7-16-1985

Catholic Archdiocese of Denver v. Denver

SUPREME COURT, STATE OF COLORADO

Case No. 85-SA-172

OPENING BRIEF OF APPELLANTS

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,

v.

CITY AND COUNTY OF DENVER, a Municipal Corporation; and CARL GUSTAFSON, 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,

v.

CITY AND COUNTY OF DENVER; and CARL H. GUSTAFSON, Manager of Revenue for the City and County of Denver,

Defendants-Appellees.

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

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STATEMENT OF THE CASE

The City of Denver, like the State of Colorado, imposes a tax on sales at retail.[1] Prior to 1982, there was a specific provision in the Denver Sales Tax Ordinance ("Ordinance") exempting sale of newspapers from retail sales tax.[2] Effective January 1, 1982, the city council repealed the exemption. Shortly thereafter, the Denver Department of

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[1]The Denver ordinance relating to retail sales and use tax substantially tracks the language of the state statute, C.R.S. 1973, 39-26-101 et seq. The definitions of "retail sale," "wholesale sale," "retailer," and "wholesaler," which are crucial to the resolution of the present case, are basically identical in the city ordinance and the state statute.

[2]A similar exemption is still included in the state retail sales tax law. See C.R.S. 1973, 39-26-102(15).

Revenue promulgated rules and regulations ("Manager Rules or Regulations") relating only to the imposition and collection of sales tax on newspapers.[3] In essence, these rules create a rebuttable presumption that sales of papers to unlicensed newspaper carriers are retail sales, subject to tax. Further, the rules provide that the sale of newspapers through vending machines is subject to a 3% tax.

A. The Declaratory Judgment Action (Civil Action Number 82 CV 2555)

On March 30, 1982, numerous plaintiffs, including The Denver Publishing Company d/b/a Rocky Mountain News ("News") and The Denver Post Corporation ("The Post"), instituted suit in the Denver District Court seeking a

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[3]The Denver Municipal Code was recodified in 1982. Certain portions of the record, such as the Manager of Revenue's Findings and Conclusions, refer to the old codification, while other portions, such as the trial judge's Findings and Conclusions, refer to the new codification. This brief will refer to both designations. It should be noted that relevant sections of the Denver Retail Sales Tax Ordinance were amended in December of 1984. However, these amendments do not apply to the case at bar and are relevant only insofar as they provide insight into the meaning of the ordinance prior to their enactment.

Reference to the transcript of proceedings before the Manager of Revenue will be referred to by page number (Transcript, p. ____). References to both the Findings and Conclusions of the Manager and the trial court will be by paragraph number. Reference to other documents in the record will be by page number (Record,_____ p. ____).

declaratory judgment that (a) the regulations adopted by the Department of Revenue conflicted with the sales tax ordinance; and (b) the regulations and ordinance, as applied and construed by the city, were unconstitutional.

B. The Assessment Proceedings - (Civil Action Number 82 CV 9312)

During March and April of 1982, the Department of Revenue assessed a sales tax against both the News and The Post on their sales of newspapers to carriers, independent distributors, and through vending machines for the period February 23, 1982 to February 28, 1982. Both publishers filed timely petitions to cancel the assessment. An evidentiary hearing was held before the Deputy Treasurer acting on behalf of the Manager of Revenue. All of the evidence was uncontradicted.[4] Thereafter, the Manager, through the Deputy Treasurer, issued Findings of Fact and Conclusions of Law. Essentially, these Findings and Conclusions held that all sales by the News and Post to carriers and through vending machines were subject to retail sales tax under the

[4]Both the Manager of Revenue and the trial court concluded that the testimony was undisputed. See paragraph one of the Manager's Findings of Fact and paragraph 11 of the Trial Court's Findings of Fact, Conclusions of Law and Order.

Department's rules. The Manager further concluded that sales of papers to independent distributors for resale to carriers were not taxable, but that sales of papers to independent distributors for the purpose of resale to consumers were taxable transactions.

Both the News and the Post filed a timely complaint pursuant to Rule 106(a)(4) of the Colorado Rules of Civil Procedure, claiming that the decision of the Deputy, as adopted by the Manager of Revenue, was arbitrary, capricious, an abuse of discretion, in excess of his jurisdiction, and contrary to law.

The declaratory judgment action and the assessment review case were consolidated, and cross-motions for summary judgment were filed by all parties.[5] On December 15, 1984, the trial court entered Findings of Fact, Conclusions of Law, and Order granting the city's motion for summary judgment. The trial court affirmed the decision of the Manager of Revenue and determined that the ordinance and regulations as applied were not unconstitutional. A timely notice of appeal was filed in the Colorado Court of Appeals

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[5]The record before the Manager was submitted by the plaintiffs in the declaratory judgment action in support of their motion for summary judgment.

as to both cases on January 25, 1985. The appeal was referred to this Court pursuant to CRS 1973, 13-4-110(1)(a).

STATEMENT OF FACTS

A. The Ordinance[6]

The Denver Sales Tax Ordinance clearly and unequivocally provides that sales tax is imposed only on sales at retail:

> There is levied and there shall be collected and paid a tax in the amount stated in this article, as follows:
>
> (1) On the purchase price paid or charged upon all sales and purchases of tangible personal property at retail. Sec. 53-25, Chapter II (formerly Article 166.4 and 166.4-1) (emphasis added).

