10-23-1985

Catholic Archdiocese of Denver v. Denver

SUPREME COURT, STATE OF COLORADO

Case Number 85-SA-172

PLAINTIFFS-APPELLANTS' REPLY BRIEF

CATHOLIC ARCHDIOCESE OF DENVER, a Colorado non-profit corporation, McGRAW HILL INFORMATION SYSTEMS, CO./DODGE DIVISION, a New York corporation; THE COLORADO LEADER, INC., a Colorado corporation; THE COLORADO POLITICAL PRESS, INC., a Colorado corporation; J. IVANHOE ROSENBERG, d/b/a THE HERALD-DISPATCH; INTERMOUNTAIN JEWISH NEWS, INC.; a Colorado corporation; HISPANO PUBLISHING AND GRAPHICS CORP., a Colorado corporation; THE DENVER POST CORPORATION, a Colorado corporation; and DENVER PUBLISHING, INC., a Colorado corporation; WARREN PETERSON; HANS LEISO; ROSENDO LERMA; STAN BOXTER; JUSTIN KOSEBA; JANET WESTON; MARY ZACHMAN; and EARNEST ZACHMAN,

Plaintiffs-Appellants,

vs.

CITY AND COUNTY OF DENVER, a Municipal corporation; and THOMAS P. BRIGGS, Manager of Revenue, City and County of Denver,

Defendants-Appellees,

and

THE DENVER POST CORPORATION, a Colorado corporation; and THE DENVER PUBLISHING COMPANY, d/b/a ROCKY MOUNTAIN NEWS,

Plaintiffs-Appellants,

vs.

CITY AND COUNTY OF DENVER, a Municipal corporation; and THOMAS P. BRIGGS, Manager of Revenue, City and County of Denver,

Defendants-Appellees.

ON APPEAL FROM DISTRICT COURT
CITY AND COUNTY OF DENVER
JUDGE SANDRA ROTHENBERG

Respectfully Submitted,

Rodney L. Smith, Reg. No. 6664
Eiberger, Stacy & Smith
3500 Republic Plaza
370 Seventeenth Street
Denver, Colorado 80202-5635
Telephone: (303) 534-3500
Attorneys for Plaintiff-Appellant
The Denver Post Corporation

Thomas B. Kelley, Reg. No. 1971
Cooper & Kelley, P.C.
1660 Wynkoop, Suite 900
Denver, Colorado 80202
Telephone: (303) 825-2700
Attorneys for Plaintiffs-Appellants

Bruce D. Pringle, Reg. No. 1877
Baker & Hostetler
303 East Seventeenth Avenue, Suite 1100
Denver, Colorado 80203
Telephone: (303) 861-0600
Attorneys for Plaintiff-Appellant
The Denver Publishing Company

I. TABLE OF CONTENTS

		Page
II.	TABLE OF AUTHORITIES	ii
III.	SUMMARY OF THE ARGUMENT	1
IV.	ARGUMENT	2
	A. Issues Relating to the Construction of the Ordinance	2
	1. With respect to its distribution of newspapers by carriers, The Post and the News are not in a direct retail sales relationship with the readers.	2
	2. The publishers' tax liability cannot be determined by "administrative convenience"	8
	3. Vending machine sales of newspapers at less than $.19 per copy are not taxable.	10
	B. Issues Relating to the Constitutionality of the Ordinance and the Regulations	12
V.	CONCLUSION	14

II. TABLE OF AUTHORITIES

Page

Table of Cases:

Bedford v. Colorado Fuel and Iron Corp.,
102 Colo. 538, 81 P.2d 752 (1938) 8

Calvert v. Canteen Co.,
372 S.W.2d 556 (Tx. 1963) 11

Carpenter v. Carman Distributing Co.,
111 Colo. 566, 114 P.2d 770 (1943) 10

Cohen v. Department of Revenue,
197 Colo. 385, 593 P.2d 957 (1979) 8

Craftsman Painters and Decorators, Inc. v. Carpenter,
111 Colo. 1, 137 P.2d 414 (1943) 9, 10

Gannett Satellite Information Network, Inc. v. MTA,
745 F.2d 767 (2d Cir. 1984) 11

