9-19-1985

Catholic Archdiocese of Denver v. Denver

SUPREME COURT, STATE OF COLORADO

Case No. 85-SA-172

ANSWER BRIEF OF APPELLEES

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 THOMAS P. BRIGGS, Manager of Revenue, City and County of Denver,

Defendants-Appellees (Denver District Court No. 82-CV-2555),

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 THOMAS P. BRIGGS, Manager of Revenue for the City and County of Denver,

Defendants-Appellees (Denver District Court No. 82-CV-9312).

APPEAL FROM DISTRICT COURT,
CITY AND COUNTY OF DENVER,
The Hon. Sandra I. Rothenberg, District Judge

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September 1985

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II. IS DENVER'S METHOD OF TAXING THE SALE AND USE OF NEWSPAPERS CONSTITUTIONAL?

III. MUST THE TAX BE PAID ON SALES MADE THROUGH VENDING MACHINES OF NEWSPAPERS PRICED AT FIFTEEN CENTS?

STATEMENT OF THE CASE

These two cases, consolidated for hearing in the trial court and for purposes of appeal, raise the central issue of whether the retail sale of newspapers can be taxed.

The Denver Post (Post) and the Denver Publishing Company (News) challenged before the Denver Manager of Revenue assessments of sales tax based on estimates of sales of their newspapers through vending machines and by news carriers over a period of five days (Exhibits B and B-1, Mgr. of Rev.). The Manager of Revenue sustained the assessments, and the publishers in Civil Action No. 82-CV-9312 sought review under C.R.C.P. 106(a)(4) and also demanded that the Denver ordinances and regulation adopted thereunder pertaining to newspaper sales be declared void and unconstitutional.

In Civil Action No. 82-CV-2555 brought by the Catholic Archdiocese of Denver and other publishers, including the Post and the News, as well as retailers selling over the counter, news carriers, and consumers, a declaratory judgment of facial invalidity of the ordinances and regulation was sought. In addition, although the plaintiffs did not allege that they had invoked and exhausted their administrative remedies, refunds of all taxes collected were demanded. None of these plaintiffs except the Post and the News had been assessed for delinquent taxes.

Denver moved for dismissal of 82-CV-2555 because the plaintiffs a) had failed to exhaust their administrative remedies, b) lacked standing to bring their claims, and c) failed to allege facts showing a justiciable controversy. Rec. 272-273. The trial judge (the Honorable Harold Reed) denied the motion (Rec. 328) after considering Collopy v. Wildlife Comm., 625 P.2d 994 (Colo. 1981) inter alia.

Partially at the suggestion of Judge Reed, cross motions for summary judgment were filed, and supporting briefs were submitted along with those submitted in the 106(a)(4) action. The trial court (the Honorable Sandra I. Rothenberg now sitting) denied plaintiffs' motion and granted defendants' (Rec. 246), declaring that the Denver Sales and Use Tax Articles were facially constitutional and constitutional as applied to sales of newspapers. The court further held that the regulations adopted by the Manager relating to newspaper sales were valid, and affirmed in 82-CV-9312 the Manager's decision sustaining the assessments made

gainst the Post and the News. Rec. 246-247. Thereupon this ppeal was brought regarding both cases.

STATEMENT OF FACTS

The Post and the News, who exhausted their administrative emedies in 82-CV-9312, are Colorado corporations located in)enver and engaged in the business of publishing and selling ıewspapers. Tr. 17, ll.19-25; Tr. 83, ll.6-8. The plaintiffs in 32-CV-2555 are publishers of newspapers sold in Denver (Rec. 13),)ver-the-counter vendors of newspapers sold in Denver (Rec. 3), ıdependent distributors of newspapers sold in Denver (Rec. 3), ıewspaper carriers delivering in Denver, and readers (consumers))f newspapers in Denver (Rec. 4). The independent distributors)btain their papers from either the Post or the News and may deliver them to the consumer (Tr. 43, ll. 10-24; Tr. 110, ll. 4-10) or sell them to a newspaper carrier (Tr. 32, ll. 12-20; Tr. 86, ll. 4-8) for delivery to the consumer.