Section 53-24(10) of Chapter II (formerly Article 166.2-6) defines a "retail sale" as any sale within the city except a wholesale sale." A "wholesale sale" is:

> [a] sale by wholesalers to retail merchants, jobbers, dealers or other wholesalers for resale . . . .

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[6]The trial court found that the sales tax ordinance was not put into evidence in the hearing before the Department of Revenue. See paragraph 6 of the Findings of Fact, Conclusions of Law and Order. This is erroneous. The ordinance was offered and introduced as Exhibit A. See Transcript, pp. 12 and 14.

The term "wholesaler" is also defined in the Sales Tax Ordinance. Section 53-24(18) of Chapter II (formerly Article 166.2-3) states as follows:

> Wholesaler means a person doing a regularly organized wholesale or jobbing business, and known to the trade as such, and selling to retail merchants, jobbers, dealers, or other wholesalers, for the purpose of resale."

B. The Regulations

After the repeal of the exemption for newspapers, the Department of Revenue adopted regulations dealing specifically and only with the imposition of sales tax on newspapers and other publications. Paragraphs 1 and 2 of the regulations purport to create certain presumptions as to whether a sale of newspapers is "retail" or "wholesale."

> 1. Sales-for-resale of such publications to vendors (a) who are licensed as retailers pursuant to said Sales and Use Tax Articles and General Licensing Provisions of the Denver Revised Municipal Code, and (b) who sell such publications to purchasers from commercial locations, such as places of retail business or vending machines, shall be considered to be wholesale sales. All other sales by publishers or vendors of such publication shall be presumed to be retail sales on which the publisher or vendor must collect and remit the Sales Tax . . . the presumption may be rebutted by such reasonable proof as the Manager deems adequate. (Emphasis added.)
>
> 2. Sales of newspapers by publishers or licensed retailers to independent news carriers shall be presumed similarly to be sales at retail and taxable transactions. The tax in such cases shall be measured by the purchase price paid by the news carrier to the publisher or licensed retailer. The term "news carrier" as used herein

> shall mean those hawking newspapers on regularly established routes or at random locations. (Emphasis added.)

Paragraph 6 of the regulations pertains to sale of newspapers through vending machines.

> 6. Publications vended through vending machines located within the City are subject to the Sales Tax and the vendor must, regardless of the price of the publication, pay over to the Manager of Revenue an amount equivalent to 3% of gross sales made through vending machines (Record, f. 115-116.

C. The Undisputed Evidence

The News and The Post presented extensive uncontroverted evidence at the administrative hearing proving that their newspaper sales to carriers and distributors clearly fell within the definition of wholesale sales under the ordinance. Upon such a showing, the contrary presumption created in the regulations should have been overcome as a matter of law.

The evidence presented by the News and The Post consisted of the testimony of Howard Greenberg, Director of Circulation for The Post; Ron Myatt, Circulation Manager for the News; Dennis McNeil, Associate Professor of Marketing at the University of Denver and Marketing Consultant; joint exhibits A and J, Post exhibits B through G; and News exhibits B-1 through I-1.

For purposes of this case the distribution systems of The Post and the News are essentially the same. Both

publishers sell newspapers (1) to carriers for resale to customers, (2) to independent distributors for resale to carriers, (3) to retail outlets, and (4) to vending machines. Vending machine sales are undisputedly retail. At all times relative to this case, newspapers through vending machines cost 15 cents for a daily paper and 50 cents for a Sunday paper.[7] Sales to retail outlets are undisputedly wholesale and are not involved in this litigation. Most newspapers are distributed to independent carriers.

The undisputed evidence in the record establishes the following. Transactions between The Post and the News and their independent carriers and distributors are "sales," within the meaning of the ordinance. (Managers Findings, para. 2; Trial Court Findings, para. 14).

The Post and the News do a regular wholesale business and are known in the trade as wholesalers of newspapers. (Managers Findings, para. 4; Tr. at p. 100-101 and 110 to 111 [Myatt of the News]; Tr. at pp. 39 to 41 [Greenberg of the Post]; Tr. at pp. 137 to 140 [McNeil, Defendants' marketing expert].) Also Post carriers, for example, hold themselves out in their receipts to subscribers

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[7]No vending machine is designed to accommodate pennies (Tr. at p. 112).

as independent retailers. (See, for example, Post Exhibit F.)

The Post and the News sell newspapers to independent carriers and distributors at a wholesale rate for the purpose of resale at a retail rate. (Manager's Findings, para. 2.) The carriers and distributors purchase large quantities of newspapers. (Tr. at p. 98.) All agreements between the publishers and the carriers and distributors establish that the papers are sold for the purpose of resale. (Manager's Findings, para. 6; Trial Court Findings, para. 17; the News exhibit D-1; and The Post exhibit D.)

