

BEFORE THE DIRECTOR
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In The Matter of the Petition)
For Correction of Assessment) D E T E R M I N A T I O N
of))
) No. 89-97A
))
) Registration No. . . .
) . . . /Audit No. . . .
))
)

[1] RULE 143: B&O TAX -- PRINTING AND PUBLISHING --
PERIODICAL -- DEFINITION. A periodical is a vehicle
for the expression of ideas, thoughts, or news, and
not merely the compiling of advertisements.

[2] RULE 143 -- SALES OR USE TAX -- PRINTING CHARGES --
NEWSPAPER -- DEFINITION. A publication which
consists entirely of advertising and commercial
speech is not a newspaper within the meaning of Rule
143 or RCW 82.08.0253.

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 CONFERENCE: July 12, 1989, Olympia, Washington

HEARING CONDUCTED BY: . . . , Deputy Director
 . . . , Assistant Director
 . . . , Senior Administrative Law
Judge

NATURE OF ACTION:

The taxpayer protests the determination of the Department of Revenue that the above-referenced publication is neither a periodical nor a newspaper under Rule 143.

FACTS AND ISSUES:

Faker, Sr. A.L.J. -- Taxpayer petitioned for correction of the above captioned assessment, and in Determination 89-97, the Department denied taxpayer's petition.

The taxpayer is the local publisher of, a real estate guide in the Kirkland area. is a nationally franchised publication. It is made of slick paper and bound together with staples. The publication contains no news articles or editorial articles of any sort, but instead contains listings of real estate for sale and other realty advertising. It is published every two weeks and distributed free of charge at over 250 locations. Taxpayer estimates its circulation at approximately 16,000. The taxpayer receives its entire income from the sale of advertising space in the guide.

The auditor classified the taxpayer's advertising income under the Service and Other Business Activities classification of the business and occupation tax, and imposed use or deferred sales tax on the printing charges for the guide. The taxpayer reported its advertising income under the Service classification, but now argues that it should have filed under the printing/publishing category, and has requested a refund of the tax differential between these two classifications.

TAXPAYER'S EXCEPTIONS:

The taxpayer argues that is a periodical under the commonly understood meaning of the term, and therefore taxpayer should be taxed under the printing/publishing classification of the business and occupation tax. Next, taxpayer argues that the guide is a newspaper and therefore specifically exempt from the sales/use tax. Finally, taxpayer contends that if the guide does not meet the regulatory definition of a newspaper, then the regulation is invalid "because the only constitutional way to interpret RCW 82.08.0253 is to include [taxpayer's] publication within the scope of the exemption."

DISCUSSION:

RCW 82.08.0253 provides as follows:

The tax levied by RCW 82.08.020 shall not apply to the distribution and newsstand sale of newspapers.

RCW 82.04.280 provides, in relevant part, as follows:

Upon every person engaging within this state in the business of: (1) Printing, and of publishing newspapers, periodicals or magazines; . . . as to such persons, the amount of tax on such business shall be equal to the gross income of the business multiplied by the rate of forty-four one hundredths of one percent.

RCW 82.04.290 provides that persons engaging in a business for which no tax rate is specified are taxable under the Service and Other classification of the business and occupation tax. Thus, persons who receive income from advertising, other than publishers of newspapers, periodicals, or magazines, are taxable under this catchall service classification.

WAC 458-20-143 (Rule 143), is the Department of Revenue's duly adopted administrative rule dealing with the taxability of publishers. It has the force and effect of law unless overturned by "a court of record not appealed from." RCW 82.32.300. It provides, in relevant part, as follows:

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.

RETAIL SALES TAX

Sales of newspapers, whether by publishers or others, are specifically exempt from the retail sales tax.

However, sales of magazines, periodicals, and all publications other than newspapers are subject to the retail sales tax when made to consumers.

"NEWSPAPER" DEFINED. The word "newspaper" means 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. It shall include school newspapers, regardless of the frequency of publication, where such newspapers are distributed regularly to a paid subscription list.

Sales to newspapers, magazine and periodical publishers of paper and printers ink which become a part of the publications sold and sales by printed publications to publishers for sale, are sales for resale and are not subject to the retail sales tax.

[1] Under the statute and rules, if the taxpayer's publication is a periodical, taxpayer is subject to tax under the printing/publishing classification of the business and occupation tax on its income from advertising. If it is not a periodical or newspaper, the advertising income is subject to tax under the service classification.

