

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 Assessment)
of) No. 89-97
)
) Registration No. . . .
) Document No. . . .
) Audit No. . . .
)

- [1] **RULE 143:** PRINTING & PUBLISHING -- B&O TAX --
NEWSPAPER, MAGAZINE OR PERIODICAL -- DEFINITION. A
real estate guide found not to be a newspaper,
magazine, or periodical and therefore advertising
income is taxable under the Service and Other
Activities tax classification.
- [2] **RULE 144 & RULE 178:** -- USE AND/OR DEFERRED SALES
TAX -- PERIODICAL -- REAL ESTATE GUIDES -- PRINTING
CHARGES. Printing charges for real estate guides
given away free by the publisher to its readers
found to be subject to use and/or deferred sales
tax.
- [3] **RULE 143** -- B&O & SALES TAX -- DEFINITION BASED ON
CONTENT -- NEWSPAPER, MAGAZINE, PERIODICAL --
CONSTITUTIONALITY -- ADMINISTRATIVE POWER. The
Department of Revenue is without power to declare a
statute unconstitutional.

Headnotes are provided as a convenience for the reader and are
not in any way a part of the decision or in any way to be used
in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: June 8, 1988

NATURE OF ACTION:

The taxpayer protests the classification of its advertising income under the Service and Other Activities tax classification. In addition the taxpayer protests the assessment of use and/or deferred sales tax on charges for printing the publication.

FACTS:

Okimoto, A.L.J. & Roys, Sr. A.L.J. -- The taxpayer's books and records were examined for the period January 1, 1982 through June 30, 1986. An audit disclosed taxes and interest owing in the amount of \$. . . and Assessment No. . . . was issued in that amount on June 30, 1987.

The taxpayer publishes a real estate guide in the . . . , Washington area. The guide is titled, published every two weeks in a magazine format, bound by two staples, distributed at no charge to its readers, and has a circulation of 16,000 copies. The taxpayer receives its entire income from the sale of advertising space in the distributed guide. The advertising material is supplied by its customers, and the taxpayer compiles and arranges the location of the adds in the publication. Once the layout is finished, the taxpayer contracts with its franchisor to print the guide. The guide contains no editorials or general news articles of any sort, but consists entirely of real estate related advertising. The vast majority consists of a picture of a house for sale, its selling price, and a list of its various amenities.

The taxpayer protests the classification of its advertising income under the Service and Other Activities tax classification. During the audit period, the taxpayer had reported its income under the Service and Other Activities tax classification, but after further reflection, it now believes that it is publishing a newspaper, magazine, or periodical, and that it should have reported under the Printing & Publishing tax classification.

The taxpayer also protests the imposition of use and/or deferred sales tax on printing charges for the real estate guide. The taxpayer states that it is publishing a newspaper, and therefore printing charges are exempt from retail sales tax.

The taxpayer also states that under the Arkansas Writers' Project, Inc. v. Charles D. Ragland, Commissioner of Revenue

of Arkansas, 481 US ___, 95 L. Ed. 2d 209, (1987), the State cannot constitutionally differentiate the tax status of publications based on content. To do so, the taxpayer argues, is a violation of the taxpayer's First Amendment Rights.

ISSUE:

1. Does a periodically published real estate guide meet the definition of a newspaper, magazine, or periodical under WAC 458-20-143, (Rule 143)?
2. Does Rule 143 unconstitutionally differentiate between publications based on content, and therefore violate taxpayer's First Amendment Rights?

DISCUSSION:

RCW 82.04.280 imposes a B&O tax:

Upon every person engaging within this state in the business of: (1) Printing, and of publishing newspapers, periodicals or magazines;

Rule 143 which implements the above statute provides:

BUSINESS AND OCCUPATION TAX

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

To summarize, the rule provides for the following three classes of taxpayers for B&O tax purposes:

1. Publishers of newspapers, magazines and periodicals who are taxed under the Printing and Publishing tax classification.

2. Persons who both print and publish books, music circulars, and any other item (except newspapers, magazines or periodicals) who are also taxed under the Printing and Publishing tax classification.