The Post and the News also own and operate vending machines through which newspapers are sold at fifteen cents for each daily copy. Rec. 3; Tr. 19, ll. 11-16. Some of the publishers in 82-CV-2555 sell through prepaid mail subscriptions. Rec. 1-2. The Post and the News allow home-delivery subscribers to prepay them directly through the mail. Exhibit E; Tr. 37, ll. 18-25; Tr. 38, ll. 1-9; Exhibits F-1 and I-1, Tr. 93, ll. 15-20, Tr. 96, ll. 7-10.

Junior carriers, age 11-14 years, deliver 80% of the newspapers sold in Denver by the Post (Tr. 44, ll. 1-10), and

approximately 70% sold in Denver by the News. Tr. 86, ll. 1-9. The annual turnover rate for both junior carriers and adult carriers is approximately 100% per annum. Tr. 45, ll. 22-25; Tr. 46, ll. 1-11; Tr. 119, ll. 2-21. Adult carriers often use motor vehicles in making distribution. Tr. 119, ll. 11-18.

The Post, the News, and other retailers selling their newspapers directly to the consumer hold retail sales tax licenses issued by Denver (Tr. 21, ll. 1-18), but newscarriers do not hold the retail sales tax license. Tr. 32, ll. 21-25; Tr. 33, l. 1. Although the junior carriers could obtain the license (Tr. 151, ll. 18-22), the Manager of Revenue found no evidence suggesting that they had. Tr. 25, ll. 15-17. Manager's Findings, p. 6, paragraph 9.

Under the news carriers' arrangement with the publisher, each carrier is responsible for one route and is furnished a manual containing guidelines for managing his route. Tr. 45, ll. 6-21; Tr. 62, ll. 8-19. At the end of each month the carrier is given a statement of credits, as for prepayments made by consumers directly to the publisher, which can be up to 30% of the billing (Ex. E, Tr. 28-30), and charges, as for papers that have been delivered (Ex. E), insurance premiums, envelopes, rubber bands, etc. (Ex. G, Tr. 33-38). If, in making the rounds, the newscarrier misses some deliveries, or newspapers are stolen, the consumer has the option of calling the publisher who will deliver the paper. Tr. 42, ll. 4-19. The news carrier is then charged on the monthly statement a fee for the missed delivery (Tr. 42,

ı. 11-14) and the carrier pays the publisher for such special deliveries at the established rate. Ex. D (paragraph 3), Tr. 26; Ex. E-1 (paragraph 9), Tr. 91-92.

The Post and the News do not purport to control the carriers' method of delivery. Ex. D (paragraph 4); Ex. E-1 (paragraph 2). The publishers do, however, provide a manual containing guidelines on how to make deliveries. Tr. 45, ll. 6-21; Tr. 118, ll. 1-23. News carriers may hire assistants or substitutes. Ex. D (paragraph 4); Ex. E-1 (paragraph 8). They are required to deliver advertising supplements for the major publishers (Tr. 54, ll. 5-18; Tr. 120, ll. 11-21), but may not insert advertising supplements on their own. Tr. 61, ll. 21-25. The publishers assist the carriers in soliciting new subscribers by furnishing the carriers with free sample copies for distribution along the route. Tr. 57, ll. 9-25.

The publisher suggests that the carriers charge regular subscribers the going rate for the paper and its delivery and the established price is published in the newspaper. Tr. 55, ll. 24-25, Tr,. 56, ll. 1-2; Tr. 115, ll. 16-23. The Circulation Director for the Post stated that in his experience of ten and one-half months with the publishing company, he could not recall a case of the carrier's departing from the established price. Tr. 60, ll. 6-24.

Aside from folding the paper and placing it in a weather resistant tube, when necessary, as suggested by the publisher, Tr. 56, ll. 6-25, delivering the paper at a time and price as

suggested by the publisher, Tr. 55, ll. 24-25, Tr. 56, ll. 1-5, maintaining surety bonding and automobile liability policies as asked or suggested by the publisher, Tr. 55, ll. 4-10; Tr. 94, ll. 19-25, Tr. 95, ll. 1-8, Tr. 119, ll. 19-24; Ex. D (paragraph 8), Ex. E-1 (paragraph 11), using receipts provided by the publisher, Tr. 31, ll. 22-25, Tr. 32, ll. 1-11, and informing the publisher of the names and addresses of consumers on the route, Tr. 120, ll. 6-10, the news carrier is free to make delivery as the carrier sees fit.

