

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In The Matter of the Petition) D E T E R M I N A T I O N
For Correction of Assessments)
of) No. 89-127
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) Registration No. . . .
) . . . /Audit No. . . .
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) Registration No. . . .
) . . . /Audit No. . . .

- [1] **RULE 143:** RCW 82.04.280 -- RCW 82.04.290 -- B&O TAX --PRINTING & PUBLISHING -- PERIODICALS -- DEFINITION. A periodical, as the term is used in RCW 82.04.280, is a vehicle for the expression of ideas, thoughts, or news, and not merely the compiling of advertisements. An "[rental] guide" is not a periodical, and therefore advertising income to its publisher is taxable under the service category of the B&O tax.
- [2] **RULE 178:** RCW 82.04.190(2) -- USE TAX -- CONSUMER - -DEFINITION. A consumer includes any person engaged in an activity taxable under the Service B&O tax.
- [3] **RULE 178:** RCW 82.12.010 -- RCW 82.04.050 -- USE TAX --VALUE OF THE ARTICLE USED -- ETB 417.12.144 -- ETB 456.08.143. The use tax is imposed on the value of the property consumed. A publisher of advertising guides is the consumer of the guides, and is taxable for their value (cost), including the cost of the printer's services. The ETBs are not applicable to the value of a final printed product, but apply only to goods produced as an intermediate step in final production.
- [4] **RULE 178:** USE TAX -- INTERSTATE COMMERCE -- "TRANSPORTATION FINALLY ENDED". The transportation

the printing and publishing category of the B&O tax to service B&O, and assessed use tax on charges from printers. Both corporations will be referred to as "taxpayer."

Taxpayer's [rental] guides are offered free of charge to the public at 7-Eleven and Safeway stores, park and rides, and chambers of commerce. [Rental] owners and management companies purchase space in the guides to advertise [rental properties] available for rent. The taxpayer controls the layouts of all of the [rental] listings, so that all [rental] listings in the guides follow the same format. The guide contains the [rental] listings, some basic maps showing the locations of the [rentals], advertisements for [other rentals], advertisements for furniture rental companies, 7-Eleven stores, and a listing of missing children. All layout, design and printing are performed at the taxpayer's Reno, Nevada office. Nevada printers are used to actually print the booklets. The printers ship the guides by common carrier directly to Washington, where the guides are picked up at the airport and delivered directly to the distribution sites. The taxpayer pays a fee to the various sites to distribute the guides.

Taxpayer argues (1) that it is not properly taxable under the service category of the B&O tax, but should be taxed under the printing and publishing category, as the publisher of a periodical, and (2) that it is not taxable for use tax on printing services provided by out-of-state printers.

DISCUSSION:

RCW 82.04.280 provides, in relevant part, that "every person engaging within this state in the business of: (1) Printing, and of publishing newspapers, periodicals or magazines" falls into the printing and publishing B&O tax classification, at a rate of approximately .484 percent. RCW 82.04.290 provides that

Upon every person engaging within this state in any business activity other than or in addition to those enumerated in RCW 82.04.230, 82.04.240, 82.04.250, 82.04.255, 82.04.260, 82.04.270, and 82.04.280; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of 1.50 percent. This section includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such business

passes to another by accession, confusion or other than by outright sale), persons engaged in the business of rendering any type of service which does not constitute a "sale at retail" or a "sale at wholesale."

WAC 458-20-143 (Rule 143), the Department of Revenue duly adopted administrative rule implementing the above statute, provides:

PRINTING AND PUBLISHING. Publishers of newspapers, magazines and periodicals are taxable under the printing and publishing classification upon the gross income derives from the publishing business.

Persons who both print and publish books, music, circulars, etc., or any other item, are likewise taxable under the printing and publishing classification. However, persons, other than publishers of newspapers, magazines or periodicals, who publish such things and do not print the same, are taxable under either the wholesaling or retailing classification measured by gross sales, and taxable under the service classification, measured by gross income received from advertising.

[1] Under the statute and rule, only persons who publish but do not print items that are not newspapers, magazines or periodicals are taxable under the service and/or retailer/wholesaler classification. Taxpayer concedes that its publications are not "newspapers" under the rule. The taxpayer argues that its publications are "periodicals" under the statute and rule. The rule does not define the term periodical. Taxpayer argues that the ordinary meaning of the term is "a magazine or other publication of which the issues appear at stated or regular intervals," (from Webster's Third New International Dictionary Unabridged edition, 1981), and the meaning of "publication" is "communication (as of news or information) to the public: public announcement." (Webster's Third New International Dictionary, Unabridged edition, 1981). Thus, taxpayer argues, its guide is a periodical, since it is a communication of information (the availability of [rentals]) to the public, at periodic intervals. Taxpayer then cites a Minnesota case that held that advertising circulars were periodicals when they were published at periodic intervals and distributed to the public. United Hardware Distributing Company v. Commissioner of Revenue, 224 N.W. 2d 820 (Minn. 1979). That case is readily distinguishable, in that the

Minnesota statute exempted from sales tax "any publication regularly issued at average intervals not exceeding three months, and any such publication." Id, 821. "Publication" is a much broader term than "periodical."