Herbertson v. Cruse,
115 Colo. 274, 170 P.2d 531 (1946) 10

Independent Publishing Co. v. Haines,
168 S.E.2d 904 (Ga. 1969) 9

Matthews v. Department of Revenue,
193 Colo. 44, 562 P.2d 415 (1977) 12

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,
460 U.S. 575 (1983). 1, 3, 12

Piedmont Canteen Service v. Johnson,
123 S.E.2d 582 (N.C. 1962) 11

Pluss v. Department of Revenue,
173 Colo. 86, 476 P.2d 253 (1970) 7, 8

Quality School Plan, Inc. v. Alabama,
301 S.2d 183 (Ala. App. 1974) 9

Ragland v. Quality School Plan, Inc.,
651 S.W.2d 447 (Ark. 1983) 9

Robert W. Hinckley Co. v. State Tax Commission of Utah,
404 P.2d 662 (Utah 1965) 11

State of Alabama v. The Advertiser Co.,
337 S.2d 943 (Ala. App. 1978), cert quashed,
337 S.3d 947 13

Sunshine Art Studios of California v. State Board of Equalization,
114 Cal. Rptr. 24 (1974) 9

Travelers Indemnity Co. v. Barnes,
191 Colo. 278, 552 P.2d 300 (1976) 8

Virden v. Schaffner,
496 S.W.2d 846 (Mo. 1973) 11

Winslow-Spacarb, Inc. v. Evatt,
59 N.E.2d 924 (Ohio 1945) 11

Other Authorities:

Administrative Decison, State Tax Department
84-6-B, West Virginia ..... 7, fn 5

Section 53-28, Chapter II, Revised Municipal Code
of the City & County of Denver 3

Section 53-25, Chapter II, Revised Municipal Code
of the City & County of Denver 4

Section 53, et seq, Chapter II, Revised Municipal Code
of the City & County of Denver 8

Section 53-27, Chapter II, Revised Municipal Code
of the City & County of Denver 11

III. SUMMARY OF THE ARGUMENT

The City takes an entirely new position as to why newspaper sales by carriers are taxable to newspaper publishers. Whereas the Manager of Revenue and the trial court held, albeit erroneously, that carrier sales were taxable to the The Post and the News solely because the carriers did not hold valid sales tax licenses, the City has abandoned this position and contends instead that carriers are only providing a non-taxable "delivery and debt collection service". Based upon this erroneous contention, the City argues that The Post and the News, not the carriers, are in a direct retail sales relationship with the readers and as a result, the publishers are responsible for collecting and reporting the tax. The City's new-found position is not only inconsistent with the Manager of Revenue's Rules and Regulations and the trial court's decision which the City seeks to uphold in this appeal, but is totally lacking in any evidentiary support in the record.

The City's answer to the The Post's and the News' contention that vending machine sales of newspapers selling at $.15 per copy are not taxable is equally meritless, if not totally confusing. The publishers' position is simply that no tax is due on items selling for less than $.19, as plainly stated by the Ordinance.

Finally, the City completely misses the point of the publishers' constitutional arguments which are being raised by all of the Plaintiffs-Appellants. Plaintiff-Appellants do not dispute the City's obvious assertion that a general sales tax may be imposed upon the sale of newspapers, Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983). Rather, Plaintiff-Appellants protest the Manager's Rules and Regulations which unconstitutionally discriminate against newspapers on their face and against different methods of newspaper distribution. Both forms of discrimination were

clearly condemned by the United States Supreme Court in Minneapolis Star & Tribune Co.

IV. ARGUMENT

A. Issues Relating to the Construction of the Ordinance.

1. With respect to its distribution of newspapers by carriers, The Post and the News are not in a direct retail sales relationship with the readers.

For the first time in its Answer Brief, the City argues that the news carriers do not buy their papers at wholesale from The Post and the News and resell them at retail, but are merely engaged in a "delivery and debt collection service" on behalf of the publishers.[1] Thus, the City concludes that it is the publishers, not the carriers, who are in a direct retail sales relationship with the readers and that the publishers are responsible for collecting and reporting the 3% sales tax, not on the retail sales price to the reader, but on the price paid by the carriers. The sole authority for the City's new-found position is a West Virginia administrative tax opinion which, like the City's argument itself, appears in the record for the first time in the City's Answer Brief.

