

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CHIEF FINANCIAL OFFICER
OFFICE OF TAX AND REVENUE



OTR NOTICE 2006-01

March 24, 2006

NOTICE OF INSTRUCTIONS FOR FILING A PROTECTIVE CLAIM BASED ON BENDER VS. DISTRICT OF COLUMBIA

Recently, a D.C. Superior Court judge held that the District could not collect an unincorporated business franchise tax on the net profits of real estate partnerships conducting business here to the extent that those profits belonged to partners who are nonresidents of the District. The judge concluded that the tax in this circumstance was a tax on the personal income of nonresidents and, therefore, barred by the Home Rule Charter.

The District strongly believes that this decision is incorrect and has filed an appeal with the D.C. Court of Appeals. The Office of Tax and Revenue will not act on any claims for refunds until a decision has been made by the Court of Appeals; however, guidance on how to file protective claims is listed below.

Please note that any protective claims filed will be held in suspense until the final adjudication of this case. All protective claims must be filed within the three-year statute of limitations period to be accepted.

Instructions for Filing a Protective Claim

1. Submit a completed D-30 with the words **“BENDER CLAIM”** clearly displayed across the top of page one.
2. The D-30 should be identical to the last one submitted for the period down to line 35. If adjustments are claimed above line 35, this needs to be noted in a separate cover letter attached to the D-30. The cover letter and return must then be identified as an amended return.
3. Line 36 needs to be recalculated to eliminate the taxed portion of the income allocated to non-resident individual partners. A sample schedule is shown below. All of the information shown in the sample must be included to constitute a valid claim.

Example:

Owner'(s) Name Residence Address	FEIN Number	Percentage of Ownership	Partners Share of Line # 36	Non-Resident Share of Line # 36	Resident Share of Line # 36
Ima Taxpayer 27 Main Street Rockville, MD	000-00-000	25%	\$5,000	\$5,000	
Yura Taxpayer 2500 M Street, NW Washington, DC	000-00-000	25%	\$5,000		\$5,000
Another Partnership 14 No Road Alexandria VA	00-0000000	25%	\$5,000		\$5,000
Wera Corporation 9 N. Capitol St., NE Washington, DC	00-0000000	25%	\$5,000		\$5,000
Total Percentage of Ownership		100 %			
Taxable income Original D-30			\$20,000		
Total Non-Resident Partners Income				\$5,000	
Revised Taxable Income Line # 36					\$15,000

Frequently Asked Questions**Question: Who is a resident?**

Answer: D.C. Code § 47-1801.04(17) states that "Resident" means every individual domiciled within the District at any time during the taxable year, and every other individual who maintains a place of abode within the District for an aggregate of 183 days or more during the taxable year, whether or not such other individual is domiciled in the District. The term "resident" shall not include any elective officer of the government of the United States or any employee on the staff of an elected official in the legislative branch of the government of the United States if such employee is a bona fide resident of the state of residence of such elected officer, or any officer of the executive branch of such government whose appointment to the office held by him was by the President of the United States and subject to confirmation by the Senate of the United States and whose tenure of office is at the pleasure of the President of the United States, or any Justice of the Supreme Court of the United States, unless such officers or Justices are domiciled within the District at any time during the taxable year. In determining whether an individual is a "resident", such individual's absence from the District for temporary or transitory purposes shall not be regarded as changing his domicile or place of abode.

Q: Who is a non-resident?

A: D.C. Code § 47-1801.04(18) states that "Nonresident" means every individual other than a resident.

Q: Does the Bender ruling apply to corporations?

A: No, the Bender ruling only applies to individual partners. See D.C. Code §47-1801.04(4) for the definition of individual.

Q: Should I file my future business returns consistent with the Bender decision?

A: No, returns filed consistent with Bender may subject filer to interest and penalties if the ruling is overturned.

Q: When will the appeal of the Bender decision be decided?

A: This is uncertain at this time but the case is being expedited. The D.C. Court of Appeals is scheduled to hear oral argument in this case in June of this year (2006).

Q: When should we expect the refund from the claim?

A: Not until after the appeals decision is decided.

Q: Will I get notification that my claim was received?

A: No. It is best to send it “Return Receipt Requested”.

Q: Can I file a claim for all open years on one filing?

A: No, each claim must be filed separately.

Q: What if I can’t gather all of the ownership information in time to file a claim by the time the statute expires?

A: The information should be readily available since the basic information was required on the Schedule J of the original return.

Q: Can I file a claim for the oldest year now and file a claim for more recent years later based on the outcome of the Court of Appeals decision?

A: Yes, this is the method that OTR prefers as it will eliminate unnecessary work in the event the judge’s decision is overruled by the appeals court.

Q: What if a partner moved from within DC to outside of DC during the year in question?

A: Allocate the DC income based on the percentage of time as resident vs. a non-resident. This should correspond with the allocation made on the individual’s D-40 filed for the part year.

Q: How are non-individuals treated in the Bender decision?

A: The decision only addressed the taxation of non-resident INDIVIDUALS so OTR’s position is it would be incorrect to exempt any income for other entities outside of DC that were non-individuals.