Opinion
No. 1262

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

TAX DIVISION

WASHINGTON MAGAZINE, INC.,	*	
Petitioner,	*	
v.	*	Tax Docket No. 3850-86
DISTRICT OF COLUMBIA,	*	
Respondent.	*	

ORDER

This matter came before the Court on the parties' Cross Motions for Summary Judgment. Petitioner, Washington Magazine, Inc., challenges a sales tax assessment made against it for the five-year period beginning April 1, 1980, and ending March 31, 1985, by respondent. Respondent contends that the assessment appealed from was lawfully made and should, therefore, be sustained.

The Court has jurisdiction to hear this appeal pursuant to D.C. Code §§ 11-1201, 47-2021(a)(1986 Supp.), and 47-3303 (1986 Supp.). Based on the arguments of counsel at the hearing and the pleadings filed, the Court makes the following:

FINDINGS OF FACT

1. **The Washingtonian** is a magazine of general circulation and interest, published monthly in Washington, D.C. by petitioner.

2. **The Washingtonian** solicits typescript articles, editorial materials, poetry, and the like (collectively referred to as "Articles"), from independent writers (sometimes referred to as "Outside Authors"), many of whom are frequent contributors to the magazine.

3. Every Article submitted for publication in the magazine by an Outside Author is edited, both as to content and as to style, before publication.

4. In general, when **The Washingtonian** commissions and accepts an Article from an Outside Author, it negotiates an agreed fee for the Article, and, where appropriate, agrees to reimburse the author for out-of-pocket expenses in researching or acquiring background material to be used in the Article. In all cases, the cost of the paper on which an Article is submitted (and on which the author has already paid sales tax) is substantially less than 10% of the fee paid by petitioner for the Article. No other tangible personal property is transferred from an Outside Author to petitioner. In each case where the receipt is for an expenditure that would normally be subject to sales tax (e.g., photocopying, parking, meals, and the like), the sales tax is paid by the author and included in petitioner's reimbursement.

5. In most cases, one-third of the negotiated fee is paid at the time the Article is submitted, and, if a decision is made not to publish the Article, the author retains that payment as compensation for his or her effort and receives no further payment. This is referred to in the trade as a "kill fee." In the case of some of its regular independent writers, **The Washingtonian** pays a monthly fee in the nature of a retainer that covers both original Articles and editorial work in revising materials submitted by others.

6. As a general rule, when **The Washingtonian** commissions an Article from an Outside Author, it is understood that the negotiated price gives petitioner the right to the first publication of the Article. Generally, Petitioner does not enter into any written agreement with an Outside Author, but a sample contract, used on some occasions, together with a written advice sheet to prospective Outside Authors, has been submitted to the Court by respondent. It is petitioner's understanding that each

Outside Author retains ownership of his or her Article and is free to sell it - or a revised version of it - to other publications after it has appeared in **The Washingtonian.**

7. In its original audit, respondent determined that all fees, including expense reimbursements, paid to Outside Authors were payments for the purchase or lease of tangible personal property, subject to sales tax. Subsequently, respondent agreed that payments to independent contractors for their services in editing material submitted by others and "kill fees" paid to authors for the submission of material not accepted for publication were not taxable as tangible personal property.

8. The deficiency assessment dated January 3, 1986, as finally issued by respondent in the amount of $255,808.48, was paid by petitioner. It included only tax assessed against payments made by petitioner for Articles written by free-lance authors who are not employees of petitioner, including any expenses for which petitioner had reimbursed such authors and any monthly retainer fees. The assessment was for the five-year period beginning April 1, 1980, and ending March 31, 1985. Only an unspecified portion of the assessed amount is contested. No attempt was made to assess payments to Outside Authors for their writing or editorial services which did not relate to sales of Articles by them.

CONCLUSIONS OF LAW

Summary Judgment is an extreme remedy, appropriate only when there are no material facts in issue and the moving party is entitled to judgment as a matter of law. See Spellman v. American Security, 504 A.2d 1119, 1122 (D.C. 1986). In the instant case, both parties contend there are no material facts in dispute, thus the issues are ripe for decision on their cross-motions for summary judgment. The

Court concurs with the parties contentions that the issue presented is one of law and justiciable on the motions before it. The sole issue therefore is whether the purchase by petitioner of typescript articles from outside authors constitutes a taxable sale within the meaning of D.C. Code §47-2001 et seq. (1981) and (1986 Supp.).