The sole witness called by the city was Mr. Donald Guttenstein, the field audit supervisor for the Department of Revenue, Sales, Use and Occupational Tax Section. Far from contradicting the testimony of Messrs. Greenberg, Myatt, and McNeil, Mr. Guttenstein agreed that the sales by the News and Post to their carriers and independent distributors were wholesale in nature (Record, pp. 156-157). Guttenstein stated that the presumptions contained in paragraphs 1 and 2 of the regulations were adopted simply for administrative convenience in collecting the tax, and without regard to whether the sales in question were wholesale or retail under the ordinance (Record, p. 155). As Mr. Guttenstein testified:

> I would agreed with the expert witness that in the marketplace the transaction between the

> newspaper and the carrier is one of a wholesale characteristically rather than retail characteristics. Again, I think with the rules and regulations we really weren't worried about that particular emphasis. (Record, p. 156)
>
> * * *
>
> I am neither a marketing expert or have legal experience, so my answer reflects that of a tax administrator. And typically the transactions in one or two of the sales by the newspaper would be a wholesale transaction. And this leads to the purpose of the rule and regulation, because we wanted to administer it in somewhat unique fashion (Record, p. 158).

In his Conclusions, the Manager correctly recognizes that the taxability of any particular sale must be determined by reference to the Sales Tax Ordinance, and that any regulation which conflicts with the ordinance is void (Manager's conclusions, para. 7). Relying on the decision of this Court in Pluss v. Department of Revenue, 173 Colo. 86, 476 P.2d 253 (1970), the Manager also correctly determined that a regulation making the sale to a non-licensed person presumptively a retail transaction is valid, provided that the presumption is rebuttable.

However, the Manager erred when he then proceeded to construe the regulations as creating irrebuttable presumptions or absolute rules of law. Thus, instead of holding that the News and The Post merely bore the burden of going forward to establish that sales to carriers and independent distributors were "wholesale," as defined by the ordinance, the Manager concluded that the carriers' and

distributors' lack of a license, ipso facto, made sales to them retail, rather than wholesale:

> 1. The Post and News sell newspapers to news carriers and to independent distributors who are neither licensed as retailers by Denver nor selling their publications from commercial locations; therefore, the sales are presumptively sales at retail and taxable transactions. The presumption, with the exception of certain of the independent distributors, has not been rebutted by proof meeting any standard; in fact, it is admitted that the news carriers and independent distributors are not licensed and do not sell at commercial retail outlets. (Manager's Ultimate Findings, para. 18.) (Emphasis added.)

The Manager also erred when he determined that the Denver Sales Tax Ordinance was intended to tax such vending machine sales, even though (a) the seller could not recoup the tax from the buyer because the transaction was for less than 18 cents; and (b) the ordinance itself provided that no taxes be levied where the amount of the purchase was between 1 and 18 cents; See Section 53-27 of Chapter II (formerly Article 166.8).

The Manager declined to rule on the constitutionality of either the ordinance or regulations, on the ground that such matters were solely for judicial consideration.

E. The Trial Court's Findings, Conclusion and Order

The trial court entered findings of fact, conclusions of law, and an order affirming the Manager of

Revenue.[8] Although conceding that the evidence was undisputed, the trial judge proceeded to make additional findings not supported by the evidence in the record. For example, the lower court found that the carriers and distributors are essentially providing a service of delivering papers (Trial Court's Findings, para. 14, and Conclusions, para. 6).[9]

Overall, the trial court erred by adding an additional word to the statutory definition of wholesale sale; i.e., that "wholesale" sales are defined as sales to licensed retailers for the purpose of resale. Since it was undisputed that neither carriers nor independent distributors held licenses, the court concluded that any sale to them could not be at wholesale.

Finally, the judge determined that the Denver Sales Tax Ordinance requires the vendor to pay tax on retail

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[8]The trial judge's findings and conclusions are copied verbatim from the proposed findings and conclusions submitted by the city. Such a procedure has been criticized by this Court. See Phillips v. Phillips, 171 Colo. 127, 464 P.2d 876 (1970); Uptime Corp. v. Colorado Research Corp., 161 Colo. 87, 420 P.2d 232 (1966).

[9]This conclusion also lends no support whatsoever to the court's decision that the transactions are taxable as retail sales. If carriers and distributors are simply acting as the publisher's agents in providing a delivery service, then no sale has taken place and no sales tax can be imposed. See section I(B) of this brief, infra.

sales, even if the price is less than 18 cents. As a result, the court held that the sale of newspapers from vending machines was subject to taxation (Trial Court's Conclusions, para. 13).

The lower tribunal rejected the constitutional arguments of the News and Post. The court found that the sales tax imposed by the city applied equally to all vendors. In so holding, the judge totally ignored the fact that the regulations under which the tax was assessed apply solely to newspapers and other publications.

SUMMARY OF THE ARGUMENT

The major controversy presented by the consolidated cases involves the proper interpretation of the Denver Sales Tax Ordinance which defines the term "wholesale sale." Under the express language of the ordinance, a wholesale sale is a sale by a wholesaler to a retail merchant for the purpose of resale. The uncontroverted evidence in the record establishes that the sales of newspapers by the News and The Post to carriers and independent distributors clearly meet this definition. However, the trial court erroneously imposed an additional element to the Ordinance by defining "wholesale" as a sale to a licensed retailer. This impermissible act of judicial legislation conflicts with the plain and unambiguous language of the ordinance

itself, and is inconsistent with the Denver Sales Tax Ordinance, the Manager's rules, and this Court's decision in Pluss v. Department of Revenue, 173 Colo. 86, 476 P.2d 253 (1970) which is dispositive of the issues here presented. In summary, the trial court forgot that in Colorado taxing laws should be construed most favorably to the taxpayer. Instead, the court created a new rule that tax laws should be interpreted to favor the convenience of the taxing authority.