In a New York case, the Court of Appeals discussed the issue as it related to tax liability at length. Matter of Business Statistics Organization, Inc., v. Joseph 299 N.Y. 443 (1949). In that case, the issue was whether or not the publications at issue could be classified as periodicals and therefore exempt from a tax on the receipts of tangible personal property sold at retail. The state had determined that sales of the publications were subject to tax as sales of tangible personal property, and not exempt as periodicals. The taxpayer published two publications, one of which was published weekly and consisted of four pages of printed matter, and the other, which consisted of three parts, two of which were issued monthly and contained ten pages each, and one of which was issued weekly and consisted on four pages. In deciding that the publications were periodicals, the court relied on Houghton v. Payne, 194 U.S. 88 (1904). The courts quoted Houghton as follows:

A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature of some special branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel or essays upon subjects pertaining to general literature. . .

Matter of Business Statistics Organization, 450, 451. The court went on to state that "the word 'literature' in this context means 'no more than productions which convey ideas by words, pictures, or drawings.'" (citations omitted) Id, at 451.

Courts in at least two other jurisdictions have ruled against taxpayers in analogous situations. In re G&B Publishing Co. v. Department of Taxation and Finance,, Sales Tax Bureau, 392

N.Y. Supp.2d 938, 57 A.D.2d 18 (1977); and Green v. Home News Publishing Co., 90 So. 2d 295 (Fla., 1956). In the New York case, the issue was whether a weekly publication of commercial advertising, which was distributed free of charge, was exempt from taxation as a newspaper or periodical. In rejecting the taxpayer's claim that it occupied the status of a "newspaper" or "periodical", the Court stated that it was resorting to a test of "common understanding influenced by authority from collateral sources." 392 N.Y. Supp.2d at 939. The Court stated:

In this regard it is significant that the instant publication seldom contains intelligence of current events or happenings of general interest, . . . does not regularly supply information on a variety of subjects, except for the availability of merchandise and services, would not qualify as a proper medium for the publication of legal notices. . . and so far as we can tell, never presents internally generated thoughts or expressions of editorial opinion. . . While we do not mean to imply that any of the foregoing factors is determinative, it seems plain to us that petitioner exerts no independent control over the content of materials that appear in its publication as true newspapers and periodicals invariably do to a greater or lesser degree, but functions as a passive organ for the transmission of whatever words and symbols those who pay for such a service wish to have placed before the general public.

Id., at 940. Essentially, the Court held that newspapers, magazines, and periodicals are vehicles for the expression of ideas, news or thoughts, and not merely compilations of advertisements. We adopt this definition. Taxpayer's guides, on the other hand, are merely compilations of advertisements for [rentals], no different from any catalog offering items for sale. Taxpayer does present [rental] listings in a fixed format, but that is no different from a large department store controlling the layouts in its catalog, which often contain goods made by others. Taxpayer does not present any ideas, thoughts, news, but merely presents the information the [rental] managers and owners wish to transmit to the public.

Because taxpayer's [rental] guides fail to meet the definition of a newspaper, magazine, or periodical, and the taxpayer does not print the publication, the taxpayer falls within the third group listed in the rule, and its income was correctly

classified under the service and other activities tax classification.

Taxpayer next argues that it should not be subject to the use tax because it does not use tangible personal property as a consumer in this state.

The use tax is imposed by RCW 82.12.020. It provides as follows:

There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail, or acquired by lease, gift, repossession, or bailment, or extracted or produced or manufactured by the person so using the same, or otherwise furnished to a person engaged in any business taxable under RCW 82.04.280, subsections (2) or (7). This tax will not apply with respect to the use of any article of tangible personal property purchased, extracted, produced or manufactured outside this state until the transportation of such article has finally ended or until such article has become commingled with the general mass of property in this state. This tax shall apply to the use of every article of tangible personal property, including property acquired at a casual or isolated sale, and including byproducts used by the manufacturer thereof, except as hereinafter provided, irrespective of whether the article or similar articles are manufactured or are available for purchase within this state. Except as provided in RCW 82.12.0252, payment by one purchaser or user of tangible personal property of the tax imposed by chapter 82.08 or 82.12 RCW shall not have the effect of exempting any other purchaser or user of the same property from the taxes imposed by such chapters. The tax shall be levied and collected in an amount equal to the value of the article used by the taxpayer multiplied by the rate in effect for the retail sales tax under RCW 82.08.020, as now or hereafter amended, in the county in which the article is used. (Emphasis added.)

