SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

AMERICAN PHILOSOPHICAL ASSOCIATION, et al., *Plaintiffs*, v. DISTRICT OF COLUMBIA, *Defendant*.	Case No. 2019 CVT 000003 Judge Jonathan H. Pittman Next Date: TBD

ORDER

Defendant District of Columbia ("District") seeks reconsideration of that portion of the order of January 29, 2019 ("January 29, 2019 Order"), which denied Defendant's motion to dismiss the complaint on the ground that Plaintiffs failed to apply for a refund from the Office of Tax and Revenue before filing suit. The January 29, 2019 Order was issued by the Honorable Anthony C. Epstein in Case No. 2017 CA 004057 B, which was pending in the Civil Division. Judge Epstein granted the District's motion to dismiss the complaint to the extent that it sought relief other than a refund of taxes paid, and then transferred the litigation to this Division, where it has been assigned a new case number (2019 CVT 0003). In addition, the District filed a separate motion on March 11, 2019, seeking a stay of briefing and discovery on class certification pending the outcome of the District's

motion for reconsideration. In the alternative, the District seeks an extension of time to oppose Plaintiffs' pending motion for class certification.

For the reasons set forth below, the Court will deny the motion for reconsideration and will deny the motion for stay. The Court will grant the District's motion for an extension of time to oppose the pending motion for class certification.

STANDARD OF REVIEW

The District seeks reconsideration under Superior Court Civil Rule 54(b).[1] Rule 54(b) addresses modification of interlocutory orders like the January 29, 2019 Order. Rule 54(b) provides that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."

The standard for reconsideration of interlocutory orders under Rule 54(b) is whether reconsideration is consonant with justice *See Marshall v. United States*, 145 A.3d 1014, 1018-19 (D.C. 2016) (discussing the standard for reconsideration of interlocutory orders). Reconsideration is warranted if, for example, moving parties "present newly discovered evidence, show that there has been an

[1] Superior Court Tax Rule 3 provides that certain Civil Rules, including Rule 54(b), are applicable to proceedings in the Tax Division.

intervening change in the law, or demonstrate that the original decision was based on a manifest error of law or was clearly unjust." *See Bernal v. United States*, 162 A.3d 128, 133 (D.C. 2017) (quotation, ellipsis, and brackets omitted). However, "it is well-established that motions for reconsideration, whatever their procedural basis, cannot be used as an opportunity to reargue facts and theories upon which a court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier." *Ali v. Carnegie Inst. of Wash.*, 309 F.R.D. 77, 81 (D.D.C. 2015) (quotation omitted); *SmartGene, Inc. v. Advanced Biological Labs., SA*, 915 F. Supp. 2d 69, 72 (D.D.C. 2013). Raising "arguments that should have been, but were not, raised in" the original filing "is, frankly, a waste of the limited time and resources of the litigants and the judicial system." *Estate of Gaither v. District of Columbia*, 771 F. Supp. 2d 5, 9-10 (D.D.C. 2011); *see Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996) ("Reconsideration is not an appropriate forum for… arguing matters that could have been heard during the pendency of the previous motion.").

The "consonant with justice" standard is comparable to the "as justice requires" standard that federal courts apply for reconsideration of interlocutory orders. *See, e.g.*, *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 227 (D.C. Cir. 2011). In deciding whether justice requires reversal of an interlocutory order, courts assess circumstances such as "whether the court

'patently' misunderstood the parties, made a decision beyond the adversarial issues presented, made an error in failing to consider controlling decisions or data, or whether a controlling or significant change in the law has occurred." *In Def. of Animals v. NIH*, 543 F. Supp. 2d 70, 75 (D.D.C. 2008) (quoting *Singh v. George Wash. Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005)); *Loumiet v. United States*, 65 F. Supp. 3d 19, 24 (D.D.C. 2014) (same).