The trial judge erred as a matter of law in finding that carriers and independent distributors are agents of, and merely perform a service for, their subscribers. The uncontroverted evidence, as well as the Manager's own Findings and Conclusions, are to the contrary.

The trial court further erred in holding that sales of newspapers through vending machines are subject to sales tax, even though the purchase price is less than 19 cents. Under the plain language of the ordinance, sales less than 19 cents are not taxable.

Finally, the trial court erred in concluding that the Ordinance and the Manager's regulations do not involve fundamental rights and differential treatment of the press which infringes these rights.

ARGUMENT

I. ISSUES RELATING TO CONSTRUCTION OF THE ORDINANCE

A. The trial court erred in concluding that under the Denver Sales Tax Ordinance, a "wholesale sale" can occur only if the purchaser holds a sales tax license.

In order to uphold the regulations, as construed by the Manager, the trial court was compelled to change the statutory definition of "wholesale sale" by adding the word "licensed." As the trial court stated in its conclusions of law:

> 7. Assuming, arguendo, that the news carriers do acquire the newspapers at wholesale, and sell them at retail without a license, the court concludes that the ordinance imposes the obligation to collect the tax on the publishers. This is so because the wholesale exclusion logically applies in this situation only to sales made to licensed retailers. Otherwise, a major source of revenue that the Council of Denver intended to be collected when it removed the exemption for newspapers would be lost. This stands in contrast to the situation where a subsequent retail transaction occurs and a licensed retailer is authorized to collect the tax. (Trial Court's Conclusions, para. 7.) (Emphasis added).

The key issue in this case is whether the word "licensed" should be judicially inserted before the words "retail merchant" in section 53-24(17), Chapter II (formerly Article 166.2-4) of the Denver Sales Tax Ordinance. There are at least seven reasons why the trial judge erred in judicially adding the word "licensed" to section 53-24(17).

1. Section 53-24(17), on its face, plainly and unambiguously applies to all sales by wholesalers to retail merchants for purpose of retail.

Perhaps the most persuasive reason for not adding the word "licensed" to section 53-24(17) by judicial construction is that the legislative body itself did not include the word. The ordinance defines "wholesale sale" as "a sale by wholesalers to retail merchants . . . for the purpose of resale . . . ." Thus, the plain and unambiguous language of section 53-24(17) does not restrict the definition of a "wholesale sale" to purchases made by licensed retail merchants for the purpose of resale. Nor does the definition of "retail" sale refer to licensed retailers. Section 53-24(14), Chapter II (formerly Article 166.2-5).

It is a universally accepted principle of statutory construction that if legislation is clear and unambiguous on its face, it cannot be given a different meaning through judicial construction. Heagney v. Schneider, 677 P.2d 446 (Colo., 1984); Isaak v. Perry, 118 Colo. 93, 193, P.2d 269 (1948). A corollary to this rule is that a statute or ordinance may not be restricted, qualified, or narrowed by judicial construction. E.g., State v. Patriarca, 43 A.2d 54 (R.I. 1945). This is especially true where the restriction is accomplished by judicially adding words or phrases omitted by the legislative body. As the New York Court of Appeals stated in Patrolmen's Benevolent Ass'n. v. City of New York, 41 N.Y.2d 205, 359 N.E.2d 1338, 1341 (1976):

> Hence, where as here the statute describes the particular situation in which it is to apply, "an

> irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded."

See also Estate of Bourguin, 84 Colo. 275, 269 P.903 (1928); People ex rel. Park Res. Co. v. Hinderlider, 98 Colo. 505, 67 P.2d 894 (1936).

If the Denver City Council had intended to limit the definition of "wholesale sale" to transactions involving purchases by licensed retail merchants, it would have been an easy matter to do so. Indeed, City Council has clearly indicated that it knows how to accomplish this, since it amended section 53-24(17) in December of 1984 to add the word "licensed." See part I.(A). 5 of this brief, infra.

2. The trial court's interpretation of section 53-24(17) completely ignores this Court's decision in Pluss v. Department of Revenue, 173 Colo. 86, 476 P.2d 253 (1970).

In 1970, this Court construed the definition of the term "wholesale sale," as contained in the Colorado Emergency Retail Sales Tax Act, in light of a regulation of the Colorado Department of Revenue which was nearly identical to the one at issue in this case. Pluss v. Department of Revenue, 173 Colo. 86, 476 P.2d 253 (1970). Like the Denver Sales Tax Ordinance, the definition of a wholesale sale in the Colorado retail sales tax statute simply states that a wholesale sale is one in which a wholesaler sells to a retail merchant, jobber, or another wholesaler for the purpose of resale. The Colorado Department of Revenue had

adopted regulations which, like the Manager's regulations here in question, stated that any sale to an unlicensed vendee was presumed to be at retail. Pluss sold poultry products to non-licensed jobbers. These transactions were clearly for the purpose of resale. Nevertheless, the State of Colorado attempted to impose a retail sales tax on Mr. Pluss on the grounds that the jobbers did not have a license.