The taxpayer argues that since the word "periodical" is not defined in the rule, it must be given its commonly understood meaning. Taxpayer quotes the dictionary definition of periodical as "a publication issued at regular intervals of more than one day." Taxpayer contends that its publication meets that definition. Determination 89-97 concluded that taxpayer's publication is not a periodical by relying on cases from other jurisdictions. Taxpayer argues that

We know of no authority which stands for the proposition that other jurisdictions' tax cases provide the commonly understood meaning of words. Rather, we are of a view that the dictionary provides the commonly understood meaning of words. .

. . .

"Great weight is given to the interpretation placed on a statute by the officials charged with its enforcement, particularly where that interpretation has been accompanied by a long period of silent acquiescence by the Legislature." Newschwander v. Board of Trustees, 94 Wn.2d 701, 711, 620 P.2d 88 (1980), quoted in Colasurdo v. Waldt, 49 Wn.App. 257, 261 (1987). The United States Supreme Court has discussed the definition of periodical:

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 of novel or essays upon subjects pertaining to general literature. . . .

Houghton v. Payne, 194 U.S. 88, 97 (1904).

In this case, the taxpayer's guide contains only listings of real estate for sale and various other realty advertising. There is no conveyance of ideas by any means, but simply the transmittal of advertising. We find that the taxpayer's publication is not a periodical under prevailing case law and under the commonly understood meaning of that term.

The common sense meaning of the word "periodical" does not encompass every printed material, of whatever sort or for whatever purpose, simply because of the regularity or frequency with which it is produced. Thus, the very limited dictionary definition of "periodical" urged upon us by the taxpayer is not appropriate for application here. It would lead to the highly irrational conclusion that every catalog, handbill, junk flyer, mailed advertising insert in customer billings, and printed message of any conceivable sort is a "periodical" simply because it is published at regular intervals. Such a conclusion has no rational basis whatever and it would clearly defeat the legislative distinction inherent in the special tax classification for newspapers, periodicals, or magazines provided by RCW 82.04.280. While

the Department does attribute the common and ordinary meaning to terms used in statutory provisions which are not expressly defined, it does so in a manner which preserves the common sense of the entire context of the statutory provisions in which such terms are used. In our view, persons of common understanding would not consider the taxpayer's advertising material to be a "periodical."

[2] The taxpayer also argues that its publication is a newspaper under the rule. It is published every two weeks, is of printed paper, has no substantial binding, and is of general interest, which is demonstrated by its circulation of 16,000. Taxpayer also argues that it contains news of current events, which are the listings of real property currently for sale, and that it is not devoted to a specialized field, because it is not of a "technical, sophisticated or scientific nature requiring exceptional or uncommon knowledge." Taxpayer cites several cases to illustrate its point that the term "specialized field" in the rule does not mean a singular field, such as real estate, but instead argues that "specialized field" has the technical meaning attributed by case law.¹

We find it unnecessary to refute each of taxpayer's contentions that its publication meets the meaning of the term "newspaper" in the rule. Rule 143 has existed in essentially the same form since 1947. RCW 82.08.0253, the sales tax exemption for newspapers, was first enacted in 1935, and although it has been recodified several times, it has existed unchanged since then. The Department of Revenue, in fifty years of administering the exemption, has never held that a publication consisting solely of advertising met the definition of either a newspaper or periodical. The Legislature has never evidenced any dissatisfaction with the Department's interpretation. Exemptions to a tax must be narrowly construed, taxation is the norm and exemption is the exception. Budget Rent-A-Car v Department of Rev, 81 Wn.2d 171, 174 (1972). In passing, we reiterate the Department's conclusion that the taxpayer's publication fails to satisfy either the content or format criteria for designation as a newspaper. Publications which include exclusively advertising of things for sale are not entitled to the statutory exemption for newspapers. (See Determination 89-98 at page 5).

¹ We note that taxpayer finds it acceptable in this instance to use court cases to determine the meaning of words in a rule.

Finally, the taxpayer argues that if its publication does not meet the definition of newspaper, then "the regulation and underlying statutes are invalid." Taxpayer cites Arkansas Writers' Project, Inc. v. Raglund, 95 L.Ed. 2d 209 (1984), for this assertion. Arkansas Writers' does not compel the grant of a newspaper exemption for a publication which is devoted entirely to advertising and can be deemed to constitute commercial speech. We find support for this conclusion in a recent decision of the California court of Appeals in Redwood Empire Publishing v. Cal. State Bd. of Equalization, 255 Cal. Rptr. 514 (1989). In that case, the California court concurred in the denial of a tax refund to a publication that consisted entirely of commercial speech.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED this 13th day of September 1989.