SUMMARY OF ARGUMENT

Even if news carriers are independent contractors, as the publishers contend, the evidence establishes that the carriers are engaged for the delivery of the newspaper and for debt collection. The differential in the price paid by the consumer and price paid by the carrier is the news carrier's fee for this delivery and collection service, non-taxable services under the Denver ordinances and the regulations issued by the Manager of Revenue. Therefore, the Manager's regulation, by basing the tax on the price paid by the carriers to the publishers, does not single out carrier sales for a lower tax rate.

A generally applicable sales tax imposed uniformly on the sale at retail of tangible personal property, including newspapers, does not violate the First or Fourteenth Amendments to the United States Constitution or the corresponding Colorado provisions.

Vending machine sales of newspapers at a single-copy price of fifteen cents are includible in the retailer's "gross taxable sales" of commodities under the terms of the ordinances and, therefore, part of the tax base against which the 3% rate applies.

Because the trial court made substantial changes in the Finding of Fact, Conclusions of Law and Order submitted upon the court's request by Denver's counsel, and because disputed evidence was not presented to trial court for factual resolution, the trial court did not violate C.R.C.P. 52(a) or 58(a) in entering its order of December 13, 1984.

ARGUMENT

I. INTRODUCTION.

Aside from amendments to the City Retail Sales and City Use Tax Articles made in 1984 (Ordinances Nos. 638 and 637, respectively), the articles of Denver's Revised Municipal Code are except for headings and numbering the same today as when re-enacted in 1981 (Ordinances Nos. 666 and 667, respectively). The Sales Tax Ordinance (No. 666) was introduced before the Manager of Revenue for review by the court in 82-CV-9312 (Joint Ex. A). Substantive changes in the ordinances that might have a bearing on this appeal will be pointed out herein where appropriate with the recognition that the appeal will turn on the language extant in 1982, when the Manager heard the petition of the Post and the News.

The current codification, which includes the 1984 amendments, is appended hereto as are the regulations issued by the Manager on February 22, 1982. The regulations have not been changed. Addendum, pp. A-1--A-42 and B-8--B-13, respectively.

Denver by the 1981 re-enactments of the ordinances eliminated the exemption previously existing for sales of newspapers. Because of this and other law changes, the Manager of Revenue issued on February 22 regulations dealing with construction supplies and equipment, newspapers and other publications, data processing services and equipment, and hearings before the Manager. Tr. 147, l. 22 - Tr. 150, l. 14. Add. B-1--B-21 (hearing rules omitted).

The Manager in his Finding of Fact, Conclusions of Law and Order pertaining to the assessments made against the Post and the News describes the assessments, reviews the mode of operations giving rise to them, takes notice of the applicable regulations, and, concluding that he lacks the power to rule on constitutional issues, rules that the newspaper publishers are not singled out for special treatment. Mgr's Finding at 2-10. Therefore, after observing that the use of the terms "wholesale" and "retail" in the testimony may not be legally descriptive of their use in the ordinances, he distinguishes Pluss v. Dept. of Rev., 173 Colo. 86, 476 P.2d 253 (1970), and sustains the assessments. However, the Manager qualifies his ruling by indicating (Mgr's Findings at 14 (paragraph 21)) that independent distributors will, upon timely application for refund, receive refunds of taxes they have

paid to the publishers if they demonstrate that they are second-tier wholesalers (i.e., retailers) under the Pluss rationale. The prospect of pyramiding the tax is thus disclaimed. Mgr's Finding at 15-16 (paragraphs 25-26).

In reviewing the Manager's Findings in 82-CV-9312, and passing on cross-motions for summary judgment in 82-CV-2555, the trial court found that the major publishers were engaged in distributing newspapers through news carriers primarily, Rec. 239 (paragraph 11), that the differential in price compensates the news carrier for the service provided, Rec. 240 (paragraph 14), and that the "news carriers are engaged essentially in performing the service of delivering the newspapers and are not selling newspapers as licensed retailers." Rec. 243-244 (paragraph 6). Alternatively, the trial court construed the ordinance section defining "wholesale sale" to incorporate impliedly the participle "licensed" as a modifier to "retailer", so as to come within the analysis of State of Alabama v. The Advertizer Co., 337 So.2d 943, (Ala.App.) cert. quashed, 337 So.2d 947 (1976). The court discerned no constitutional infirmity and, therefore, affirmed the Manager and declared the regulations and ordinances valid. Rec. 246-248.