The Colorado Supreme Court held that the statutory definition of a wholesale sale did not require that the purchaser of goods for resale be licensed. This Court reasoned that if the regulation was construed as creating an irrebuttable presumption that sales to unlicensed persons were automatically retail, it was in conflict with the statute and void. On the other hand, held the Court, if the regulation merely created a rebuttable presumption which could be overcome by evidence establishing that the sale was from a wholesaler to a retail merchant, jobber, or another wholesaler, and was for the purpose of resale, then the regulation was a valid exercise of administrative power. The high court adopted this latter construction of the regulation, and concluded that Pluss had presented sufficient evidence to overcome the rebuttable presumption.[10]

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[10]The Court in Pluss, 476 P.2d at 254, also held that
(Footnote Continued)

Since the definition of a wholesale sale in the Denver Sales Tax Ordinance is essentially the same as that contained in the state statute, there is no rational justification for construing them differently. See generally Warner v. People, 71 Colo. 559, 208 P. 459 (1922); Hallet v. Alexander, 50 Colo. 37, 114 P. 490 (1911).

The trial court's interpretation of the Denver Sales Tax Ordinance is not only inconsistent with Pluss, but is also at odds with the Colorado case law before and after Pluss. These cases indicate that "[t]he controlling factor in the classification [of wholesale and retail] is the disposition of goods made by the buyer and not the character of the business of the seller or the buyer." Bedford v. C.F.& I. Corp. 102 Colo. 538, 81 P2d 752, 755 (1938). The goal of the sales tax has always been to impose the tax on what is in fact the "final consumptive transaction." IBM v. Charnes, 198 Colo. 374, 601 P.2d 622, 625 (1979).

3. The trial court's construction of Section 53-24(17) is inconsistent with the overall scheme of the Denver Sales Tax Ordinance.

(Footnote Continued)
if the rule was interpreted to create an irrebuttable presumption, it would be unconstitutional. See section II.(C). of this brief, infra.

The trial judge's interpretation of the Ordinance violates the well recognized principle of statutory construction that statutes should be construed as a whole, and the meaning placed on one section should not be such as to render other sections unnecessary or insignificant. See, e.g., Massey v. District Court, 180 Colo. 359, 507 P.2d 128 (1973). The trial court's interpretation contravenes the ordinance's clear method of imposing the sales tax. A sales tax is a tax on a consumer to be collected by the retailer. IBM, 601 P.2d at 625; Columbine Beverage Co., v. Continental Can Co., 662 P.2d 1094, 1096 (Colo., 1982). The trial court's interpretation provides a completely different means to collect the tax; namely, a tax on the wholesaler when it is inconvenient for the city to collect from the retailer.

Additionally, the trial court's construction of section 53-24(17) renders section 53-76 of Chapter II, which prohibits an unlicensed person from selling at retail, useless suplusage, since such an unlawful transaction could never take place. If any sale to an unlicensed vendee is automatically retail and taxable, then the further sale of such goods by the unlicensed vendee cannot be at retail. See section I.(B). of this brief, infra.

4. The trial court's construction of section 53-24(17) renders the Manager's regulations useless.

Shortly after the Denver City Council repealed the exemption from retail sales tax applicable to newspapers,

the Manager of Revenue adopted regulations designed to facilitate the collection of the tax on such sales. The regulations create a rebuttable presumption that sales of newspapers and other publications to persons who are unlicensed, and who do not carry on business at an established commercial location, are retail, and, thus, subject to tax.

Under the trial court's interpretation of the Denver Sales Tax Ordinance, any sale to an unlicensed retail merchant is a retail sale as a matter of law. This interpretation renders the Manager's regulations competely useless and meaningless, since any transaction which falls within the presumption would automatically be a retail sale under the ordinance in any event.

5. The City Council's amendment of Section 53-24(17) in December of 1984 clearly establishes that the trial court's construction of the section, as it existed before the amendment, is erroneous.

While the present case was pending in the trial court, the City Council amended the Denver Sales Tax Ordinance, and specifically made several changes in section 53-24(17). One of these changes was to expressly add the word "licensed" immediately preceding the words "retail merchant." As a result, the ordinance now reads:

> (17) Wholesale sale means:
>
> a. A sale by wholesalers to licensed retail merchants, jobbers, dealers or other wholesalers for resale . . . . (Emphasis added.)

When a legislative body amends a statute or ordinance, there is a strong implication that it intends to change, and not merely to reiterate, the amended law. E.g., Ridge Erection Co. v. Mt'n. States Tel. & Tel., 37 Colo. App. 477, 549 P.2d 408 (1976). According to the trial court's interpretation, section 53-24(17) read exactly the same way prior to the amendment as it did thereafter. Hence, if the trial court's construction is correct, the City Council performed a completely useless act in amending the definition of a wholesale sale to include the word "licensed."

6. The trial court's interpretation of section 53-24(17) runs afoul of the principle of statutory construction that taxing laws should be construed most favorably to the taxpayer.

Numerous Colorado decisions have recognized the well recognized rule of statutory construction that in case of doubt, taxing statutes must be construed most favorably to the taxpayer and against the taxing authority. E.g., Transponder Corp. v. Property Tax Adm., 681 P.2d 499, 504 (Colo. 1984); Denver Feed Co. v. Commerce City, ____P.2d ____ (Ct. App. No. 84-CA-0323 decided May 16, 1985). Here, however, the proper construction of section 53-24(17) is not even doubtful -- it expressly omits any reference to licensed retail merchants, and the law should not be construed in a manner inconsistent with its express terms. However, even if the question of whether the definition of wholesale sale

should include the word "licensed" is an open one, any doubt must be resolved against the taxing authority.

