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**

ORDER

The District of Columbia, like many other jurisdictions, imposes a tax on a vendor's gross receipts from the retail sale of goods and services, commonly referred to as a "sales tax." *See* D.C. Code § 47-2002(a) ("A tax is imposed upon all vendors for the privilege of selling at retail certain tangible personal property and for the privilege of selling certain selected services (defined as "retail sale" and "sale at retail" in this chapter)"). Although the tax is imposed on the vendor or seller of the goods or services, the vendor typically collects the tax from the purchaser at the time of sale. D.C. Code § 47-2003(a) ("Reimbursement for the tax imposed upon the vendor shall be collected by the vendor from the purchaser. . ."). The rate of taxation is a percentage of the money received for the goods or services sold, and sales of most goods and services in

the District of Columbia are currently taxed at six percent. D.C. Code § 47-2002(a) ("The rate of such tax shall be 6.00% of the gross receipts . . ."). Receipts from sales of certain goods and services, such as hotel room charges and food and beverages prepared for immediate consumption, are taxed at higher rates. *See, e.g.* D.C. Code §§ 47-2002(a)(2)(A) (imposing a 10.2% tax on hotel room charges) and (3)(A) (imposing a 9% tax on sales of food and beverages sold for immediate consumption).

The District also exempts certain sales from imposition of the sales tax, including sales to certain entities. Tax-exempt sales include sales to the United States or District of Columbia governments, D.C. Code § 47-2005(1), sales to state governments, D.C. Code § 47-2005(2), and, as is relevant for these proceedings, sales to non-profit and non-for-profit organizations referred to as "semipublic institutions," provided that certain conditions are met. D.C. Code § 47-2005(3).[1]

D.C. Code § 47-2005(3) sets forth the four conditions that semipublic institutions must satisfy to avoid paying sales tax in the District of Columbia:

> (A) [The semipublic] institution shall have first obtained a certificate from the Mayor stating that such institution is entitled to such exemption;
>
> (B) The vendor keeps a record of the sale, the name of the purchaser, the date of each separate sale, and the number of such certificate;

[1] "Semipublic institutions" are defined as "any corporation, and any community chest, fund, or foundation, organized exclusively for religious, scientific, charitable, or educational purposes, including hospitals, no part of the net earnings of which inures to the benefit of any private shareholder or individual." D.C. Code § 47-2001(r).

(C) [The semipublic] institution ***is located within the District***; and

(D) The property or services purchased are for use or consumption, or both, in maintaining, operating, and conducting the institution for the purpose for which it was organized or for honoring the institution or its members.

D.C. Code § 47-2005(3)(A)-(D) (emphasis added). The language of D.C. Code § 47-2005(3) thus limits entitlement to exemption from sales tax to semipublic institutions that are "located within the District," and denies entitlement to exemption from sales tax to semipublic institutions that are not "located within the District."[2]

PLAINTIFFS' CLAIMS

The Commerce Clause gives the United States Congress "the power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." United States Constitution, art. I, § 8, cl. 3 (the "Commerce Clause"). While the Commerce Clause explicitly grants the power to regulate interstate commerce to Congress, it implicitly prohibits the states from acting in a manner that affects

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[2] Plaintiffs assert that the District's Office of Tax and Revenue ("OTR") interprets "location within the District" to mean that an organization must have a physical location or office in the District. OTR requires semipublic institutions seeking a sales tax exemption to obtain a certificate of exemption by filing a Form FR-164, a copy of which is attached to plaintiffs' complaint. *See* Complaint, Ex. A. OTR's current instructions for completing Form FR-164 require a semipublic institution seeking a sales tax exemption to include a "signed copy of lease, District of Columbia Certificate of Occupancy permit issued to the organization or other documentation to show proof of a physical location in D.C." *See* User Guide: How to Request an Exemption to File (FR-164), accessible at: https://otr.cfo.dc.gov/sites/default/files/dc/sites/otr/publication/attachments/How_to_Request_an_Exemption_to_File_FR-64_1220.pdf.