The City's argument is not only inconsistent with the Manager's Rules and Regulations and the trial court's decision which the City seeks to uphold in this appeal, but is totally unsupported by the evidence, as found by the Manager of Revenue and the trial court.

---

1. The City's position is not entirely consistent. At page 17 of its Answer Brief the City states: "In the case at hand, it is arguable that the news carriers are not merely performing non-taxable services, but that they are truly retailing a product without a retail sale tax license."

It is also curious that the City only makes this argument with respect to youth carriers, not independent distributors who resell the newspapers they purchase from The Post and the News to carriers or directly to the public.

The City's argument renders the very Regulations which it seeks to uphold meaningless. The Regulations create a presumption that sales to unlicensed news carriers are retail sales and in so doing, explicitly recognize that a sales transaction takes place between the publishers and the carriers, not between the publishers and the readers. Indeed, the Manager found that the Regulations apply directly to the sales by the publishers to news carriers and independent distributors. (Manager's Findings, ¶ 15) The City cannot claim that no sale takes place.

Furthermore, if The Post and News are in a direct retail sales relationship with the readers, as the City contends, then under the express terms of the Ordinance, the publishers are responsible for collecting and reporting the 3% tax on the retail purchase price of the newspaper paid by the reader. (Section 53-28, Chapter II (formerly Art. 166.7)). In an obvious attempt to reconcile its new position with the Regulations, however, the City now claims that the publishers are only responsible for paying the 3% tax on the purchase price paid by the carriers, not the purchase price paid by the readers. The City attempts to justify this peculiar computation of the tax on the basis that "the differential in the price paid by the consumer and the price paid by the carrier is the news carrier's fees for this delivery and collection service, . . ." and ". . . the Manager apparently felt that delivery and collection services were not taxable events, . . ." (City's Brief at 6 and 11).

This justification is without merit for several reasons. First, the Regulations compute the tax based on the purchase price paid by the carrier only because the sale between the publisher and the carrier is presumed to be retail. (Manager's Rules, ¶ ¶ 1 and 2) There is nothing in the Rules that suggest that the tax is computed in this way because the carriers were engaged in a non-taxable

service. Indeed, the City's sole witness in hearings before the Manager, Don Guttenstein, testified that the tax was computed in this manner for reasons of administrative convenience, not as a means of avoiding the taxation of non-taxable services.

> Under the sales tax ordinance, it is designed to tax retail sales. . . . When you look at the rules and regulations in Section 2, you know, it mentions the presumption that this type of transaction, that between the publisher and carrier, is presumed to be a retail sale. And then the following sentence refers to the fact that the tax shall be measured by the purchase price paid by the carrier or distributors to the publisher or licensed retailer which leads me to believe that if we wanted to tax the ultimate the [sic] transaction between the carrier and the consumer we would have based the tax on the prior charges to the consumer. So, I think the language of Section 2 here is to support a position of the Department where we really were trying to in I guess our own way conveniently approach the situation really without a whole lot of concern whether it is retail or wholesale sale, but a mechanism of making it work. (Tr. at 155, emphasis added)

Almost all service retailers, not just newspaper carriers, are compensated based on the difference between the wholesale cost of the goods they purchase and the retail price of the goods they sell. This difference, or profit, compensates retailers for the services which they provide in connection with a retail sale. Regardless of the fact that some degree of service accompanies every retail sale, the Ordinance explicitly provides that the tax is to be computed based on the retail purchase price, not the wholesale price of the goods purchased. (Section 53-25(1), Chapter II (formerly Art. 166.4-1)). The City's attempt to treat newspaper sales by carriers differently defies common sense.