The purpose of this standard for reconsideration "is to ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." *In re Okean B.V.*, 2013 U.S. Dist. LEXIS 126361, at *2 (S.D.N.Y. Sept. 4, 2013) (citations omitted). Courts have greater discretion to reconsider interlocutory orders than final judgments because the interest in finality is less, *Williams v. Vel Rey Properties*, 699 A.2d 416, 419 (D.C. 1997), but there is still a substantial interest against relitigation. The standard for reconsideration "attempts to balance the interests in obtaining a final decision on matters presented to the Court and the recognition that the Court, like all others, is capable of mistake and oversight." *Brambles USA, Inc. v. Blocker*, 735 F. Supp. 1239, 1240 (D. Del. 1990). But where the trial court has considered a party's argument and ruled, a motion for reconsideration will typically not succeed. *See NYSA-PPGU Pension Fund v. Am. Stevedoring, Inc.*, 2013 U.S. Dist. LEXIS 124417 at *9 (D.N.J. Aug. 30, 2013) ("A motion for

reconsideration is improper when it is used to ask the Court to rethink what [it] had already thought through – rightly or wrongly.") (quotation and citation omitted).

"The burden is on the moving party to show that reconsideration is appropriate and that harm or injustice would result if reconsideration were denied." *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 893 F. Supp. 2d 258, 268 (D.D.C. 2012) (citing *Husayn v. Gates*, 588 F. Supp. 2d 7, 10 (D.D.C. 2008)).

ANALYSIS

Judge Epstein concluded that nothing in the relevant provisions of the D.C. Code, sections 47-2021(a) and 47-3303, mandates that a plaintiff seeking refund of taxes paid must first request a refund from the District before bringing suit. January 29, 2019 Order at 2. Relying on *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243 (D.C. Cir. 2004), Judge Epstein held that nothing in these provisions contains the "sweeping and direct statutory language indicating that there is no [] jurisdiction prior to exhaustion." *Id*. at 2. Conceding that the statute "does not contain straightforward language requiring administrative exhaustion as that found in, for example, D.C. Code § 47-825.01a(g)(1)," the District nonetheless argues that the "context" of section 47-2021(a) mandates exhaustion. While the District's argument has some appeal, the statute nonetheless does not contain the "sweeping

and direct language" mandating exhaustion.[2] In light of the language of the statute, the Court cannot conclude that Judge Epstein's ruling was an error at all, let alone a "manifest error of law or . . . clearly unjust" result that would justify reconsideration. *See Bernal*, 162 A.3d at 133.

Judge Epstein also concluded that although the Court could mandate exhaustion as a judicially created prudential requirement, he would not do so in the unique circumstances of this case. January 29, 2019 Order at 4. The District takes issue with this conclusion, relying primarily on *Kleiboemer* and *Keyes* (cited in note 2, *supra*), to support its argument that administrative exhaustion would provide the District with notice of potential liabilities. But another provision of the D.C. Code, namely D.C. Code § 12-309, addresses the circumstances under which a claimant must provide pre-litigation notice of claims to the District. That statute contemplates circumstances in which the District will not receive pre-litigation notice of certain claims. As there is a separate statute addressing when pre-

[2] In support of its "context" argument, the District relies on *Kleiboemer v. District of Columbia*, 458 A.2d 731, 733 n2 (D.C. 1983) for the proposition that because the federal courts had held that filing an administrative claim was a prerequisite to obtaining a refund of federal taxes, Congress must have intended that D.C. law incorporates the same requirement. Mot. at 11. *Kleiboemer* addressed claims for refunds under D.C. Code § 47-1586j(a) (1973 ed.). That section was recodified as D.C. Code § 47-1812.11 (1981 ed.), and was thereafter repealed in 2001. Moreover, *Kleiboemer* relied on *Keyes v. District of Columbia*, 362 A.2d 729 (D.C. 1976). But *Keyes* addressed D.C. Code § 47-709 (1973 ed.), the previous version of D.C. Code § 47-825.01a(g)(1), which, like the current version of that provision, explicitly requires administrative exhaustion before filing suit.

litigation notice is required, there is no need to graft a judicially-created notice requirement onto D.C. Code §§ 47-2021 and 47-3303 through the imposition of an exhaustion requirement.

