SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

AMERICAN PHILOPHICAL ASSOCIATION, *et al.*	:	
v.	:	Case No. 2017 CA 004057 B
DISTRICT OF COLUMBIA	:	

ORDER

The Court grants in part and denies in part defendant District of Columbia's motion to dismiss. Plaintiffs American Philosophical Association and American Anthropological Association may pursue their claim for a refund in this action even though they did not apply to the Office of Tax and Revenue ("OTR") for a refund of the sales taxes that they contend they unconstitutionally paid, but they may not obtain from the Court any non-monetary relief relating to these sales taxes. The Court will also transfer the case from the Civil Division to the Tax Division.[1]

Each plaintiff is a "semipublic institution" within the meaning of D.C. Code § 47-2001(r), and neither plaintiff maintains offices in the District. D.C. Code § 47-2005(3)(C) exempts semipublic institutions that are "located within the District" from paying District sales taxes, and the parties apparently agree that neither plaintiff qualifies for the exemption because neither is "located within the District." Each plaintiff has paid substantial sales and use taxes to hotels and other service providers related to its meetings in the District. Plaintiffs contend that the imposition of these taxes only on non-resident semipublic institutions violates the Commerce Clause of the U.S. Constitution and that they are entitled to recover the taxes they paid.

[1] The undersigned judge recently assumed responsibility for this motion following the retirement of the previously-assigned judge.

A. Exhaustion of administrative remedies

Contrary to the District's argument, plaintiffs were not required to apply for a refund from OTR before seeking refunds through the Court.

Exhaustion of administrative remedies may be categorically mandated by statute or prudentially required by courts. *See Washington Gas Light Co. v. Public Service Commission*, 982 A.2d 691, 700-01 (D.C. 2009); *District of Columbia v. Craig*, 930 A.2d 946, 955 (D.C. 2007). "If the statute does mandate exhaustion, a court cannot excuse it," even where exhaustion is futile or where "a seeming hardship results to the taxpayer." *See Craig*, 930 A.2d at 956 (quoting *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004), and other cases). "In order to mandate exhaustion, a statute must contain sweeping and direct statutory language indicating that there is no federal jurisdiction prior to exhaustion, or the exhaustion requirement is treated as an element of the underlying claim." *Avocados Plus*, 370 F.3d at 1248 (quotation and citation omitted). "But where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (citation omitted). Because the common-law exhaustion doctrine "is a discretionary rule derived from equity, it allows for some flexibility." *Washington Gas Light Co.*, 982 A.2d at 701 (footnote omitted). "[W]hen the exhaustion requirement is itself a judicial creation," courts may "relieve plaintiffs of exhaustion requirements" if the "administrative process was virtually certain to prove futile." *Craig*, 930 A.2d at 956 (citations omitted).

No statute mandates that a taxpayer must apply for a refund from OTR before seeking a refund through judicial action. The two relevant statutory provisions are D.C. Code §§ 47-2021(a) and 47-3303. Section 47-2021(a) provides that "[a]ny person aggrieved" by OTR's "denial of a claim for refund … may, within 6 months … from the date of the denial of a claim

for refund appeal to the Superior Court of the District of Columbia." This provision authorizes judicial review of an administrative denial of a refund claim, but it does not state that a taxpayer must apply for an administrative refund before seeking judicial relief. Like the statute at issue in *Avocados Plus*, § 47-2021(a) "neither mentions exhaustion nor explicitly limits the jurisdiction of the courts," and it "merely creates an administrative procedure for challenging the [agency's] orders." *See Avocados Plus*, 370 F.3d at 1248. *Cf. Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109, 112-13 (D.C. Cir. 1989) (the Federal Power Act created a jurisdictional exhaustion requirement by providing that "[n]o proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon" and "[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission").

Section 47-3303 provides that "[a]ny person aggrieved by any assessment by the District of any … sales … tax or taxes … may, within 6 months after the date of such assessment appeal from the assessment" to the Superior Court, provided that the complainant "shall first pay such tax together with penalties and interest due thereon." The only prerequisite specified in the statute is that the person shall first pay the tax, and notably absent is any requirement that the person shall also first apply to OTR for a tax refund. The plain language of § 47-3303 does not require OTR review before the taxpayer files suit in Superior Court, and it permits appeal to this Court directly from the assessment of the tax, so long as the tax is first paid.