Secondly, there is no evidentiary support in the Manager of Revenue's Findings of Fact, Conclusions of Law and Order for the City's new-found argument

that the publishers are in a direct retail relationship with the readers. Based on "essentially undisputed evidence," (Manager's Findings at p. 4; see also Trial Court Findings ¶ 11) the Manager specifically found that The Post's and the News' carriers and distributors were not employees or agents of the newspapers:

> The news carriers and independent distributors are not employees of the newspaper publishers. Neither are the news carriers or independent distributors employees or agents of the householder or business subscriber that constitutes the reading public. (Manager's Findings, ¶ 21)

More to the point, the Manager found in several instances that a wholesale sale took place between the publishers and the carriers who in turn sold their papers at retail to the public. (Manager's Findings ¶ ¶ 2 and 5)

The Manager made no intimation, much less a finding, that The Post and the News were in any kind of a retail relationship with the readers (with the exception of vending machine sales) or that the agreement between the publishers and the carriers was simply for a "delivery and debt collection service."[2] Instead, the Manager of Revenue concluded that the publishers were liable because evidence that the carriers lacked sales tax licenses failed to rebut the presumption that such sales were retail. (Manager's Conclusions of Law, ¶ ¶ 10-26) As argued in the Plaintiffs-Appellants' Opening Brief at 7-11, this conclusion is erroneous, but in any event, is incompatible with the City's new-found position.

---

2. The carriers do agree to deliver the newspapers which they purchase from the publisher, as would any retailer who has an agreement to retail a supplier's product. (Manager's Findings, ¶ 6; Trial Court Findings, ¶ 17) There is nothing in the agreement between the publishers and the carriers, however, which requires the carriers to collect a debt on behalf of the publisher. Like any other retailer whose compensation depends on the sale of the product he sells, the carrier collects a "debt" for himself. (Tr. 27, lines 2-7; Post Exhibit "D" and News Exhibits "D-1" and "E-1")

Finally, there is nothing in the trial court's decision itself which supports the City's new-found argument that The Post and the News are in a direct retail sales relationship with the readers. Like the Manager, the trial court specifically found that a sales transaction took place between publishers and their carriers and distributors:

> The Post and the News sell their papers to the carriers at a lesser price than that which the consuming public pays. (Trial Court Findings, ¶ 14)

Although the trial court made passing note that the carriers provide a service and that the differential between the retail and wholesale price of the newspapers compensated the carriers for such service (Trial Court Findings, ¶ 14 and Conclusion ¶ 6), these paragraphs, standing alone, cannot and do not support the conclusion that the publishers are in a direct retail relationship with the readers or that the carriers are relegated to a "delivery and debt collection agreement" with the publishers.[3] As discussed above, carriers, like any other retailer, provide a service in connection with the product which they buy and resell, and are compensated for such services by the difference between the wholesale and resale price. This fact standing alone does not nullify a wholesale transaction between the wholesaler and a retailer, nor does it turn a retailer into an agent or employee of the wholesaler.

The trial court made no finding that the publishers were in a direct retail relationship with the readers, and of course, never mentioned the existence of any "delivery and debt collection agreement" on which the City now rests its

---

3. As argued in Plaintiff-Appellants' Opening Brief at 25-26, there is no support in the record for a finding by the trial court that the carriers were agents of the publishers, and even if there were, such a finding would be contrary to the Manager's Rules.

argument. Instead, the trial court found The Post and the News liable by judicially redefining the definition of a "wholesale sale" in the Ordinance so as to only include sales to "licensed" vendors. (Trial Court Findings, ¶ 6)

The trial court adopted the City's proposed findings of fact and conclusions of law almost verbatim,[4] yet the City in its Answer Brief makes no attempt to support the trial court's reasoning or refute any of the publishers' arguments as to why the trial court's decision is erroneous. In particular, the City fails to mention, much less discuss, how trial court's decision can be be reconciled with Pluss v. Department of Revenue, 173 Colo. 86, 476 P.2d 253 (1970), which invalidated a state sales tax regulation almost identical to the Manager's Rules. (See Plaintiffs-Appellants' Opening Brief at 17-19.)

In the final analysis, the only support for the City's new-found position rests on the factual findings of a West Virginia administrative tax decision (Addendum E to City's Answer Brief). Needless to say, the record in an entirely different case from an entirely different jurisdiction cannot create the record in this case, nor can it supply legal reasoning which was never even considered by the Manager or the trial court.[5]

---

4. In its Answer Brief, the City attempts to disclaim its authorship of the trial court's decision and indeed, claims that ". . . the trial court made substantial changes in the findings of fact, conclusions of law and order submitted upon the court's request by Denver's counsel." (City's Answer Brief at 7) A simple comparison of the City's proposed decision (Addendum D) and the trial court's final decision, however, reveals only a minor transposition of paragraphs and a few minor wording changes. As noted in the Plaintiff-Appellants' Opening Brief at 12, n. 8, the practice of adopting a proposed order virtually verbatim has been routinely discouraged by the Colorado courts.