7. The Alabama case relied upon by the trial court, is totally inconsistent with the trial court's decision, and, in fact, directly supports the position of the News and The Post.

The trial court relied heavily on the Alabama case of State of Alabama v. The Advertiser Co., 337 So.2d 943 (Ala. App. 1976), cert. quashed, 337 So.2d 947, in support of its conclusion that the word "licensed" should be judicially inserted into the definition of the term "wholesale sale" contained in section 53-24(17) of Chapter II. The Advertiser case involved precisely the opposite situation from the one presented here. The City of Montgomery adopted a business license tax on retail sales. Unlike the Denver ordinance, the Montgomery ordinance specifically included the word "licensed" in its definition of a wholesale sale.

The Advertiser sold newspapers to unlicensed carriers for the purpose of resale. Under the express terms of the Montgomery ordinance, these sales were not wholesale, because the carriers were not licensed. Nevertheless, the Advertiser argued that the court should construe the ordinance to delete the word "licensed," so that a wholesale sale would be defined simply as a sale for the purpose of resale. The Alabama Court of Appeals refused to do so,

holding that such a procedure would usurp the authority of the legislature.[11]

In the case at bar, the Denver ordinance does not contain the word "licensed," and it is the city which argues that the court should add this word to the ordinance. Certainly, the Alabama case cannot be read as authority for the proposition that the term "licensed" can be inserted into the Denver Sales Tax Ordinance by judicial construction. Rather, the case stands for the principle that where the legislative body includes the word "licensed" as part of the definition of a wholesale sale, the judiciary may not delete the word under the guise of construction. The same logic would also dictate that where the legislative body omits the word "licensed," the judiciary may not add the term under the guise of construction. Yet, that is precisely what the trial court has done in this case at bar.

In summary, the trial court's addition of the word "licensed," to section 53-24(17) does violence to the plain language of the ordinance; is inconsistent with the overall

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[11]The Alabama taxing scheme is fundamentally different from the Denver sales tax scheme. In Alabama, if the retailer does not remit the tax due, then the retail sales tax becomes an obligation of the wholesaler. See Advertiser, 337 So.2d at 945. In Colorado, if the licensed retailer does not remit the tax, then the consumer is liable. J. A. Tobin Constr. Co. v. Weed, 158 Colo. 430, 407 P.2d 350 (1965).

scheme established by the ordinance; renders the regulations adopted by the Manager of Revenue meaningless; ignores the dispositive decision of this Court in Pluss v. Department of Revenue, 173 Colo. 86, 476 P.2d 253 (1970); violates several well recognized principles of statutory construction; and makes the City Council's 1984 amendment to section 53-24(17) a useless act. The trial court erred because section 53-24(17) means precisely what it says -- that a wholesale sale is a sale by a wholesaler to a retail merchant for purposes of resale. The focus of the definition is on the purpose for which the product is bought, and not on whether the purchaser has a sales tax license.[12]

B. The trial court erred as a matter of law in finding that carriers and independent distributors are agents of, and merely perform a service for, their subscribers.

In the course of her findings and conclusions, the trial judge made the following statement:

> In response to the plaintiffs' contention that sales to news carriers by the News and Post are wholesale sales and excluded from the tax, the court concludes that the news carriers are engaged

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[12]The trial court's erroneous findings and conclusions suggest that the burden of proof is upon the publishers to establish that they fall within the exemption for wholesale sales. See Trial Court's Conclusions, para. 4. The Denver Sales Tax Ordinance taxes only retail sales. Thus, if a sale is at wholesale, it simply does not fall within the scope of the taxing provision. It is the city's burden to prove by a preponderance of the evidence that the sale in question is at retail.

> essentially in performing the service of delivering newspapers and are not selling newspapers as licensed retailers. (Trial court's conclusions, para. 6.)

It is unclear how this conclusion supports the ultimate decision of the trial court. If the trial judge's statement was intended to indicate that carriers are merely agents of the publisher, performing the service of delivering the publisher's newspapers, then the transaction between the publisher and carrier is not a sale, and cannot be subject to tax. If, on the other hand, the judge is suggesting that the carrier is the agent of the subscriber, the statement is contrary to the undisputed evidence and the Findings of the Manager (see Manager's Findings, para. 21).

In any event, there is no support in the record for the proposition that carriers merely provide a service rather than resell the newspapers purchased by them. The undisputed evidence overwhelmingly establishes that carriers buy papers at wholesale from the publisher and resell them at retail to the subscriber. Even if the record is conflicting on this point, the Manager of Revenue specifically found that the transaction between the carrier and the subscriber is a sale (Manager's Findings, para. 2). The trial court may not substitute its own findings of fact for those of the Manager. E.g., State Civil Serv. Comm'n v. Hazlett, 119 Colo. 201 P.2d 616 (1948).

C. Both the trial court and the Manager of Revenue erred in holding that the Denver Sales Tax Ordinance imposes a tax on vending machine sales of newspapers for less than 18 cents.