It is true that "to maintain a refund suit, a taxpayer must follow the specific, statutorily prescribed procedures governing such suits." *District of Columbia v. Craig*, 930 A.2d 946, 954 (D.C. 2007). "The required procedure to challenge either a tax or an assessment … is to pay the

tax and within six months of payment, bring a refund suit against the District, or its agency, in the Tax Division of Superior Court." *D.C. Department of Consumer and Regulatory Affairs v. Stanford*, 978 A.2d 196, 199 (D.C. 2009). This is exactly the procedure that plaintiffs here have followed: they paid the tax and then brought a refund suit against the District in this Court. As the District admits, "here plaintiffs have paid the taxes at issue, and therefore their suit does not imperil the general principle of 'pay first and litigate later.'" Motion at 9 (quoting *Stanford*, 978 A.2d at 199).

The common-law exhaustion doctrine applies in tax cases, so the Court must decide whether to exercise its discretion to require plaintiffs to apply to OTR for a refund before seeking refunds through the judicial process. The District has not persuaded the Court that exhaustion is warranted in the circumstances of this case. Courts may decline to require administrative exhaustion where the agency "lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute" that the agency is obligated to enforce. *See McCarthy*, 503 U.S. at 147-48. OTR does not have any special expertise concerning the Commerce Clause of the U.S. Constitution. *See generally D.C. Fire & Emergency Medical Services Dep't v. D.C. Public Employee Relations Board*, 105 A.3d 992, 996 (D.C. 2014) (a "court does not … defer to an agency's interpretation of law that the agency has not been delegated the authority to administer"). Moreover, all indications are that any application to OTR for a refund would be futile. The District takes the position that limiting the sales tax exemption for resident semipublic institutions is fully consistent with the Commerce Clause, Motion at 13-18, Reply at 8-9, and the District does not suggest that its tax agency will disagree with the legal opinion of its Attorney General.

These factors distinguish this tax case from the far more common tax cases in which taxpayers challenge the assessment or imposition of a tax as inconsistent with D.C. tax laws or regulations. The common-law exhaustion doctrine "serves several important policy functions: it prevents litigants from evading the agency's authority, thereby safeguarding the intent of the legislature in creating the agency; it protects agency authority by ensuring that the agency has the opportunity to apply its expertise and exercise its discretion; it aids judicial review by creating a record and promotes judicial economy by channeling claims to the decision maker of the legislature's choice." *See Washington Gas Light Co.*, 982 A.2d at 701 (footnotes omitted); *McCarthy*, 503 U.S. at 145 (the "twin purposes" of the exhaustion doctrine are "protecting administrative agency authority and promoting judicial efficiency"). By protecting agency authority, "the exhaustion doctrine recognizes the notion … that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer," and "[e]xhaustion concerns apply with particular force when … the agency proceedings in question allow the agency to apply its special expertise." *Id.* (citations omitted).

All of these policies generally apply in typical tax disputes that turn on the construction and application of D.C. tax statutes or regulations. Although OTR does not have special expertise or institutional competence to resolve constitutional questions, it does have expertise in interpreting and applying D.C. tax laws and regulations. That is why courts "defer to reasonable administrative understandings of uncertain legislative commands in the taxation context." *See Hospitality Temps Corp. v. District of Columbia*, 926 A.2d 131, 134 (D.C. 2007) (quotation and citation omitted): *see generally D.C. Fire & Emergency Medical Services Dep't*, 105 A.3d at 996 (courts afford "a high degree of deference" to an agency's interpretation of a statute it administers); *St. Mary's Episcopal Church v. D.C. Zoning Commission*, 174 A.3d 260, 267 (D.C.

2017) ("An agency's interpretation of the regulations that govern it must be accorded great weight, and must be upheld unless it is plainly erroneous or inconsistent with the regulations."). Moreover, when OTR first addresses an issue of interpreting or applying a tax statute or regulation, "a judicial controversy may well be mooted." *See McCarthy*, 503 U.S. at 145. "And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context." *Id.* (citations omitted). This principle applies in typical cases involving disputes between District taxpayers and tax collectors, but not in a facial challenge to the constitutionality of a D.C. tax law.

B. The Anti-Injunction Act

To the extent that plaintiffs seek relief other than refunds, they do not state a claim upon which such non-monetary relief can be granted.