5. Even if the West Virginia decision had any bearing on this appeal, it should be noted that the facts surrounding the carrier-publisher relationship in that case are significantly different from those established in this case. There the publishers guaranteed delivery. Here there is no evidence that the publishers guaranteed delivery but rather, the reader has the option of calling the publishers which deliver the paper and then charge the carrier. (City's Answer Brief at 4; Tr. 42,

(Cont'd on next page)

2. The Publishers' tax liability cannot be determined by "administrative convenience".

As an alternative argument, the City appears to dispense with the requirements of the Ordinance, established Colorado case law and legal reasoning altogether, by simply arguing that it is administratively inconvenient to treat the carriers as retailers for sales tax collection purposes. In support of this position, the City candidly sets forth the testimony of its field audit supervisor who, after admitting that The Post's and the News' sales to its carriers were indeed wholesale (Tr. 155, line 3-158, line 17), confessed that the "paperwork" in licensing carriers prompted his decision to tax the publishers in this case. (See City's Answer Brief at 10.)

As argued in the Plaintiffs-Appellants' Opening Brief, the plain language of the Ordinance cannot be changed for reasons of administrative convenience. The source of the City's power to impose a sales tax is Section 53, Chapter II (formerly Art. 166). If the transactions in question are not taxable under the provisions of the Ordinance, they cannot legally be made taxable by regulation or policy of the Department, including the Manager's Rules in question. See, e.g., Cohen v. Department of Revenue, 197 Colo. 385, 593 P.2d 957 (1979); Travelers Indemnity Co. v. Barnes, 191 Colo. 278, 552 P.2d 300 (1976); Pluss v. Department of Revenue, 173 Colo. 86, 476 P.2d 253 (1970); Bedford v. Colorado Fuel and Iron Corp., 102 Colo. 538, 81 P.2d 752 (1938).

---

lines 14-19). In the West Virginia case, some customers prepaid the publisher who treated the monies as its own. Here there is no such evidence. There the publisher contracted with the customer. Here the evidence is that the carrier contracted with its own customers. (City Answer Brief at 5; Post Exhibit "F") There is simply no evidence in the record to justify the City's reliance upon this West Virginia administrative decision.

The cases from other jurisdictions relied upon by the City in support of its "administrative inconvenience" argument are clearly inapposite. In Sunshine Art Studios of California v. State Board of Equalization, 114 Cal. Rptr. 24 (1974) the California statute specifically allowed the tax administrator discretion to collect the tax from the distributor rather than the retailer. There is no basis for such unbridled administrative discretion in Colorado law or under the Denver Ordinance. Similarly, in Independent Publishing Co. v. Haines, 168 S.E.2d 904, 907-908 (1969), the Georgia statute, unlike the Denver Ordinance prior to its recent amendment, defined "retail sales" to include sales where the tax would otherwise be lost. In addition, the Georgia and California actions were essentially Commerce Clause cases.

The Alabama and Arkansas cases are equally distinguishable. Ragland v. Quality School Plan, Inc., 651 S.W.2d 447 (Ark. 1983) and Quality School Plan, Inc. v. Alabama, 301 S.2d 183 (Ala. App. 1974) both concern students who were selling subscriptions as agents of a distributor under a statute which specifically provided for taxation under an agency theory.

