax. The Office of Corporation Counsel in the instant case has made the very same argument with respect to the analogous D.C. regulation, i.e. 9 DCMR 444.10.

The Comptroller's interpretation of the certificate requirement was squarely rejected by the Court of Appeals of Maryland, concluding that the statute was not ambiguous as to its exclusive reference to "resale" certificates. Schaefer, supra, at 419.

In other words, the Maryland Court of Appeals refused to apply and rely upon a mere rule to create new law in place of statutory language that was never enacted. This Court must do the same. Doing otherwise would have been improper under both Maryland law and the law of the District of Columbia, where principles of

statutory interpretation are applied. A regulation cannot neutralize or change a statute that is unambiguous. See Comptroller of the Treasury v. American Cyanamid, 214 A.2d 596, 604 (Md. 1965). The District of Columbia Court of Appeals likewise has observed that although an agency's interpretation of a statute that it must execute should be given considerable deference, interpretation that is inconsistent with the statute must be rejected by the courts. Cooper v. District of Columbia Dept. of Employment Services, 588 A.2d 1172, 1175 (D.C. 1991).

The District of Columbia Code, like that of Maryland, is not ambiguous on the issue at hand, i.e. taxpayers such as District Paving and Schaefer Brewing Company are simply not to be taxed on the purchase of utility power for use in their manufacturing. No agency rule or bureaucratic practice can alter this principle.[9]

The Maryland Court of Appeals set forth more precisely why it is that there is no need for a "resale" certificate in order for a utility to figure out if its power is being purchased for manufacturing and that it is, thus, exempt from taxation to the customer. The Court relied expressly upon the unique nature of how the utility industry operates as a vendor. It stated:

> In providing electrical service in an amount sufficient for payment of sales tax averaging

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[9]As the United States Court of Appeals for the District of Columbia Circuit has stated, where a statute's language and history indicate clear congressional intent, courts need not ever reach the issue of extent of deference to be accorded to the agency's interpretation of the statute, even if the agency interpretation is contrary to the court's interpretation. Transbrasil, S.A. Linhas Aereas v. Dept. of Transportation, 253 U.S.App.D.C. 31, 35-36, 791 F.2d 202, 206-07 (1985).

> more than $3500.00 per year, as in this case, an electric utility would be obliged to know something of the operation involved and the demands to be made on it. Likewise, a utility selling for resale must have some knowledge of demand in order to arrange its own generating capacity. A wholesaler of some commodities might or might not know whether a purchaser intended to resell, but the utility here certainly had knowledge from the nature of the demand that no resale was involved. Accordingly, it would have been prohibited under § 333A form accepting a resale certificate.

Id. at 418. Clearly, a utility would very well know whether an entity such as District Paving was seriously trying to re-sell the same electric power that it purchased.

The logic of the above-quoted passage from Schaefer is inescapable. This Court adopts it in principle and applies it herein.

As a practical matter, the Maryland court realistically recognized that there is no way for a purchaser to obtain non-exempt electrical power without the utility itself knowing about it independently and being simultaneously liable to the Government to remit any taxes that are due.[10] This Court similarly looks to the

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[10]The Maryland court made an informative comparison between Schaefer Brewing Co. and the vendor in the case of Comptroller of the Treasury v. Atlas General Industries, 198 A.2d 86 (Md. 1964). In Atlas, the purchaser was in the business of manufacturing baskets and crates for packaging vegetables, poultry, and other food. Id. at 87. The vendor in Atlas was in no position to know or ferret out exactly what any customer was doing with generic products such as packaging. Resales may or may not have been what was involved. Schaefer, supra, at 418. The appellate court in Atlas concluded that a pre-sale exemption certificate was necessary and that the absence of one was a legitimate basis for denying a refund. This ruling was expressly made, however, on the basis of the nature of the business that was involved -- and the fact that "resale" was clearly a disputed issue. This is not the case in the

practical facts that are evident here.[11]

This Court must recognize that the public utility industry operates based upon massive distribution capability. All utilities presumably know perfectly well who can actually distribute power and who cannot. Moreover, no utility company would sell its power to another entity that is capable of making redistribution of power without doing so purposely and with full knowledge of the intent of the purchaser. It defies belief to suggest that a non-utility can re-sell electric power or natural gas accidentally or surreptitiously.

The practical purpose of issuing exemption certificates (whether they are labelled "resale" certificates or anything else) is to establish a convenient way of forestalling fraud against the District. Here, the realities of how a utility company markets its commodity serve as the Government's shield against fraud. This is inherently why the lack of an exemption certificate for past utility power purchases is of no significance in the refund process.

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instant tax appeal.

[11]In its pleading, the District has briefly suggested that a "resale certificate" is the same document that is issued for all tax-exempt entities. However, this record does not contain facts that sufficiently prove this to be true. The District has failed to demonstrate that this phrase actually denotes a solitary certificate that is used for multiple purposes. This is not merely a matter of semantics. In fact, the record herein contains copies of the exemption certificates that were eventually issued to the Petitioner. Those documents are facially entitled, "Certificate of Specific Exemption." They contain no reference whatsoever to "resale." The Petitioner herein has never held a so-called "resale" certificate. This is a phantom issue.