Pursuant to Chapter 20 of the D.C. Code titled, "Gross Sales Tax", the District of Columbia is authorized to impose a tax upon all vendors for the privilege of selling at retail certain tangible personal property and for the privilege of selling certain selected services (defined as "retail sale" and "sale at retail"). D.C. Code §47-2002 (1986 Supp.)(emphasis added). According to Section 47-2001(n)(1) "retail sale" and "sale at retail" means the sale in any quantity or quantities of any tangible personal property or services taxable under the terms of Chapter 20. The definition of "retail sale" and "sale at retail" includes:

> "The sale or charges for possession or use of any article of tangible personal property granted under a lease or contract, regardless of the length of time of such lease or contract or whether such lease or contract is oral or written; in such event, for the purposes of this chapter, such lease or contract shall be considered the sale of such article and the tax shall be computed and paid by vendor upon the rental paid; Provided, however, that the gross proceeds from the rental of films, records, or any type of sound transcribing to theaters and radio and television broadcasting stations shall not be considered a retail sale;"

D. C. Code §47-2001(n)(1)(F)(1986 Supp.)

Petitioner's primary argument is that its transactions with authors are non-taxable personal service transactions, because (a) §§47-2001(n)(2)(B) and 47-2201(a)(2)(B) of the District of Columbia Code (1981 ed.) expressly exclude from transactions subject to sales and use tax:

> "Professional, insurance, or personal service transactions which involve sales as inconsequential elements for which no separate charges are made, except as otherwise provided . . . ."

and (b) professional writing services are not among the service transactions "otherwise provided" that Congress has expressly subjected to sales and use tax.[1]

Respondent maintains the transfer of typescript articles by outside authors to petitioner for some consideration, constitutes a taxable sale even though petitioner's rights to the publication of such articles are limited and the materials used in the reproduction may have belonged to or were supplied by, petitioner. They further argue petitioner's payments to its authors are taxable as payments for the rental of printed matter. Respondent cites as authority District of Columbia v. Norwood Studios, Inc., 118 U.S. App. D.C. 358, 336 F.2d 746 (D.C. Cir. 1964), which held that the production and sale of finished motion pictures for use on television was a taxable transaction, and Bigsby v. Johnson, 99 P.2d 268, 270 (Cal. 1940)(en banc), an early California case cited in the Norwood opinion, involving the sale of finished printed matter by printing companies.

---

1. The meaning of "sales as inconsequential elements" is defined in title 9 of the District of Columbia Municipal Regulations (DCMR), Regulation 403.2 as follows:

> "The phrase 'sales as inconsequential elements' shall be deemed to include any sales of tangible personal property made in connection with professional, insurance, or personal service transactions where the sales price of the tangible personal property is less than ten percent (10%) of the amount charged for the services rendered in the transaction."

The Court is persuaded that the services taxed herein are not tangible property. Professional and personal service transactions are excluded from transactions covered by the District's sales and use tax laws. The proper rule of construction in such cases is that stated in Gould v. Gould, 245 U.S. 151, 153 (1917):

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out."[2]

When dealing with its free-lance authors, petitioner seeks the author's professional and creative writing services and the right to publish the author's creative product in their magazine. Respondent acknowledged both in oral argument and in its Statement of Facts that the only tangible personal property delivered by an author to petitioner consists, at most, of rough transcript and that the value of that tangible personal property is "substantially less than 10% of the fee paid by Petitioner for the Article" and is thus clearly within the District's own definition of the meaning of "sales as inconsequential elements."

The Court is convinced the statutory exclusion in §§47-2001(n)(2)(B) and 47-2201(a)(2)(B) applies to professional and creative services of writers and thus finds no justification for the imposition of tax on the services of petitioner's free-lance authors. This determination is fully

---

2. See also Comptroller v. John C. Louis Co., 285 Md. 527, 539, 404 A.2d 1045, 1053 (1979), and the cases cited therein. This rule of construction was also adopted by this Court in Acme Reporting Company v. District of Columbia, Tax Docket No. 3326-83 (D.C. Sup. Ct., June 3, 1985) appeal docketed, No. 85-941 (D.C. App. July 10, 1985).

supported by prior decisions of the courts in the District of Columbia and in other jurisdictions which provide for similar exclusions or exemptions. See Acme Reporting Company v. District of Columbia, Tax Docket No. 3326-83 (D.C. Sup. Ct., June 3, 1985) appeal docketed, No. 85-941 (D.C.App. July 10, 1985); Washington Times-Herald Inc. v. District of Columbia, 94 U.S.App.D.C. 154, 213 F.2d (D.C. Cir. 1954); District of Columbia v. Universal Computers Associates, Inc., 151 U.S.App. D.C.30, 465 F.2d 615 (D.C. Cir. 1972).