Judge Epstein was careful to note that as a general matter, "[t]he common law exhaustion doctrine applies in tax cases." January 29, 2019 Order at 4. The Court reiterates this conclusion – as a general matter, a party seeking refund of taxes must first claim a refund from the Office of Tax and Revenue. But, in the unique circumstances of this case, Judge Epstein concluded that the Court need not exercise its discretion and require administrative exhaustion. The Court cannot conclude that Judge Epstein erred in reaching this conclusion, and will therefore not reconsider this ruling.

Finally, the District notes that the Court lacks jurisdiction over refund suits that are filed too late. The January 29, 2019 Order did not address this issue. The Court agrees that the statutory language mandates that refund suits must be filed within six months, and that the Court lacks jurisdiction over refund suits that are filed too late. The District of Columbia Court of Appeals and its predecessor courts have held that the time limitation contained in D.C. Code § 47-2403, the predecessor to D.C. Code § 47-3303, is jurisdictional.[3] *See, e.g.*, *Jewish War*

[3] D.C. Code § 47-2403 was recodified as D.C. Code § 47-3303 (1981 ed.), and was thereafter amended in 1982 to clarify that the six-month time to appeal begins with the notice of assessment, rather than payment of the tax. *See People's*

Veterans, U.S.A. Nat'l Mem'l Inc. v. District of Columbia, 243 F.2d 646, 647 (D.C. Cir. 1957) (discussing D.C. Code § 47-2403 (1951 ed.), which provided that an aggrieved taxpayer "may appeal 'within ninety days after notice of . . . assessment,'" and holding that "[t]he ninety-day requirement is jurisdictional to the appeal."); *Nat'l Graduate Univ. v. District of Columbia*, 346 A.2d 740, 743 (D.C. 1975) (holding that the six-month period in which a taxpayer "may appeal" under D.C. Code § 47-2403 (1973 ed.) "is jurisdictional in nature and not merely a statute of limitations"). Because both D.C. Code § 47-2021(a) and D.C. Code § 47-3303 provide that an aggrieved taxpayer "may appeal" the adverse action within six months, the Court concludes that the six-month limitation contained in these sections is jurisdictional. However, because at least some of the taxes alleged in the complaint were or may have been paid within six months of the filing of the lawsuit, the Court will not dismiss the plaintiffs' refund claim on this basis at this stage of the litigation.

Based on the foregoing, it is, this 30th day of May, 2019, hereby

ORDERED, that the District of Columbia's motion for reconsideration of the January 29, 2019 Order, filed on March 8, 2019, is **DENIED**; and it is

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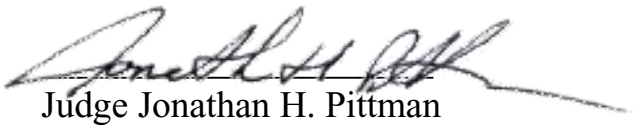
Drug Stores, Inc. v. District of Columbia, 470 A.2d 751, 752 n1 (D.C. 1983) (en banc). That amendment did not affect the jurisdictional nature of the six-month period in which to appeal.

FURTHER ORDERED, that the District's motion to stay discovery and briefing on class certification, filed March 11, 2019, is **DENIED IN PART** and **GRANTED in PART**; and it is

FURTHER ORDERED, that the District shall file its opposition to Plaintiffs' pending motion for class certification, appointment of Plaintiffs as class representatives and Plaintiffs' counsel as class counsel, filed on March 29, 2019 no later than sixty days from the date of this Order.



Judge Jonathan H. Pittman

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