Section 53-27, Chapter II (formerly Article 166.8) imposes and levies a tax on all taxable sales of commodities and services specified in the ordinance, except aviation fuel, as follows:

Amount of Purchase Price	Tax
$.01 including $ .18	No Tax
.19 including .51	1¢
.52 including .84	2¢
.85 including 1.00	3¢

* * *

> The sales price of all taxable items of tangible personal property sold through coin-operated vending machines shall include the sales tax levied by this Article, and the schedule set forth in this section must be used by the vendor in determining amounts to be included in such sales price.[13]

The tax imposed by section 53-27 does not apply to sales under 19 cents and, hence, the sales by The Post and News through vending racks of daily newspapers at a price of 15 cents is not a taxable transaction.[14]

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[13]The latter paragraph of the above-quoted provision, formerly Article 166.8-5, was deleted by the 1984 amendments, so that no citation to the most recent Revised Municipal Code exists.

[14]Subsequent to the assessments here in question, the (Footnote Continued)

The Manager of Revenue concluded, however, that the sale of daily newspapers through vending racks for less than 19 cents was taxable. This conclusion was premised on a Department of Revenue Regulation which states:

> 6. Publications vended through vending machines located within the City are subject to the Sales Tax and the vendor must, regardless of the price of the publication, pay over to the Manager of Revenue an amount equivalent

In spite of the clear language of Section 53-27, the trial court upheld the Manager of Revenue's Rule and findings on the grounds that Section 53-28[15], Chapter II (formerly Article 166.7) requires the payment of 3% by the retailer, even though no tax is due under 53-27. Section 53-28, however, does not impose a tax. It merely provides that the retailer shall pay 3% of gross taxable sales. There is nothing in Section 53-28 which expressly provides that the 3% payment shall be made when the transaction is not taxable under Section 53-27, as in this case.

(Footnote Continued)
News and Post both raised the price of daily papers purchased through vending machines to 25 cents.

[15]Section 53-28 (formerly Article 166.7) provides in pertinent part:

> Every retailer shall, irrespective of other provisions of this article, be liable and responsible for the payment of an amount equivalent to three percent (3%) of gross taxable sales made by him of commodities or services specified in this article . . .

The effect of the trial court's determination of course, is that the The Post and The News must absorb the sales tax, since, by the terms of the Ordinance itself, no tax can be added to the $.15 daily copy price of its newspapers sold through vending machines.

The Colorado courts have uniformly held that a sales tax is a tax on the consumer who is obligated to pay the tax, not on the seller who is merely obligated to collect the tax. State Department of Revenue v. Modern Trailer Sales, Inc., 175 Colo. 296, 486 P.2d 1064 (1971); J.A. Tobin Construction Co. v. Weed, 158 Colo. 430, 407 P.2d 350 (1965). Most recently, the Colorado Court of Appeals has recognized that this principle applies to the Denver Sales Tax Ordinance, in Columbine Beverage Co. v. Continental Can Co., 662 P.2d 1094, 1096:

> The applicable statues, §39-26-101, et seq., C.R.S. 1973, and the applicable ordinance, Denver Revised Municipal Code §166.1, et seq., provide that the ultimate responsibility for the payment of the tax is on the consumer. While the retailer has the duty to collect the tax, it only acts as a agent of the State in this capacity. Bennetts, Inc. v. Carpenter, 111 Colo. 63, 137 P.2d 780 (1943); Tri-State Generation and Transmission Ass'n., Inc. v. Department of Revenue, 636 P.2d 1355 (Colo. App. 1981).[16]

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[16]Similarly, section 53-27(e) (formerly Article 166.802) of the Code recognizes the retailer as the collecting agent of the City:

(Footnote Continued)

If the trial court's interpretation is allowed, then the distinction between consumer's liability to pay the tax imposed according to the schedule and the retailer's limited responsibility to collect the tax is destroyed.

The Denver Sales Tax Ordinance must be strictly construed in favor of the taxpayer, and all inferences as to its scope and meaning must be drawn in the taxpayer's favor. See also, Winslow-Spacarb, Inc., v. Evatt, 144 Ohio St. 471, 59 N.E. 2d 924 (1945). Since the Denver Sales Tax Ordinance does not require the payment of 3% on transaction not taxable under Section 53-27, the provision of the regulations which imposes such a requirement is contrary to the ordinance and void. E.g., Cohen v. Department of Revenue, 173 Colo. 86, 476 P.2d 253 (1970).

(Footnote Continued)

> The retailer shall be entitled as collecting agent of the City to apply and credit the amount of his collections of the tax levied by this article . . .

II. ISSUES RELATING TO THE CONSTITUTIONALITY OF THE ORDINANCE AND REGULATIONS

A. The Ordinance and the Manager's regulations violate freedom of speech and press as guaranteed by the First Amendment to the United States Constitution and Art. II, Sect. 10 of the Colorado Constitution.

Under both the federal and Colorado Constitutions, there must be a rational basis for any classification scheme. E.g., Turner v. Lyon, 189 Colo. 234, 539 P.2d 1241 (1975); Leonard v. Reed, 46 Colo. 307, 104 P.2d 410 (1909). In the present case, the classification scheme created by the Denver Sales Tax Ordinance and the Department's regulations involves and affects areas protected by the United States and Colorado Constitutions. Where a classification scheme impacts on fundamental rights, such as those protected by freedom of speech and press, there must be a compelling state interest for such classification. E.g., NAACP v. Button, 371 U.S. 440 (1963); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982).