Finally, the City cites three Colorado cases which are readily distinguishable from the present action. In Craftsman Painters and Decorators, Inc. v. Carpenter, 111 Colo. 1, 137 P.2d 414 (1943) the Court held that painters and contractors were consumers of each item which they incorporated into a finished painting project and thus were responsible for paying retail sales tax on the paint and supplies which they purchased. In reaching this result, the Court correctly reasoned that when the painters incorporated items, such as paint, into a structure as an integral part of the entire contract, they were the consumers. In this case, however, the newspapers sold by the publishers to the carriers are not integrated into another product for resale, but are in fact resold without any

modification whatsoever. (Manager's Findings, ¶ 8) Similarly, in Carpenter v. Carman Distributing Co., 111 Colo. 566, 114 P.2d 770, 772 (1943), the incorporated laundry items, like the paint in Craftsman, were not available for resale. Herbertson v. Cruse, 115 Colo. 274, 170 P.2d 531 (1946) is not at all relevant as the issue was the degree of continuous possession by a lessee necessary to constitute a sale.

In conclusion, the undisputed evidence at the hearing, as found by the trial court, established that The Post's and the News' carriers and distributors are independent contractors who purchase newspapers from publishers at wholesale and resell them at retail to the readers. There is no evidence these independent contractors are merely providing a service or that they are merely agents for "debt collection." The City's arguments are without factual support and must be rejected by this Court.

3. Vending machine sales of newspapers at less than $.19 per copy are not taxable.

In response to The Post and the News' arguments that its vending machine sales of newspapers at $.15 per copy are not taxable, the City makes only one point: If the Court accepts the publishers' argument then,

> . . . the court should also accept the argument that a tax of $.01 should always be imposed on an item priced $.25. Thus, instead of the 3% rate required by §53-28 a 4% rate would be firmly established for retailers of the major dailies at current prices. (City's Answer Brief at 19)

This "argument" makes absolutely no sense. The Post and the News concede that a $.01 tax is now included in the $.25 vending machine sales price of its daily editions pursuant to the schedule set forth in the Ordinance, and that in effect, this $.01 tax represents approximately 4% of the purchase price. But

there is nothing surprising about this fact. Since a penny is the smallest denomination of currency, it is impossible to collect exactly 3% of the purchase price unless the purchase price is in multiples of $1.00. For example, when a product sells for $.19, the $.01 tax required under the schedule in the Ordinance represents 5.2% of the purchase price and when the product sells for $.51, the same $.01 represents only 1.9% of the purchase price. The schedule in §53-27, Chapter II (formerly Art. 166.8) which imposes the tax merely recognizes this arithmetic fact of life.

This obvious fact does not address, much less refute, the publishers' argument that no tax is due on the sale of the newspapers sold through vending machines at $.15 per copy, or its chief complaint that the City is asking the publishers to pay a tax which it cannot, under the clear terms of the Ordinance itself, add to the purchase price of its newspaper. Section 53-27 plainly states that there is to be imposed no tax on sales of $.01 through $.18 and the Court should so hold.[6]

---

6. The City's reliance on cases from other jurisdictions, without explaining the relationship of those cases to the present action, is misplaced and totally confusing. In Calvert v. Canteen Co., 372 S.W.2d 556, 557 (Tx. 1963), the tax act specifically referred to the bracket system as a method for collecting the tax. See also, Robert W. Hinckley Co. v. State Tax Commission of Utah, 404 P.2d 662, 665 (Utah 1965). Also in Utah, there was no provision in the tax law prohibiting adoption of the tax by the retailer, Hinckley, 404 P.2d at 667-68. The Utah court thus struck down the tax administrator's regulation prohibiting the retailer from absorbing the tax because it created, in conjunction with the bracket system, an inconsistent taxing scheme. Cf. §53-29, Chap. II (formerly Article 166.8-6) which prohibits retailers in Denver from absorbing the sales tax. In Virden v. Schaffner, 496 S.W.2d 846, 847 (Mo. 1973) the tax was not a sales tax but a privilege tax imposed on retailers. See also, Piedmont Canteen Service v. Johnson, 123 S.E.2d 582, 585 (N.C. 1962) Also in North Carolina, the bracket system expressly required every retailer to add and collect the relevant amounts as set forth in the bracket system. Cf., Winslow-Spacarb Inc. v. Evatt, 59 N.E.2d 924 (Ohio 1945). Gannett Satellite Information Network, Inc. v. MTA, 745 F.2d 767, 775 (2d Cir. 1984) is totally irrelevant here since that case concerns whether licensing fees are a permissible means to raise revenue for self-sufficient commuter lines.