"The purpose of the anti-injunction statute is to preserve this right [of the government to prompt collection of taxes] by prohibiting a court from interfering with the collection of taxes, requiring the determination of the legality of the tax to be determined in a refund suit." *Tolu v. District of Columbia*, 906 A.2d 265, 267 (D.C. 2006). "This anti-injunction statute has been consistently interpreted as depriving the court of subject matter jurisdiction over causes of action for equitable relief regarding District of Columbia taxes." *Agbaraji v. Aldridge*, 836 A.2d 567, 569 (D.C. 2003) (citing *Barry v. American Tel. & Tel. Co.*, 563 A.2d 1069, 1073 & n.10 (D.C. 1989)). "[T]he anti-injunction statute applies to declaratory relief as well as injunctive relief." *Barry*, 563 A.2d at 1073.

Plaintiffs argue that the non-monetary relief they seek would not violate the Anti-Injunction Act because they only want OTR to issue an exemption to them. *See* Opp. at 8-9.

However, the practical effect of ordering the issuance of an exemption would be to interfere with the District's ability to collect sales taxes from non-resident semipublic institutions.

Furthermore, to avoid the Anti-Injunction Act bar, a taxpayer must show that it does not have an adequate legal remedy. *American Bus Association, Inc. v. District of Columbia*, 2 A.3d 203, 210 (D.C. 2010). An adequate legal remedy includes a "full opportunity to litigate [his or her] tax liability in a refund suit." *Craig*, 930 A.2d at 961. This case is a refund suit that gives plaintiffs a full opportunity to litigate their sales tax liability as non-resident semipublic institutions.

Plaintiffs' claim for refunds does not run afoul of the Anti-Injunction Act's bar on claims seeking equitable or declaratory relief. Indeed, the Act requires "the legality of the tax to be determined in a refund suit." *Tolu*, 906 A.2d at 267. Accordingly, plaintiffs' claim for refunds is a claim upon which the Court may grant relief consistent with the Act.

C. Transfer to the Tax Division

D.C. Code § 11-1201(1) gives the Tax Division jurisdiction of "all appeals from and petitions for review of assessments of tax," and § 11-1202 makes clear that this jurisdiction is exclusive: "Notwithstanding any other provision of law, the jurisdiction of the Tax Division of the Superior Court to review the validity and amount of all assessments of tax made by the District of Columbia is exclusive." Section 11-1202 applies "where federal or constitutional issues are raised." *Fernebok v. District of Columbia*, 534 F. Supp. 2d 25, 27 (D.D.C. 2008) (citing *Jenkins v. Washington Convention Center*, 236 F.3d 6, 11 (D.C. Cir. 2001)). This case involves the validity of assessing a sales tax on non-resident semipublic institutions. *See* Motion at 5 ("As an initial matter, plaintiffs here challenge the assessment of a tax"), 8 ("Plaintiffs' Suit Challenges the Assessment of a Tax."); *Fernebok*, 534 F. Supp. 2d at 28 ("Any distinction …

between assessment and imposition of a tax is illusory" with respect to Tax Division jurisdiction). The case therefore belongs in the Tax Division.

Even if § 11-1202 did not require this result, the Court would transfer the case in order to manage tax cases more efficiently and to help achieve consistency in judicial tax rulings.[2]

Accordingly, the Court will transfer this case to the Tax Division. The Tax Division in turn will schedule a hearing. At the hearing, the parties should be prepared to discuss (1) whether the Court needs any additional evidence or briefing in order to decide plaintiffs' constitutional challenge and (2) whether and how the Court should determine the amount of any refund due to plaintiffs if they prevail on their constitutional challenge. The parties should confer about these matters before the hearing.

D. Conclusion

For these reasons, the Court orders that:

1. The District's motion to dismiss is denied in part and granted in part.

2. The Court has jurisdiction to review plaintiffs' requests for refunds of the sales taxes they paid.

3. Plaintiffs' claims for relief other than refunds are dismissed.

Anthony C. Epstein

Anthony C. Epstein
Judge

Date: January 29, 2019

[2] Notwithstanding the statute's reference to jurisdiction, there is no jurisdictional restriction that prohibits one division of the Court from considering matters more appropriately considered in another. *See Sanchez v. United States*, 919 A.2d 1148, 1154 (D.C. 2007).

Copies to:

Alexis H. Castillo
Jeffrey A. Klafter
Silvija A. Strikis
Counsel for Plaintiff

Gregory M. Cumming
Counsel for Defendant