II. DO NEWS CARRIERS PERFORM THE SERVICES OF DELIVERY AND DEBT COLLECTION FOR THE PUBLISHERS OR DO THEY, AS INDEPENDENT RETAILERS, BUY AT WHOLESALE FROM THE PUBLISHERS FOR RETAIL SALE TO THE CONSUMING PUBLIC?

A. The administrative inconvenience of treating news

carriers as retailers.

Denver's field audit supervisor testified in part as follows:

> Q. Would it be practical from your point of view to attempt to license [as retailers] those carriers, those retail sellers?
>
> A. I really don't think so. There would be a burden both to the City and industry if we were to issue licenses and require returns to be filed and so forth by 1500 or 2000 carriers. The license fee is $10, annual fee. Probably the amount of tax collected by the average carrier would be, say, $40 a year. So, the license fee would equal 25 percent of the tax that could be turned in.
>
> Q. Would it be impractical because of the 100 percent [annual] turnover rate also?
>
> A. This makes it more difficult. The greater the turnover, the more difficult it is to administer.
>
> Q. * * * In considering or proposing regulations...do you take into account the ease with which the levied collection and administration of the tax can be attained?
>
> * * * * *
>
> A. * * * Yes, and it takes clerical people to keep the paperwork flowing, keep records straight. [Tr. 150, ll. 20-25, Tr. 151, ll. 1-17.]

The California Court of Appeal, in denying a claim for recovery of sales taxes paid involving greeting card salesmen, Sunshine Art Studios of Calif. v. State Bd., 39 Cal.App.3d 223, 114 Cal.Rptr. 24 (1974), states as follows:

> The sole issue is whether appellant [a wholly owned subsidiary responsible for distribution of cards of the foreign publisher to in-state salesmen] can be assessed for the payment of sales tax on the sales made by salesmen in light of section 6051, Revenue and Taxation Code, which imposes such tax on "retailers".... And indeed the trial court made a finding that: "The salesmen are retailers."

> Respondent, however, contends that the practicalities of the situation are such that these salesmen are so numerous and so scattered and so little subject to discovery and control by it...that enforcement and collection of the sales tax from them would be extremely difficult if not impossible.... * * * [114 Cal.Rptr. at 27.]

In a way similar to Independent Publishing Co. v. Hawes, 119 Ga.App. 858, 168 S.E.2d 904 (1969), where the legislature had addressed this enforcement problem, the California legislature, although placing the incidence of the tax directly on the retailer, had given the tax administrators the discretion for the efficient administration of the sales tax to regard salesmen as agents of the dealers under whom they operated. Therefore, the court held the subsidiary of the publisher responsible for the collection.

B. The Manager's Regulation.

In Denver, the Council enacted Section 53-23, giving the Manager authority to adopt regulations "for the proper administration and enforcement" of the Tax. Add. A-2. Under this section and, with regard to the use tax, Section 53-94, the Manager adopted, inter alia, regulations regarding the construction and newspaper trades. The Manager emulated the Department of Revenue of Alabama by promulgating a regulation similar to Rule N5-013, 1A CCH All-State Sales Tax Rptr. 20,705 [paragraph 20-847], Add. C-1. However, because the Manager apparently felt the delivery and collection services were not taxable events, he based the tax not on the "gross proceeds of such sales", as did

Alabama, but on "the purchase price paid by the news carrier or distributor to the publisher or licensed retailer." Paragraph 2, Mgr's Reg., Add. B-9. The approach to the purchase price compares favorably to the Commissioner's regulation reviewed in Independent Publishing Co. v. Hawes, supra, 168 S.E.2d 904.

In the Independent Publishing Co. case, a deficiency tax judgment against a foreign newspaper publisher was upheld, even though the local carriers were deemed independent contractors. The carriers either delivered the newspapers to consumers on the established routes and collected the subscription charge for the publisher or sold the papers through coin-operated vending machines for the publisher.