B. Issues Relating to the Constitutionality of the Ordinance and the Regulation.

In their Opening Brief, all Plaintiffs-Appellants argue that the Ordinance and the Manager's Rules are unconstitutional on two grounds. First, the Rules facially discriminate against newspapers and second, the effect of the Ordinance and the Rules is to discriminate against different forms of newspaper distribution. As discussed below, the City has totally missed the point of these contentions, and in so doing, has conceded both arguments.

In response to the first argument that the Rules facially discriminate against newspapers by creating a presumption that sales to unlicensed carriers are taxable retail transactions, the City does nothing more than cite two other regulations, one governing the construction industry and the other governing the data processing industry, for the proposition that newspapers were not singled out for special treatment. The City misses the point. Regardless of other interpretive regulations which may be in effect, it is only the Manager's newspaper Regulation, and no others, which creates a presumption that sales of newspapers to "independent news carriers" are taxable retail sales. Only newspaper sales, and no other commodities, are subject to this special presumption, and that is where the discrimination lies.

As discussed in the Plaintiffs-Appellants' Opening Brief, the United States Supreme Court in Minneapolis Star & Tribune has held that a tax law which singles out newspapers for special treatment is constitutionally defective unless the government can show a compelling interest, i.e., one "it cannot achieve without differential taxation." Administrative convenience and the production of revenue have been held not to be such compelling justifications. See Minneapolis Star & Tribune, 460 U.S. at 586; Matthews v. Department of Revenue, 193 Colo.

44, 562 P.2d 415 (1977); State of Alabama v. The Advertiser Co., 337 S.2d 943 (Ala. App. 1978), cert quashed, 337 S.2d 947. The City has failed to provide any explanation or justification for this inequality.

The City fails to mention, much less address, Plaintiffs-Appellants' second argument that the Rules unconstitutionally discriminate against various forms of newspaper distribution, such as (1) the discriminatory advantage enjoyed by publishers who do not pay the sales tax because they sell to commercial outlets which collect the tax from their customers, or (2) the discriminatory advantage enjoyed by customers who bought fifteen cent newspapers from vending machines without paying a tax because the publishers were prohibited by law from collecting the tax on sales between $.01 and $.18. (Plaintiffs-Appellants' Opening Brief at 33-34.) Indeed, insofar as the City admits the discrimination between newspapers of larger circulation which distribute primarily by carrier and newspapers of smaller circulation which sell primarily at retail, the City has conceded the existence of the tax advantage enjoyed by the newspapers of larger circulation.

In conclusion, the City offers no justification for the disparities against newspapers and among various methods of newspaper distribution. Thus, the Ordinance and the Rules which create these unconstitutional discriminations must be declared unconstitutional.

V. CONCLUSION

For the foregoing reasons and for the reasons set out in the Plaintiffs-Appellants' Opening Brief, the decisions of the Manager of Revenue and the trial court should be reversed, the assessments here in question should be declared null and void, and paragraphs 1, 2, and 6 of the Manager of Revenue's Rules and Regulations should be declared null, void and unconstitutional.

EIBERGER, STACY & SMITH

By _____

Rodney L. Smith, Reg. No. 6664
3500 Republic Plaza
370 Seventeenth Street
Denver, Colorado 80202-5635
Telephone: (303) 534-3500
Attorneys for The Denver Post Corporation

COOPER & KELLEY, P.C.

By _____

Thomas B. Kelley, Reg. No. 1971
1660 Wynkoop, Suite 900
Denver, Colorado 80202
Telephone: (303) 825-2700
Attorneys for Plaintiffs-Appellants

BAKER & HOSTETLER

By _____

Bruce D. Pringle, Reg. No. 1877
303 E. Seventeenth Avenue, Suite 1100
Denver, Colorado 80203
Telephone: (303) 861-0600
Attorneys for Plaintiff-Appellant The Denver Publishing Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of October, 1985, a true and correct copies of the foregoing PLAINTIFFS-APPELLANTS' REPLY BRIEF have been mailed, first class postage prepaid and affixed thereto, properly addressed to the following:

Duane Woodard, Esq.
Attorney General
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203

Donald E. Wilson, Esq.
Assistant City Attorney
1437 Bannock Street, Room 353
Denver, Colorado 80203