[2] Consumer is defined in RCW 82.04.190 in part as:

(1) Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property. . .

(2) Any person engaged in any business activity taxable under RCW 82.04.290 and any person who purchases, acquires, or uses any telephone service as defined in RCW 82.04.065, other than for resale in the regular course of business. . . . (Emphasis added.)

Taxpayer is engaged in a business activity taxable under RCW 82.04.290 (service B&O), and is therefore a consumer under the statute.

"Use" is defined in RCW 82.12.010 as

"Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within this state. . . .

Thus, when the taxpayer takes dominion or control over the property within this state, it is using the property, and since it is a consumer, such use is as a consumer and subject to the tax. (See text at [4] for a discussion of taxpayer's control over the guides.)

The taxpayer argues that any use tax due should be measured only by the value of the supplies used by the printer, rather than the total printing charges.

RCW 82.04.050 defines a retail sale in part, as follows:

(1) "Sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers other than a sale to a person who (a) purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person, or (b) installs, repairs, cleans, alters, imprints, improves, constructs, or decorates

real or personal property of or for consumers, if such tangible personal property becomes an ingredient or component of such real or personal property without intervening use by such person, or (c) purchases for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property or substance, of which such property becomes an ingredient or component or is a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale, or (d) purchases for the purpose of consuming the property purchased in producing ferrosilicon which is subsequently used in producing magnesium for sale, if the primary purpose of such property is to create a chemical reaction directly through contact with an ingredient of ferrosilicon, or (e) purchases for the purpose of providing the property to consumers as part of competitive telephone service, as defined in RCW 82.04.065. The term shall include every sale of tangible personal property which is used or consumed or to be used or consumed in the performance of any activity classified as a "sale at retail" or "retail sale" even though such property is resold or utilized as provided in (a), (b), (c), (d), or (e) above following such use. The term also means every sale of tangible personal property to persons engaged in any business which is taxable under RCW 82.04.280, subsections (2) and (7) and RCW 82.04.290.

(2) The term "sale at retail" or "retail sale" shall include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following: (a) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, including charges made for the mere use of facilities in respect thereto. . . . (g) the sale of or charge made for tangible personal property, labor and services to persons taxable under (a), (b), (c), (d), (e), and (f) above when such sales or charges are for property, labor and services which are used or consumed in whole or in part by such persons in the performance of any activity defined as a "sale at retail" or "retail sale" even though such property, labor and services

may be resold after such use or consumption. Nothing contained in this paragraph shall be construed to modify the first paragraph of this section and nothing contained in the first paragraph of this section shall be construed to modify this paragraph. (Emphasis added)

[3] Taxpayer argues that only the value of the materials used to make the guides can be subject to use tax in order to avoid an "impermissible use tax on services."

The use tax is imposed on the value of tangible personal property used within this state. "Value" is defined in RCW 82.12.010 as:

(1) "Value of the article used" shall mean the consideration, whether money, credit, rights, or other property except trade-in property of like kind, expressed in terms of money, paid or given or contracted to be paid or given by the purchaser to the seller for the article of tangible personal property, the use of which is taxable under this chapter. The term includes, in addition to the consideration paid or given or contracted to be paid or given, the amount of any tariff or duty paid with respect to the importation of the article used. In case the article used is acquired by lease or by gift or is extracted, produced, or manufactured by the person using the same or is sold under conditions wherein the purchase price does not represent the true value thereof, the value of the article used shall be determined as nearly as possible according to the retail selling price at place of use of similar products of like quality and character under such rules and regulations as the department of revenue may prescribe. (Emphasis added.)

Taxpayer relies on two Excise Tax Bulletins to support its claim. ETB 417.12.144 discusses the measure of use tax on consumable items produced by commercial printers for their own use as intermediate steps in the production of a final print job. That ETB states the printers are the consumers of such items, but the measure of the tax on them will be only the cost of materials in their use. This ETB has no application to taxpayer's situation--taxpayer is not a printer producing items for intermediate use in the production of something

else. Taxpayer is instead, a final consumer of the printer's work.

ETB 456.08.143 discusses the measure of use tax upon the items used in the production of printing jobs. The ETB states that

In order to equalize the use tax liability between persons who produce items as intermediate steps in the production of printing jobs and those who purchase such items from another, the following guidelines will prevail.