interstate commerce. The "Dormant Commerce Clause" is a legal doctrine that refers to the prohibition, implicit in the Commerce Clause, against states passing legislation that, *inter alia*, favors in-state citizens or businesses at the expense of out-of-state businesses or citizens.[3]

Plaintiffs claim that the District of Columbia's provision of tax exemptions to semipublic institutions located in the District, while denying sales tax exemptions to "out-of-state" semipublic institutions, violates the Dormant Commerce Clause and entitles them, and all other similarly situated semipublic institutions, to equitable relief and damages. Complaint, ¶¶ 17.

Procedural Background

Plaintiffs filed their complaint in the Civil Division on behalf of themselves and a class of similarly situated semipublic institutions. Defendant District of Columbia ("District") moved to dismiss on the ground that plaintiffs had not exhausted available administrative remedies by applying to the Office of Tax and Revenue ("OTR") for a refund of the sales taxes paid before filing suit. The then-presiding judge, Hon. Anthony C. Epstein, denied the motion to dismiss in part, concluding that plaintiffs were not required to apply for refunds from OTR before bringing suit against the

[3] Although the District of Columbia is not a "state," the District of Columbia Court of Appeals has nonetheless considered the merits of claims asserting that a District of Columbia taxation scheme violated the Commerce Clause by favoring "in-state business over out-of-state businesses for no other reason than the location of the business." *Am. Bus Association v. District of Columbia*, 2 A.3d 203, 214 (D.C. 2010).

District for a refund of taxes paid. *See* Order, January 29, 2019 in Case Number 2017 CA 4057. However, Judge Epstein also concluded that plaintiffs' claims for relief other than refunds of the sales taxes they paid were barred by the Anti-Injunction Act. *Id.* at 6-7. Concluding that plaintiffs had stated a claim for a refund of taxes paid, Judge Epstein transferred the case to the Tax Division. *Id.* at 7-8.

The District moved for reconsideration of Judge Epstein's order, which the undersigned denied. *See* Order, May 30, 2019. The District also argued that certain claims for refunds were barred because the taxes at issue had been paid more than six months before the suit was filed. The undersigned agreed, concluding that it lacked jurisdiction to consider claims for refunds of taxes paid more than six months before this lawsuit was filed on June 12, 2017, *i.e.*, before December 12, 2016. *Id.* at 7-9.

Plaintiffs' Motion for Class Certification

Plaintiffs American Philosophical Association ("APA") and American Anthropological Association ("AAA") allege that they are non-profit organizations with principal places of business located, respectively, in Newark Delaware and Arlington, Virginia. Complaint, ¶¶ 5-6. They allege that they held annual meetings at the Washington Marriott Wardman Park and Omni Shoreham hotels located in the District of Columbia and allege that these hotels collected thousands of dollars in sales taxes on charges for rooms, catering services, and audio-visual services purchased in connection with these meetings. *Id.*

Plaintiffs seek certification of a class of semipublic institutions located outside of the District that have paid sales and other taxes to certain hotels in the District of Columbia. Both plaintiffs seek to be named class representatives, and their counsel seeks to be named class counsel.

The Court has considered the following papers: *Plaintiff's Motion for Class Certification, Appointment of Plaintiffs and Class Representatives and Plaintiff's Counsel as Class Counsel*, filed on March 29th, 2019, *Defendant's Opposition to Plaintiff's Motion for Class Certification*, filed on July 29th, 2019; *Plaintiffs' Reply in Further Support of Plaintiffs' Motion for Class Certification, Appointment of Plaintiffs as Class Representatives and Plaintiffs' Counsel as Class Counsel*, filed on August 12th, 2019 and entered onto the docket October 3rd, 2019; and Defendant's *Sur-Reply in Support of Opposition to Plaintiff's Motion for Class Certification* on October 17th, 2019.