The Georgia commissioner's regulation, now somewhat modified as Rule 560-12-2.77, 2 CCH All-State Sales Tax Rptr. 31,559 [Paragraph 31-677], Add. C-2, which bases the tax on the sales price to the carrier, was promulgated pursuant to Ga. Code Ann. Sec. 92-3403a(C)(1)(d) (Ga.L. 1953, p. 199). On December 3, 1984, shortly before the trial court herein issued its judgment on December 13, 1984, Denver amended Code Section 53-25(17), defining "wholesale sale" so as to leave no doubt about its intent that newspapers should be taxed, including those delivered by news carriers. Compare Section 166.2-4 in Ordinance No. 666 (Joint Ex. A) with Section 53-25(17) of the present codification (enacted by Ordinance No. 638, Series of 1984), Add. A-5.

(When more specific sections are added to a general section, the legislative body may be attempting to clarify the meaning of

the general section. State ex rel. Szabo, 286 So.2d 529, 531 (Fla. 1973) (Amendment to sales and use tax laws specifically subjecting vending machine sales of food and drink did not constitute a change in the law but was rather a clarification of original intent.); see People v. Hale, 654 P.2d 849 (Colo. 1982).

Denver's 1984 amendment brought the law surrounding the facts of this instant case squarely within Independent Publishing Co., a case brought to the attention of the trial court (Rec. 164) and inexplicably left undiscussed in the Opening Brief before this court. Nevertheless, as explained by the trial court (Rec. 243-245, paragraphs 4-11), a complete reading of the ordinance, including the licensing requirements of Section 53-76 (Add. A-19), easily provides authority and standards for the Manager's regulation and easily brings the case within the nolding of State of Ala. v. The Advertizer Co., supra, 337 So.2d 943. (These pages, incidentally, were changed by the trial judge from those submitted for review by counsel for Denver, contrary to the statement in the Opening Brief (n. 8, p. 12); compare trial judgment (rec. 234, 238, 243-245) with submitted pages at Add. D-1--D-5.) See, also Mgr's Findings at 13-15, paragraphs 18-23.

The court in Ragland v. Quality School Plan, Inc., 279 Ark. 256, 651 S.W.2d 447 (1983) stated, after reviewing a use-tax definition of "vendor", "[a] sale cannot be made in Arkansas without someone being the vendor." Id., at 651 S.W.2d 448. The same is true in Denver. See Code Sec. 53-95(13), Add. A-14. In

the closely analogous factual setting to the one before this court, the Arkansas court in Ragland held that a local representative of magazine publishers which recruited students to sell magazines was the vendor making the sale, and quoted from Quality School Plan, Inc. v. State of Alabama, 53 Ala.App. 418, 301 So.2d 183, cert. den. 293 Ala. 771, 301 So.2d 187 (1974): "Under these facts the conclusion is inescapable that [the publisher's agent] sold magazine subscriptions through student salesmen." Ragland, supra, 651 S.W.2d at 449.

Even were this court to conclude, however, that from its point of view the news carriers are the vendors, this in itself does not foreclose sustaining the tax liability against the publisher. See Craftsman Painters and Decorators, Inc. v. Carpenter, 111 Colo. 1, 137 P.2d 414 (1943) (paint contractor liable for tax at wholesale price even though paint was sold by contractor to consumer); Carpenter v. Carman Dist. Co., 111 Colo. 566, 144 P.2d 770 (1943) (laundry liable for tax on wholesale price of cloth, thread, buttons, etc., even though the items, were indirectly billed through retail service charge to consumer); Herbertson v. Cruse, 115 Colo. 274, 170 P.2d 531 (1946) (rental car business liable for tax on wholesale price of automobiles to be used by the consumer at retail rental price).

Denver, however, urges that the analysis of the West Virginia State Tax Department in Administrative Decision 84-6-B, Add. E-1--E-6, which is similar to that of the trial court herein, best fits the unique vending methods of the newspaper trade.

> * * * The [publisher's] interference in the carrier-customer relationship, however, is too substantial to be dismissed as being solely for the protection of business interests. One would be hard-pressed to find another industry in which a wholesaler (1) contracts on behalf of its retailer; (2) guarantees the retailer's performance; (3) fulfills the retailer's contractual obligation without authorization, and then bills the retailer; and (4) withholds pre-paid revenues arising from the retailer's business. * * *
>
> Although theoretically, the carrier is free to establish the retail selling price, in reality, the price is set by the [publisher]. The [publisher] publishes carrier rates for home delivery in its newspaper, and applies this rate when it accepts prepaid subscriptions. The [publisher] could cite only one instance in which a carrier failed to charge the "suggested" price.
>
> * * * * *
>
> The contract between the [publisher] and the carriers, rather than establishing a retailer-wholesaler relationship, is one for delivery and debt collection. The carrier is strictly liable for both. Failure to deliver results in liability to the carrier for the retail price of the newspaper, if the [publisher] makes the delivery. Similarly, if the carrier fails to collect for the paper, he is liable for its retail [wholesale?] sales price. [Add. at E-6--E-7.]