3. Persons who do not print but only publish, books, music, circulars, and any other item (except newspapers, magazines or periodicals) are taxed under the Service tax classification on income derived from advertising, and under either the Wholesaling or Retailing tax classification on gross sales of the publication.

[1] The first issue to be decided is whether taxpayer's guide falls within the definition of a newspaper. Rule 143 defines a newspaper as follows:

a publication of general circulation bearing a title, issued regularly at stated intervals of at least once every two weeks, and formed of printed paper sheets without substantial binding. It must be of general interest, containing information of current events. The word does not include publications devoted solely to a specialized field.

Taxpayer's real estate guide fails to meet the above definition in several critical areas. First, the guide does not have the required physical appearance of a newspaper. It is not formed of printed paper sheets without substantial binding but is securely bound by two significant staples. These staples are capable of holding all pages securely in place even while being turned upside down. The guide is also not printed on newsprint, the type of paper normally associated with newspapers. Second, the guide is devoted solely to a specialized field, ie. the real estate industry. Finally, it does not contain information of current events. The Department has consistently held that a newspaper must contain information of current event news items of a national, state and local nature. The fact that a home is for sale does not qualify as a current event.

Nor do we feel that the taxpayer's publication is a magazine or a periodical. Because neither the statute nor the Department's rules and regulations specifically define a periodical, we must use the commonly understood meaning of the

word. The taxpayer wishes us to use the dictionary definition of the word "periodical" and construe it to mean "any publication published periodically." Unfortunately, we do not believe that such a broad definition was intended by the Legislature when it enacted the above statute. If that had been their intent, they would have surely included the words "periodical publications" in the statutory language and not the colloquial term, "periodicals." We believe, and the Department has consistently held, that a more narrow definition is required.

Although no Washington case has defined "periodical" for purposes of RCW, 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.)

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 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. (Citations omitted)

In re G & B Publishing Co. v Department of Taxation and Finance, Sales Tax Bureau, 392 N.Y.Supp.2d 938,940, 57 A.D.2d 18 (1977)

The thrust of the court's opinion is that newspapers, magazines, and periodicals are vehicles for the expression of ideas, news or thoughts, and not merely compilations of statistical facts, data, or advertisements. There must be some expression of speech or thought, either through articles, drawings or some other communicative form.

The taxpayer's publication consists entirely of advertisements for homes, condominiums, acreage, or investment properties. It fails to contain a single article or other expression of thought but merely functions as a passive organ for the transmission of whatever words and pictures that its clients wish to place before the general public. In this manner, we find it no different than an advertising catalogue, or telephone directory, both of which this Department has previously found lacking in criteria necessary to meet the definition of a newspaper, magazine or periodical.

Because the guide fails 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 above. Consequently, its advertising income was correctly classified under the Service and Other Activities tax classification.

[2] WAC 458-20-144,(Rule 144) states:

The printing or imprinting of advertising circulars, books, briefs, envelopes, folders, posters, racing forms, tickets, and other printed matter, whether upon special order or upon materials furnished either directly or indirectly by the customer is a retail sale and subject to the retail sales tax, providing the customer either consumes, or distributes such articles free of charge, and does not resell such articles in the regular course of business. (Emphasis added.)

Since taxpayer's guide is not a newspaper, magazine, or a periodical, it follows that it is an advertising circular or other printed matter. Since it is distributed free of charge, and not re-sold in the regular course of business, the taxpayer is deemed the consumer of the printing charges and use and/or deferred sales tax was correctly imposed.

[3] The above interpretation implements RCW 82.04.280 as it was passed by the Washington State Legislature. Whether this statute violates the United States Constitution is beyond our review. "An administrative body does not have the authority to determine the constitutionality of the law it administers; only the courts have that power." Bare v. Gorton, 84 Wn.2d 380, 383, 526 P.2d 379 (1974).

DECISION AND DISPOSITION:

The taxpayer's petition for correction of assessment is denied.

DATED this 27th day of February 1989.