In Acme Reporting Company v. District of Columbia, supra, this Court held that the services of court reporters were excluded from the definition of "retail sale" by D.C. Code §§47-2001(n)(2)(B) and 47-2201(a)(2)(B). The District argued in Acme Reporting that court reporting services were included in the term "public stenographic services," which are among the service transactions Congress has expressly elected to tax. Having found that "public stenographic services" did not include court reporting, this Court held that services of court reporters "(1) are personal or professional services; (2) involve the sale of inconsequential amounts of tangible personal property for which no separate charge is made; and (3) are not specifically enumerated as a taxable service." Id. at 11. In Acme Reporting, this Court stated that parties to court and governmental proceedings "pay petitioner for the work performed by petitioner's court reporters; and the material of which the transcript is composed is of insignificant value. . . . [P]etitioner's receipts for transcripts are receipts for skillful reporting -- a personal or professional service." Id. at 13. A similar analysis is applicable with respect to petitioner's transactions with free-lance authors. Petitioner is paying for skillful reporting and writing -- a

personal or professional service -- and the value of the material on which an article is written is insignificant.

Two other cases in the District of Columbia bear directly on the issue now before this Court. The earlier of these is Washington Times-Herald Inc. v. District of Columbia, 94 U.S.App.D.C. 154, 213 F.2d (D.C. Cir. 1954). In analyzing the sale to a newspaper of comic strip mats and the right to reproduce the work of the artists who had made the drawings, the Court found the transactions were non-taxable sales of professional services, with the transfer of title to tangible personal property (the mats themselves) constituting only an inconsequential element: the newspaper had brought "the creation of the artist - not the material on which it was impressed - and the right to reproduce it." 213 F.2d at 24.

More recently in District of Columbia v. Universal Computer Associates, Inc., 151 U.S.App.D.C. 30, 465 F2d 615 (D.C. Cir. 1972), the Court dealt with the question of whether punched cards containing computer "software" constituted tangible personal property for purposes of the District of Columbia tangible personal property tax. The Court found the cost of the material of the punched cards themselves and of punching the cards was insignificant and the price paid by the taxpayer "was for the intangible value of the information stored on the cards." 465 F.2d at 617. The Court likened the computer software to the cartoon mats in Times Herald and said:

---

3. While the specific result in Times-Herald might be different under DCMR, Title 9, Regulation 431.11, which provides that the purchase of artwork for reproduction is taxable, the Court's underlying reasoning remains valid. Significantly, Regulation 431.11 itself recognizes that the purchase of rough artwork, comprehensive visualizations, and the like, as opposed to the purchase of finished artwork for reproduction, is the purchase of a non-taxable service. The pages of typescript delivered to petitioner are not finished products purchased for reproduction in **The Washingtonian**, but are, instead, analogous to the rough artwork referred to in the Regulation.

> "We think that the knowledge stored on computer cards, tapes, or discs is even more demonstrably intangible intellectual property than the right to reproduce from the cartoonist's drawings involved in Washington Times-Herald." Id.

In light of the foregoing caselaw and arguments, the Court is convinced petitioner's transactions with respect to its free-lance authors, are not subject to sales and use tax. These transactions are non-taxable personal services which involve sales as an inconsequential element and thus are expressly excluded from transactions subject to taxation.

Accordingly, it is this 14th day of August, 1987,

ORDERED that petitioner's, **Washingtonian** Magazine, Inc., Motion for Summary Judgment is hereby Granted; and it is

FURTHER ORDERED that respondent's, the District of Columbia, Motion for Summary Judgment is hereby Denied; and it is

FURTHER ORDERED that petitioner's payments to authors and editors be, and hereby are, excluded from sales and use taxation pursuant to D.C. Code §§47-2001(n)(2)(B) and 47-2201(a)(2)(B)(1981 ed.) and that Respondent modify its records to reflect the same; and it is

FURTHER ORDERED that petitioner is entitled to a refund of the taxes it paid with respect to its transactions with authors and editors including any interest paid by petitioner thereon, plus interest from the date of petitioner's payment pursuant to D.C. Code §47-3310(c); and it is

FURTHER ORDERED that petitioner shall submit a proposed order setting forth the amount of the refund within ten business days of the signing of this Order.

JUDGE IRALINE G. BARNES

Copies to:

Richard G. Amato
Assistant Corporation Counsel, D.C.
1133 North Capitol Street, N.E.
Washington, D.C. 20002

Evelyn W. Pasquier
Frank, Bernstein, Conaway & Goldman
300 East Lombard Street
Baltimore, Maryland 21202

R. Grant Decker - #362355
Frank, Bernstein, Conaway & Goldman
7799 Leesburg Pike
Tysons Corner, Virginia 22043