

Cite as 6 WTD 197 (1988)

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

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Correction of Assessment of)	
)	No. 88-269
)	
. . .)	Registration No. . . .
)	Document No. . . .
)	Audit No. . . .

RULE 143: RETAIL SALES TAX -- EXEMPTION -- NEWSPAPERS --
U.S. CONSTITUTION -- FIRST AMENDMENT -- FREE SPEECH --
ARKANSAS WRITERS' PROJECT. A publication must meet the
definition contained in Rule 143 in order to qualify for
the retail sales tax exemption granted to newspapers.
The Rule is binding on the Department of Revenue, and the
above U.S. Supreme Court case discussing taxation of the
press and the First Amendment did not address the
differential treatment of newspapers versus other
publications.

TAXPAYER REPRESENTED BY: . . .
. . .
. . .

DATE OF HEARING: February 10, 1988

NATURE OF ACTION:

Taxpayer protests the assessment of retail sales tax on its two
publications, . . . and . . . , based on the decision rendered by
the United States Supreme Court in Arkansas Writers' Project, Inc.
v. Raglund, ___ U.S. ___, 55 USLW 4522 (1987).

FACTS AND ISSUES:

Hesselholt, A.L.J. -- Taxpayer publishes two newsletters, . . .
and The two publications are published weekly by taxpayer
and have a total combined circulation of 982 copies. One deals
with issues of " . . . , " the other with " " Taxpayer's
records were audited for the period October 31, 1983 through
December 31, 1986. The auditor determined that the two

publications did not meet the definition of a newspaper contained in WAC 458-20-143 (Rule 143), and assessed sales tax on the sales. Taxpayer had not been collecting or remitting sales tax on the publications. Taxpayer began collecting sales tax in June of 1987. Taxpayer objects to the determination of the auditor that its publications are subject to sales tax, requests a correction of assessment deleting the sales tax, requests a refund of sales tax remitted but not collected for the second quarter of 1987 and requests abatement of the sales tax owing for the first quarter of 1987 that was neither collected or remitted.

Arkansas Writers' Project was decided in 1987 by the United States Supreme Court. Taxpayer argues that the holding in that case was that "it is unconstitutional and, therefore, impermissible to base the sales tax treatment of a publication upon whether its contents are of general or special interest." Because of that ruling, taxpayer suggests, its publication must be classed as a newspaper under Rule 143, and therefore be exempt from the retail sales tax.

DISCUSSION:

Arkansas Writers' Project involved an Arkansas sales tax statute that exempted from the tax "gross receipts or gross proceeds derived from the sale of newspapers" and "religious, professional, trade and sports journals and/or publications printed and published within this State. . . when sold through regular subscriptions." Arkansas Writers' Project, 55 USLW at _____. The court held that the tax was unconstitutional because the "basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its content." Id. at _____. The court specifically did not decide whether a "distinction between different types of periodicals [newspapers and magazines] presents an additional basis for invalidating the sales tax. . ."

RCW 82.08.0253 provides that newspapers are exempt from the retail sales tax. Rule 143 is the administrative rule that implements the statute. This rule has the same force and effect as Washington statutory law, unless "declared invalid by the judgment of a court of record not appealed from." RCW 82.32.300. Rule 143 provides the following definition of "newspaper:"

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.

The United States Supreme Court specifically did not decide if a differentiation between types of publications was constitutionally infirm. Further, an administrative agency lacks the power to rule on the constitutionality of the law it administers. Bare v. Gorton 84 Wn.2d 380, 381 (1974).

Taxpayer's publications do not meet the definition provided in the rule. They are not publications of general interest, and they are both publications devoted solely to specialized fields. Since these publications fail the "general interest" test, we feel no need to further analyze the publications against the rest of the rule criteria. The Department's rule has not been overturned by a court of record and therefore has the force of law. RCW 82.32.200.

DECISION AND DISPOSITION:

Taxpayer's petition for correction of assessment is denied.

DATED this 20th day of July 1988.