The definition of the class changed during the parties' briefing. The result is that plaintiffs now seek certification of a class action and to be named the Class Representatives of the following class:

> All semipublic institutions that do not have offices within the District that paid a sales or hotel tax to any of the hotels listed below in connection with any meetings held at any such hotels for the purpose for which the institution was organized or for honoring the institution or its members from December 12, 2016, and continuing until there is a final determination that the requirement under D.C. Code § 47-2005(3)(C) that a semipublic institution must reside in the District in order to obtain an exemption from sales and hotel taxes violates the Commerce Clause of the United States Constitution (the "Class Period"):
>
> The Washington Hilton, the Marriott Marquis, the Renaissance Washington, the Omni Shoreham Hotel, the Grand Hyatt Hotel, the Mayflower Hotel, the Hyatt

> Regency, the JW Marriot, the Capital Hilton, the Willard Intercontinental, the Marriott Wardman Park Hotel, the Fairmont, the Mandarin Oriental, the Watergate Hotel, the Hilton D.C. National Mall Hotel, the Marriott Georgetown, the Washington Marriott at Metrocenter, and the Westin Washington City Center.

See Plaintiffs' Reply at 12.

DISCUSSION

I. APA Is Not A Member Of The Proposed Class

The District argues that plaintiff APA is not a member of the proposed class. As noted above, the Court ruled on May 30, 2019 that it lacks jurisdiction to consider claims that are based on taxes paid more than six months before the filing of this lawsuit on June 12, 2017. *See* May 30 Order at 7-9. Noting that APA only seeks a refund of the sales taxes it paid from January 6-9, 2016, the District argues that the Court lacks jurisdiction to consider any of APA's claims. Opposition at 9. APA responded to the District's argument by noting that it planned to hold another meeting in November 2019 where it be charged sales taxes, and that following that meeting there would be no doubt that it fell within the class definition. However, APA has not filed anything since that time indicating that it actually had paid sales taxes to any vendor in the District of Columbia during the proposed class period, and the record currently before the Court does not establish that APA paid sales taxes during the class period. As a result, APA is not a member of the proposed class at this time, and the Court finds that only AAA has standing at this time to seek class certification.

II. Class Certification

Plaintiff APA seeks class certification under Superior Court Civil Rule 23, which is made applicable to the Tax Division by Tax Division Rule 3.[4] Plaintiff argues that the proposed class action meets the requirements of Rule 23(a) and asks the Court to certify the class under Rule 23(b)(3).

Rule 23(a) provides that a class may be certified only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defense of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

If the Court finds that the class satisfies all the requirements of Rule 23(a), it may certify the class under Rule 23(b)(3) only if it also "finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for

[4] Tax Division Rule 3 provides that the Rules of the Civil Division are applicable to actions brought in the Tax Division of the Court "except where inappropriate or inconsistent with the Rules of this Division." Civil Rule 23 is not inconsistent with the Rules of the Tax Division.

fairly and efficiently adjudicating the controversy." Rule 23(b)(3). In making this determination, the Court is to consider

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Rule 23(b)(3(A)-(D).

The party seeking class certification bears the burden of establishing that the requirements of Rule 23(a) and at least one subdivision of Rule 23(b) are satisfied. *See, e.g.*, *Ford v. Chartone, Inc.,* 908 A.2d 72, 84 (D.C. 2006).

ANALYSIS

A. The Proposed Class Meets The Requirements Of Rule 23(a)

1. 23(a)(1)- Numerosity

Courts in the District have held that "the numerosity requirement is satisfied and joinder is impractical where a proposed class has at least forty members," and that the Court need only to "find an approximation of the size of the class." *Ait Hamadi v*

Ristorante La Perla of Washington, No 2016 CA 2467 B, 2017 D.C. Super. LEXIS 1, at *9 (D.C. Super. Ct. Mar. 7, 2017).