The recent decision of the United States Supreme Court in Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) is dispositive and compels the conclusion that the Department's regulations are unconstitutional. In 1979, Minnesota amended its general use tax laws, similar to Colorado's and Denver's, to provide for a special use tax on the cost of paper and ink products consumed in the production of a publication. The United

States Supreme Court held that where a taxing law singles out newspapers for special treatment, different from that applied to all other businesses, the tax is constitutionally defective, unless the government can show a compelling interest for the unequal treatment. The need to raise revenue, held the Court, does not establish such a compelling interest. See also Matthews v. Department of Revenue, 193 Colo. 44, 562 P.2d 415 (1977).

The Minneapolis case is similar to the present action in two respects. First, the court noted that Minnesota had taxed "an intermediate transaction rather than the ultimate retail sale," Minneapolis Star & Tribune, 460 U.S. at 581, and thus the tax did not serve its traditional function. Here, also, the Manager is seeking to tax an intermediate, i.e., non-retail sale, and to tax one who is not a consumer, contrary to the traditional function of the sales tax in Colorado which is a tax on the consumer to be collected by the retailer. See section I.(B)., infra.

Second, the Minneapolis case was "without parallel in the state's tax scheme." Minneapolis Star & Tribune, 460 U.S. at 582. Here, also, the City's sales tax supervisor admitted at the hearing that the City had promulgated these rules only for publications. See, infra.

In the present case, the regulations, in particular nos. 1, 2 and 6, apply solely to the taxation of

newspapers. Indeed, they are entitled "RULES REGARDING THE ASSESSMENT AND COLLECTION OF SALES AND USE TAXES ON THE SALES AND USE OF NEWSPAPERS AND OTHER PUBLICATIONS." (Record, p. 115). Specifically, the presumptions created by the regulations apply only to the sale of newspapers and other publications. No such presumptions exist with respect to any other business or industry. This was confirmed by the testimony of Mr. Guttenstein, who stated that, to his knowledge, other business enterprises which distribute their products through sales to independent distributors are not subject to any presumptions similar to those here in question. (Tr. at 76-77.)

It is, therefore, apparent that the regulations single out publications for special treatment. As a result, the rules are unconstitutional and unenforceable.

B. The ordinance and regulations unconstitutionally discriminate between means of distributing materials protected by the United States and Colorado Constitutions, the Fourteenth Amendment and Art. II, Sect. 25, respectively.

The effect of the ordinance and the Manager's regulations is to discriminate among newspaper publishers based on their methods of distribution. First, newspapers of small circulation sell primarily at retail directly to the consumer. This form of distribution is subject to one tax on the retail sale. Newspapers of larger circulation distribute through carriers and independent distributors. Under the decisions of the Manager and the trial court,

these publishers are subject to sales tax on the wholesale price of the papers, and, under the terms of the ordinance, a subsequent sale to the ultimate consumer may also be subject to taxation.[17] Second, those who sell to commercial retail outlets, such as 7-11 stores, pay no tax, since the papers are taxed upon their subsequent sale to the consumer at a retail rate. Third, the Rules discriminate in favor of consumers who purchase from vending machines and against those who purchase from carriers or distributors. Persons in the former category need pay no sales tax since The Post was prohibited by law from taxing the sale of a single newspaper whose purchase price is less than 19 cents.

It is clear that certain methods of distribution bear a greater share of the sales tax burden than others. In dealing with the distribution of constitutionally protected materials, such a disparity is not permissible. E.g., Minneapolis Star & Tribune, 460 U.S. at 592-3.

C. The Ordinance and regulations create unconstitutional irrebuttable presumptions.

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[17] As indicated previously in this brief, the Denver ordinance imposes a tax on all retail sales, and a retail sale is defined as any sale other than a wholesale sale. Under the decisions of the Manager and the trial court, neither the sale of newspapers from the publisher to the carrier or independent distributor, nor the later sale by the carrier or distributor to the consumer would meet the definition of a wholesale sale. As a result, both transactions would be subject to taxation.

The ordinance, as interpreted by the trial court, and the Manager's regulations create an irrebuttable presumption that sales to unlicensed retailers are retail sales. Pluss, 475 P.2d at 254, expressly has rejected such an unconstitutional interpretation of the state sales tax statute.

The United States Supreme Court has also held that irrebuttable presumptions involving tax statutes are unconstitutional.

For example, in Heiner v. Donnan, 285 U.S. 312, 325 (1931), the Court stated clearly:

> A statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment.

Accord, Hoeper v. Tax Commission, 284 U.S. 206 (1931).

Thus, based on Colorado and United States Supreme Court decisions, the irrebuttable presumptions in the ordinance and the regulations are unconstitutional and unenforceable.

CONCLUSION

For the foregoing reasons, the decisions of the Manager of Revenue and the trial court should be reversed, the assessment here in question should be declared null and

void and Paragraphs 1, 2 and 6 of the Manager of Revenue's regulations should be declared unconstitutional.

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CERTIFICATE OF MAILING

I hereby certify that on this 16th day of July, 1985, a true and correct copy of the foregoing Opening Brief of Appellants was placed in the United States mail, postage prepaid, addressed to:

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