Publisher, printers, and trade shops which purchase or produce such items are liable for use tax thereon measured by the value of the materials. This is because these materials do not become a component part of the printed article sold are put to an intervening use by the printer.

This ETB again deals with the use tax of items used in the intermediate production of another item. This is not the case here.

The use tax is imposed on the value of the property used by the consumer in this state. The value is defined as the price paid for the item. The price paid for the item includes the charges by the printer for his services, as is made clear by the definition of a retail sale. The use tax was properly imposed on the full charges for the guides.

[4] Taxpayer also argues that it should not be subject the use tax because the transportation of the guides has not finally ended until they are picked up by consumers at the places of distribution. With this conclusion we cannot agree.

The United States Supreme Court, In Minnesota v. Blasius, 290 U.S. 1, 10 (1933), stated that

Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power.

In a Maryland case, the telephone company was assessed use tax on the value of telephone books that were distributed to its customers. Chesapeake and Potomac Telephone Co. v. Comptroller, 528 A.2d 536 (Md, 1987) The directories were printed out-of-state. On instructions from the phone company, the printers shipped the directories to a third party in Maryland, designated by the telephone company to distribute the directories, through carriers approved by the telephone company. The third party met the carriers, picked up the directories, and transferred them either directly into vehicles for distribution or into storage. The court held that

at least from the time the directories arrived in the State of Maryland and until they were actually delivered to C & P [the telephone company] subscribers, they belonged to and remained subject to the control of C & P. C & P had not merely a technical ownership but the right to determine who would get the directories and when and how further distribution would take place.

Id., at 541. The court went on to state hold that "the interstate shipment ended when, at C & P's instruction, the directories were delivered in Maryland, either directly to C & P or to its designated agent." In rejecting the argument that the transmission of the directories to the third party for distribution was a "mere change in the method of transportation and did not affect the continuity of the transit", the court pointed out that

The subscribers did not order the directories from the printer, nor did C & P cause them to be printed and distributed as a charitable endeavor. C & P ordered and paid for the directories for its own business purpose . . . The transaction, then, was not between the printer and the subscribers that was temporarily interrupted by the reloading into [third party's] vehicles. [The printers] were not selling or sending the directories to the subscribers, but to C & P. What C & P did with them after delivery and payment was of no concern to the printers.

Id., at 542.

Other cases have come to similar conclusions. Deere & Co. v. Allphin, 364 N.E.2d 117 (Ill., 1977); R & M Enterprises, Inc. v. Director of Revenue, 748 S.W.2d 171 (Mo.banc 1988).

In this case, when the guides arrive in Washington, they are subject to taxpayer's control, as it determines where the guides will be distributed. The transaction at issue here is between the taxpayer and the printer, and once the guides leave the printer, they are under the taxpayer's control. They are therefore properly subject to the use tax on the guides.

Taxpayer states that "as agents under contract with the [rental] owners and management companies, the taxpayers' arrange for printing and for delivery of the guides to points of distribution." This statement is clearly erroneous. Taxpayer does not act as agent for the [rental] owners and management companies. The guides are published under its own name for its own business purpose. The taxpayer is in no way acting as agent for others, and cannot escape tax liability with such a claim.

[5] Finally, taxpayer argues that

A state may not unduly burden freedom of speech or press through taxation or other regulatory measures . . . the Equal Protection Clause of the Fourteenth Amendment to the Constitution prevents the state from imposing taxes based upon discriminatory classifications without a rational basis. Rule 143 specifically exempts from sales tax printing charges paid by publishers of newspaper, magazines and periodicals which are sold. There is no rational basis for taxing "use" by publishers of publications such as the guides distributed free of charge where publishers of publications that are sold are not subject to sales tax.

First, we assume that taxpayer meant to say "where publishers of publications that are sold are not subject to use tax."

The press is not immune from the ordinary forms of taxation in support of the government. "It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems." Minneapolis Star and Tribune Co., v. Minnesota Commissioner of Revenue, 75 L.Ed 2d 295, 302 (1983). The use tax supplements the retail sales tax by imposing a tax of like amount upon the use within this state as a consumer any article of tangible personal property. WAC 458-20-178. (Rule 178) Generally, the tax applies to the use

of tangible personal property, "the sale or acquisition of which has not been subjected to the Washington retail sales tax." Rule 178. Publishers of publications that are sold are not subject to the use tax because they are "purchases for resale" under RCW 82.04.050. The tax is collected on such items when they are sold, absent a specific statutory exemption from such tax. Thus, subjecting the taxpayer to use tax on the value of the guides given away free has exactly the same effect of charging retail sales tax on the sale of a magazine or periodical. There is no difference in treatment here--the tax equalizes the tax consequences of selling items and giving them out free-of-charge.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 10th day of March 1989.