Plaintiff does not provide the Court with an exact number of possible members of the class. However, Plaintiff does provide information that allows the Court to approximate the possible size of the class. The class definition would include all "semipublic institutions that do not have offices within the District that paid a sales or hotel tax to any of the [eighteen] hotels listed… from December 12, 2016 and continuing until there is a final determination" in this case. *See* Plaintiff's Reply at 12. Through a subpoena served on the Wardman Park Hotel, one of the eighteen hotels listed in the class definition, plaintiff contends that it has identified over fifty semipublic organizations that paid sales taxes during a portion of the class period and would qualify as members of the proposed class. *See* Class Certification Motion at 5. As this subpoena was served on only one of the eighteen hotels contained in the class definition, it appears clear that the number of class members will only grow from fifty once all qualifying organizations are identified. In any event, the District does not dispute that plaintiff's proposed class meets the numerosity requirement of Rule 23(a)(1). *See* District's Opp. at 8 n. 3. Accordingly, the Court finds that plaintiff has shown that the proposed class meets the numerosity requirement set forth in Rule 23(a)(1).

2. 23(a)(2) –Questions Of Law Or Fact Common To The Class

Rules 23(a)(2) requires that the moving party demonstrate questions of law or fact common to every member of the proposed class. The District does not dispute

that a common legal issue – the constitutionality of D.C. Code § 47-2005(3)(C) – forms the foundation of plaintiff's claim. *See* Opposition at 7. Because every single class member's claim will depend on the resolution of this legal issue, the Court readily concludes that there is a legal issue common to every member of the class. It further appears that this issue can be resolved on a class-wide basis and would not require any claimant-specific proof or legal argument. *See Ford v. Chartone*, 908 A.2d at 85-86 ("the members of a proposed class of plaintiffs raise a common question of law or fact where 'the same evidence will suffice for each member to make a *prima facie* showing' of the defendant's liability").

The District nonetheless argues that the variation in factual issues underlying whether each class member would in fact be entitled to refunds, were D.C. Code § 47-2005(3)(C) found unconstitutional, makes the class unmanageable. *Id.* at 8 (citing *Snowder v. District of Columbia*, 949 A.2d 590, 598 (D.C. 2008)). The District is correct that the members of the class would eventually need to produce individual evidence that shows they are each entitled to a refund. The District is also correct that each class member would need to show that it met the other requirements for obtaining the sales tax exemption set forth in D.C. Code § 47-2005(3) and any applicable regulations. And each class member would also need to show that it actually paid sales taxes.

The Court agrees with plaintiff that each class member's eligibility for a refund can be readily addressed in administration of the class in the event that D.C. Code §§ 47-2005(3)(C) is found to be unconstitutional. In addition, the Court finds that the

issue of whether individual questions of fact predominate is more properly addressed in deciding whether the proposed class meets the requirement of Rule 23(b)(3) that the common issue of law predominates. *See Ford*, 908 A.2d at 85-86 ("factual variations among the class members will not defeat the commonality requirement, so long as a single aspect or feature of the claim is common to all proposed class members"). Accordingly, the Court finds that there is a common issue of law and that the commonality requirement of Rule 23(a)(2) is met.

3. Rule 23(a)(3) – Typicality

The purpose of the typicality requirement is to ensure that the "claims of the representative and absent class members are sufficiently similar so that the representative's acts are also acts on behalf of, and safeguard the interests of, the class." *Ford,* 908 A.2d at 86. The District does not dispute that AAA's claim is typical of the other proposed class members' claims. Each proposed class member will have the same claim: they were improperly charged sales tax as a result of the allegedly unconstitutional statute that does not permit them to claim an exemption available to semipublic institutions located in the District. The Court readily concludes that plaintiff's claims are typical of those of the class and that the typicality requirement of Rule 23(a)(3) is met.

4. Rule 23(a)(3) – Adequacy

The District does not dispute that AAA and its counsel meet the requirements of 23(a)(4). The purpose of the adequacy of representation requirement is to ensure

that the interests of the class members are protected by and vigorously advocated for by the representative members and their counsel. The Court is confident that the plaintiff and its counsel will fully prosecute the case and protect the interests of the class. Additionally, the Court finds that plaintiff's counsel is highly experienced in class actions and is qualified to pursue this class action. Accordingly, the Court finds that 23(a)(4) is satisfied.

