

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

XYZ PRINTING, INC.,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 93-0338
)	
DEPARTMENT OF REVENUE,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

The above-styled case has been presented by stipulation filed December 15, 1993.

APPEARANCES

The parties were represented at the hearing as follows:

For Petitioner: David M. Carr
David Michael Carr, P.A.
600 East Madison Strett
Tampa, Florida 33602

For Respondent: Eric J. Taylor
Assistant Attorney General
Office of the Attorney General
The Capitol, Tax Section
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUES

The issue in this case is whether Petitioner is liable for certain taxes and, if so, how much.

PRELIMINARY STATEMENT

By Notice of Decision dated April 24, 1992, Respondent informed Petitioner that the assessment of corporate intangible tax and sales tax was correct. The amounts assessed are \$44,151.77 for sales tax from June 1, 1985, through March 31, 1990, and \$1297.08 for corporate intangible tax from July 1, 1985, through March 31, 1987.

On Notice of Reconsideration dated November 24, 1992, Respondent informed Petitioner that the assessment of sales and use tax was correct. The amount assessed is \$44,151.77 for sales and use tax from June 1, 1985, through March 31, 1990.

On January 19, 1993, Petitioner served its petition for hearing. The petition challenges the proposed assessment of sales and use tax, intangible tax, and indigent health care tax.

The parties presented the case by stipulation filed December 15, 1993. Attached to the stipulation are four exhibits, which are all admitted. In a letter accompanying the stipulation, petitioner concedes that the assessment is correct as to the intangible tax concerning accounts receivable and treasury stock.

The parties were given until January 5, 1994, within which to file proposed recommended orders. Petitioner filed no proposed recommended order. Respondent filed a proposed recommended order on January 12, 1994. Although late and thus not entitled to rulings, Respondent's proposed findings generally reflect the factual stipulations.

FINDINGS OF FACT

1. Petitioner is a Florida corporation with its principal place of business in Manatee County, Florida. Petitioner is in the printing business. Specifically, Petitioner produces, manufactures, assembles, and publishes telephone directories for mobile home parks in Florida.

2. All of Petitioner's work in connection with these directories takes place in Florida. The directories list the names, addresses, and telephone numbers of residents of the mobile home park for which the directory is prepared. The directories also contain advertisements, which Petitioner solicits from merchants seeking to sell goods or services to the mobile home park residents.

3. Following the production of the directories, Petitioner distributes them to the mobile home park residents, who maintain possession of the directories. However, Petitioner retains ownership of each directory, even after it is distributed.

4. Petitioner is solely responsible for the manufacture and distribution of the directories.

5. Petitioner owns accounts receivable reflecting monies owed it by entities for which Petitioner has performed work. Petitioner owns treasury stock.

6. Following an audit, Respondent issued its Intent to Make Sales and Use Tax Audit Changes. The proposed changes assessed additional sales and use taxes of \$44,151.77, intangible tax of \$1297.08, and \$194.75 of health care tax.

7. The bases of proposed liability for the sales and use tax were for the publication and distribution of directories for which no sales or use tax had been collected and for the sale of advertising during the period of the service tax from July 1, 1986, through December 31, 1986, for which no sales tax on advertising had been collected.

8. The basis of proposed liability for the intangible tax was for the failure to pay intangible tax on accounts receivable and treasury stock.

9. The basis of proposed liability for the health care tax was for the failure to pay the Hillsborough County Health Care Tax and Discretionary Sales Surtax.

10. On February 11, 1991, Petitioner protested the proposed assessments. On April 24, 1992, Respondent issued its Notice of Decision sustaining the proposed sales and use tax and intangible tax, but eliminating the proposed health care tax.

11. On May 12, 1992, Petitioner filed a Petition for Reconsideration concerning the proposed sales and use tax. On November 24, 1992, Respondent issued its Notice of Reconsideration sustaining the proposed sales and use tax.

12. On January 21, 1993, Petitioner timely filed its petition for a formal administration hearing.

13. Subject to the accuracy of its legal position, Respondent's assessment is factually accurate. Petitioner will pay the assessed amount of sales and use tax, plus interest, if its position is not sustained following the conclusion of this proceeding, including judicial review.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties. Section 120.575, Florida Statutes. (Unless otherwise indicated, all references to Sections are to the 1993 Florida Statutes. All references to Rules are to the Florida Administrative Code.)

15. Neither party has raised the issue whether the portion of this case concerning liability for the former tax on services requires consideration by a panel of hearing officers and the issuance of a final order, as provided by former Sections 120.575(1) and 120.65(5) (Fla. Stats. 1987).