2. Regulatory analysis.

While this Court adopts the same analysis employed in Schaefer, the proverbial bottom line remains: neither the Regulations nor the District of Columbia Code limits refunds on statutorily exempt utility purchases to those discrete sales for which a "resale" or any other exemption certificate had been presented at the time of the purchase.

Irrespective of the analysis in Schaefer, there is another reason why the District cannot prevail in this tax appeal.

It is critical to note that the regulation upon which the District relies does not apply to the instant Petitioner. An existing regulation already forbids the District from collecting sales taxes from entities such as District Paving -- without regard to pre-sale presentation of any certificate. A careful analysis of that regulation is instructive.

The regulation emphasized by the District, 9 DCMR 444.10, states:

> **Except as otherwise provided in this section**, each purchaser of natural or artificial gas, oil, electricity, solid fuel, or steam for any purpose claiming to be exempt from or not subject to the tax, in order to qualify for the exemption, must present evidence satisfactory to the Director that the sale is exempt under the Act and this section, and must obtain from the Director a specific exemption to be presented to the vendor.

The key language that robs this regulation of any controlling impact is the phrase, "[e]xcept as otherwise provided in this section." This phrase means that Section 444.10 must be read in the total context of every other provision of Title 9.

The District fails to acknowledge that on the very same page in the Municipal Regulations, a closely preceding regulation does indeed "otherwise provide" for the exemption from taxation of this Petitioner. Specifically, 9 DCMR 444.7 states:

> The tax shall not apply to the receipts from any of the types of sales exempted under D.C. Code § 47-2005 (1990 Repl. Vol.).

This regulation is a stark and unmistakable admonition to the agency not to apply the gross receipts tax to the very types of sales at issue herein, i.e. sales of "natural or artificial gas, oil, electricity, solid fuel, or steam, directly used in manufacturing, assembling, processing, or refining." D.C. Code § 47-2005(11). Nothing could be clearer. This regulation conforms precisely with the Code.

Since Section 444.7 of Title 9 directly applies to the Petitioner and tersely instructs the Department not to apply the tax, the District's reliance upon Section 444.10 is totally misplaced. Upon reflection, Section 444.10 has no connection to the instant case because, by its own terms, it covers only those sales of utility power that are not reached by any specific statutory exemption. This regulation, in context, is nothing more than a catch-all provision. This Petitioner's purchases do not fall into that vague category.

In combination, the ruling in Schaefer and the application of Section 444.7 are a powerful basis upon which to grant relief to the Petitioner. This is not a close question.

This Court concludes only that if a taxpayer whose purchases

of utility power are statutorily exempt demands a refund, such refund cannot be denied on the basis of lack of presentation of an exemption certificate or "resale" certificate at the time of the prior purchase. The denial of refund cannot be predicated upon such a piece of paper itself. However, the District may always do in the future what it did not do in the instant case, i.e. demand that the taxpayer prove substantively that it was actually engaged in manufacturing tangible products as of the dates of the prior purchases for which a refund is sought.[12] This would be a totally legitimate inquiry by DFR when the nature of the taxpayer's business activity is not already known to the Department.

In the instant case, the District expressed no interest in demanding factual proof of Petitioner's past manufacturing activities and would not even engage the Petitioner in such a challenge. The Court infers that this occurred because the Department was so wedded to the notion that the taxpayer had no standing to seek a refund at all. Raising a demand for proof of past manufacturing of tangible goods would have been an admission that the taxpayer had standing to seek a refund.

The burden of proving past entitlement to a statutory exemption will always rest upon the taxpayer. Consequently, the District may treat requests for refunds by demanding factual proof of the nature of the taxpayer's business operations if the taxpayer has no appropriate certificate to verify the relevant period of

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[12]For an established manufacturing business, proving past entitlement to the statutory exemption should be simple, and facts can be easily corroborated by the utility-vendor.

exemption.[13] Hence, it behooves taxpayers such as District Paving to scrupulously acquire exemption certificates to avoid costly factual presentations at the agency level when requesting refunds.

For all of the reasons set forth herein above, as to statutory interpretation, application of municipal regulations, and recognition of pertinent common law, the District cannot prevail.

WHEREFORE, it is by the Court this 22nd day of April, 1999

ORDERED that the Petitioner's Motion for Summary Judgment is granted; and it is

FURTHER ORDERED that the Respondent's Cross-Motion for Summary Judgment is hereby denied; and it is

FURTHER ORDERED that the Petitioner is entitled to a refund of taxes paid on purchases of gas and electricity for the three-year period following the date of October 22, 1996; and it is

FURTHER ORDERED that Petitioner shall file within 30 days hereof a Motion for Entry of Judgment as to the precise amount of the judgment, with provision for interest at the statutory rate until paid.

Cheryl M. Long
Judge

[13]In some cases, the name of the corporate taxpayers may not readily reveal the nature of its business.

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