B. The Proposed Class Action Meets the Requirements of Rule 23(b)(3)

Plaintiff seeks certification under Rule 23(b)(3). A class that meets the requirements of Rule 23(a) may be certified only if the court finds that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3).

1. Common Issues Predominate.

"Predominance tends to be established 'when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position.'" *Ford*, 908 A.2d at 88. On the other hand, "if the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23 (b)(3) action would be inappropriate." *Id.*, citing WRIGHT, MILLER & KANE, § 1778 at p. 134. The District argues that the "individualized nature of each putative class member's tax

refund claim makes this action inappropriate for class certification." Opposition at 10. The District argues that resolution of each class member's claim would require a determination that each class member met the other requirements set forth in D.C. Code § 47-2005(3) and the related Municipal Regulations, with the result that individual claims would predominate.

Every single class members' claim will depend on a determination that the provision of a sales tax exemption to semipublic organizations "located in the District," but not to semipublic entities not "located in the District" violates the Commerce Clause. The District does not argue that determination of ***this*** issue requires individual proof specific to each class member. Instead, the District argues that each individual class member's entitlement to a refund will require "a factual determination that would be overly cumbersome to administer, at lease without prior administrative rulings from OTR applying the agency's expertise as to a putative class member's satisfaction of the other statutory requirements." Opposition at 11. As noted above, it is true that each class member will need to prove its entitlement to a refund. But that is true in every class action, and a claims-handling process can be established in the event the Court finds that the District's statute is unconstitutional.

The predominant issue in this case is the constitutionality of D.C. Code § 47-2005(3)(C). If the statute is found constitutional, no class member will be entitled to a refund. Put another way, it is impossible for any class members to obtain a refund without first litigating the common legal issue: the constitutionality of D.C. Code § 47-

2005(3)(C). Accordingly, the Court finds that common issues predominate over any individual questions.

2. A Class Action Is Superior To Any Other Method Of Resolution.

The District argues that a class action is not a superior method of resolving these claims because every class member has the available administrative remedy of filing a claim for a refund with OTR. Citing *District of Columbia v. Craig*, 930 A.2d 946, 961-63 (D.C. 2007), *cert. denied*, 554 U.S. 905 (2008), the District argues that administrative appeal to OTR is an adequate remedy for a putative class action alleging a constitutional violation. In light of this available remedy, the District argues that the Court should decide the constitutionality of D.C. Code § 47-2005(3)(C) only as it relates to plaintiff's individual claim for a refund and that OTR can apply the Court's ruling to future requests for refunds or requests for exemptions. The District suggests that a ruling that the statute is unconstitutional in this individual case would "constrain" the District from denying other "out-of-state" semipublic organizations' requests for refunds. Opposition at 13. The Court understands the District to be suggesting that a ruling in this case adverse to the District might act as collateral estoppel against the District in future requests for refunds. For this reason, the District also argues that the Court should defer ruling on class certification until after it addresses the merits of plaintiff's individual claim.

The District's argument persuades the Court that a class action is superior to any other method of resolution. If the Court decides that D.C. Code § 47-2005(3)(C) is

unconstitutional without certifying a class, the ruling might bind the District in further cases. But future refund claimants would still need to litigate whether the ruling is binding on the District. Conversely, if the Court rules that D.C. Code § 47-2005(3)(C) is not unconstitutional without certifying a class, that ruling is would not be binding on any future refund claimants, who would be free to relitigate the issue. Either way, a ruling on the constitutionality of D.C. Code § 47-2005(3)(C) without class certification would permit relitigation of this issue.