16. Section 212.05 recognizes a taxable privilege for

selling tangible personal property at retail
in this state, . . . or who rents or
furnishes any of the things or services
taxable under this chapter, or who stores for
use of consumption in this state any item or
article of tangible personal property . . .
and who leases or rents such property within
the state.

17. A tax of 6 percent is imposed on the "sales price of each item or article of tangible personal property when sold at retail in this state," pursuant to Section 212.05(1)(a)1.a.

18. Section 212.02(15)(a) provides that a "retail sale" or "sale at retail"

means a sale to a consumer or to any person
for any purpose other than for resale in the
form of tangible personal property or
services taxable under this part, and

includes all such transactions that may be made in lieu of retail sales or sales at retail.

19. Section 212.02(17) defines "sales price" as

the total amount paid for tangible personal property, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses, or any other expense whatsoever. . . .

20. Section 212.02(20) states that tangible personal property

means and includes personal property which may be seen, weighed, measured, or touched or is in any manner perceptible to the senses The term "tangible personal property" does not include stocks, bonds, notes, insurance, or other obligations or securities; [or] intangibles as defined by the intangible tax law of the state

21. A tax of 6 percent is imposed on the "cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state," pursuant to Section 212.05(1)(b).

22. Section 212.06(1)(b) adds:

Except as otherwise provided, any person who manufactures, produces, compounds, processes, or fabricates in any manner tangible personal property for his own use shall pay a tax upon the cost of the product manufactured, produced, compounded, processed, or fabricated without any deduction therefrom on account of the cost of material used, labor or service costs, or transportation charges, notwithstanding the provisions of s. 212.02 defining "cost price."

23. Section 212.02(21) states that "use"

means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, or interest therein, except that it does not include the sale at retail of that property in the regular course of business.

24. The subject transaction resembles the transaction in which a publisher sells advertising for inclusion in a "shopper"- type newspaper that is distributed for free. The taxation of the latter transaction is the subject of Rule 12A-1.008.

25. Rule 12A-1.008(2)(d)3 addresses the publisher of an advertising insert that is not taxed as a "newspaper." When the publisher incorporates the insert into a publication to be given away, the publisher must self-accrue and pay use tax based on the cost price.

26. Rule 12A-1.008(2)(c)2 defines "cost price" as

the actual cost or printing of newspapers, magazines, and other publications, without any deductions therefrom on account of the cost of materials used, labor or services cost, transportation charges, or other direct or indirect overhead costs that are a part of printing costs of the property. . . .

27. Rule 12A-1.008(2)(d)4 also addresses the publisher of an advertising insert that is not taxed as a "newspaper." This provision recognizes that no sales or use tax is due on the payment from an advertiser to a publisher that is to deliver the advertising copy to potential buyers.

28. The subject transaction is similar to the transaction between advertisers and the publisher of flyers or shoppers that do not meet the definition of newspapers. The retention of title by Petitioner is irrelevant. The key factors are that Petitioner, like the shopper publisher, sells advertising, prints the medium by which the advertising is disseminated, and distributes the publication for free to persons who are potential customers of the advertisers. Like some shoppers that contain news, the subject telephone directories also contain noncommercially useful information in the form of names and addresses of mobile home park residents. But the telephone directories do not and could not exist but for the presence of the advertising.

29. Based on the foregoing, Petitioner is liable for a use tax on the cost of the materials and other items used or consumed in the production of the directories, but this cost price does not include advertising revenues. Under the conventional sales and use tax on tangible personal property, Petitioner is not liable for any sales or use tax on the advertising revenues, nor do the advertising revenues form part of the sale price under the sales tax or the cost price under the use tax.

30. However, the advertising revenues were subject to the sales tax on services during the latter half of 1986. For this limited period, Petitioner is liable for sales tax on the advertising revenues.

31. Given the fact that no conventional sales tax is due and the advertising revenues are not part of the cost price, there is no pyramiding or duplication of the conventional sales or use tax with the services tax.

RECOMMENDATION

Based on the foregoing, it is hereby

RECOMMENDED that a final order be entered determining that, for each assessed period, Petitioner is liable for the assessed corporate intangible tax plus interest, the use tax on the cost price of the materials and other covered items plus interest, the sales tax on services on the advertising revenues, but not for any sales tax apart from the period covered by the sales tax on services.

ENTERED on January 25, 1994, in Tallahassee, Florida.

ROBERT E. MEALE
Hearing Officer
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
on January 25, 1994.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.