In contrast, a ruling after a class is certified that D.C. Code § 47-2005(3)(C) is unconstitutional would (if upheld on appeal) end litigation over the matter for all time and for all similarly situated parties. As noted above, deciding the constitutionality of D.C. Code § 47-2005(3)(C) should not require any litigation of issues specific to any individual class member, which means that it should require no more resources or effort to decide the issue in the context of a class action than in the context of a single-plaintiff claim. In the same vein, a class action can be superior to individual actions where "the typical claims of class members are far too small for individual class members to maintain individual actions." *Wells v. Allstate Ins. Co.,* 210 F.R.D. 1, 12 (D.D.C. 2002). In this case, individual refunds might be insufficient to induce claimants to seek refunds in individual actions, further persuading the Court that a class action is superior. Thus, individual class members are unlikely to have an interest in controlling the prosecution of individual actions. *See* Rule 23(b)(3)(A).

It does not appear that there is any other litigation concerning the District's sales tax exemption. This factor suggests that a class action is a superior means of resolving the parties' dispute. *See* Rule 23(b)(3)(B). In addition, the District of Columbia Superior Court is the only forum in which plaintiff and the class can bring tax refund claims. As a result, there is no occasion to consider the "desirability or undesirability of concentrating the litigation of the claims in the particular forum," *see* Rule 23(b)(C), because there is no other available forum.

Finally, the predominating issue in this case is a facial challenge to the constitutionality of D.C. Code § 47-2005(3)(C). Resolution of that issue will require no complex case management. If that issue is decided adversely to the District, procedures are already in place that would permit OTR or some other entity to process the class members' refund claims. Likewise, if that issue is decided in the District's favor, the case will be over and there will be no case management issues to address. These factors also indicate that a class action is a superior method of addressing the member's claims. *See* Rule 23(b)(D).

3. Ascertainable

Rule 23 does not contain an explicit requirement that the proposed class be ascertainable. However, "such a requirement has been 'routinely required' in order to 'help the trial court manage the class.'" *Meijer, Inc. v. Warner* 246 F.R.D. 293, at 300 (D.D.C. 2007). The District argues that the class is not ascertainable because the definition may include organizations who are not eligible for a refund under D.C. Code

§ 47-2005(3)(C). Opposition at 14. The Court finds that the proposed class definition is clearly defined in a way that will allow eligible organizations to obtain notice of this action and, if the action is successful, apply for refunds. The Court also finds that claims processes either already exist at OTR or can be developed that will readily exclude organizations that are ineligible for refunds.

CONCLUSION

Based on the foregoing, it is, this 30th day of April, 2021, hereby

ORDERED, that the Plaintiff's Motion for Class Certification under Rule 23(b)(3) is **GRANTED**; and it is

FURTHER ORDERED, that Plaintiff American Anthropological Association is appointed as Class Representative; and it is

FURTHER OREDERED, that pursuant to Rule 23(g), Plaintiff's Counsel are appointed as Class Counsel; and it is

FURTHER ORDERED, that the following class is certified pursuant to Rule 23(b)(3): A class consisting of:

> All semipublic institutions that do not have offices within the District that paid a sales or hotel tax to any of the hotels listed below in connection with any meetings held at any such hotels for the purpose for which the institution was organized or for honoring the institution or its members from December 12, 2016, and continuing until there is a final determination that the requirement under D.C. Code § 47-2005(3)(C) that a semipublic institution must reside in the District in order to obtain an exemption from sales and hotel taxes violates the Commerce Clause of the United States Constitution (the "Class Period"):
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> The Washington Hilton, the Marriott Marquis, the Renaissance Washington, the Omni Shoreham Hotel, the Grand Hyatt Hotel, the Mayflower Hotel, the Hyatt

Regency, the JW Marriot, the Capital Hilton, the Willard Intercontinental, the Marriott Wardman Park Hotel, the Fairmont, the Mandarin Oriental, the Watergate Hotel, the Hilton D.C. National Mall Hotel, the Marriott Georgetown, the Washington Marriott at Metrocenter, and the Westin Washington City Center.

Judge Jonathan H. Pittman

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