III. IS DENVER'S METHOD OF TAXING THE SALE AND USE OF NEWSPAPERS CONSTITUTIONAL?

Denver's method of taxing the sale of newspapers is constitutional unless it results in differential taxation of the press that cannot be counterbalanced by an interest of compelling importance to Denver that cannot be achieved otherwise.

Minneapolis Star & Tribune Co. v. Minn. Com'r of Rev., 460 U. S. 575, 585, 103 S.Ct. 1365, 1372, 75 L.Ed.2d 295, 305 (1983). Denver maintains that its method does not result in differential treatment of the press. Alternatively, that it employs the same method of taxation but at a lower rate, so that there can be no doubt that it is "not singling out the press to bear a more burdensome tax...." Id., 460 U.S. at 590, n. 13, 103 S.Ct. at 1375, 75 L.Ed.2d at 308.

The publishers make no argument that the language of the ordinances, themselves, result in differential treatment; indeed, prior to the repeal of the exemption for newspapers, the press was singled out for preferential treatment. Rec. 184 (Denver Revised Municipal Code Sec. 166.2-11 (1976 Revision)) 203-204 (Denver Revised Municipal Code Sec. 166A.2-8 (1976 Revision)). Today, newspapers, publishers, carriers, etc., are not even mentioned in the ordinances. The 1981 enactments treat newspapers just as all other tangible personal property. The publishers argue, however, that the Manager by regulation has singled out the newspaper industry for special treatment.

On the same day that the regulations dealing with newspapers were published, the Manager published regulations dealing with the construction industry and the data processing industry. Tr. 148-150; Add. B-1--B-21. Regarding construction, there is a presumption that the contractor is the consumer and the supplier is the retailer. Add. B-1--B-2 (paragraph 2), B-3 (paragraph 5); see Craftsman Painters and Decorators, Inc., supra, 111 Colo. 1.

Regarding data processing, there is a presumption that, if the cost of modifying a program (software) is less than 100% of its unmodified cost, it is tangible personal property and taxable. Add. B-16 (paragraph 4), B-18 (paragraph E). Rebuttable presumptions created by regulation for the purpose of clarifying that which is susceptible to varying interpretations are not uncommon.

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 sales tax license. The fact that a regulation is adopted to clarify the point does not support the conclusion that newspapers are singled out for differential, although favorable, treatment. Arguably, the construction contractor is often retailing a completed product of tangible property and his services are only incidental, as when installing an elevator. Cf., Craftsman, supra, 111 Colo. at 6-7.

Minneapolis Star & Tribune Co., supra, did not establish new law regarding the taxability of newspaper sales. Such taxes have rather uniformly been sustained against First and Fourteenth Amendment challenges. Giragi v. Moore, 49 Ariz. 74, 64 P.2d 819, 110 A.L.R. 314 (1937), appeal dism., 301 U.S. 670, 57 S.Ct. 946, 81 L.Ed. 1334 (privilege tax of 1% of gross receipts derived from publishing and selling newspapers and other periodicals); Arizona Publishing Co. v. O'Neill, 22 F.Supp. 117 (D.Ariz. 1938), aff'd 304 U.S. 543, 58 S.Ct. 950, 82 L.Ed. 1518 (gross receipts tax of 1% applicable to newspaper publishing company); City of Absecon v. Vettese, 13 N.J. 581, 100 A.2d 750 (1953) (municipal

license fee of $50 for newspaper publishers); City of Corona v. Corona Daily Independent, 115 Cal.App.2d 382, 252 P.2d 56 (1953), cert. den., 346 U.S. 833, 74 S.Ct. 2, 98 L.Ed. 356 (business tax of $8 per quarter upon business of newspaper publications); Territory of Alaska v. Journal Printing Co., 135 F.Supp. 169 (D. Alk. 1955) (business tax of $25 plus 1/2% of gross receipts over $20,000 per annum applicable to newspaper publisher); Tampa Times v. City of Tampa, 29 So.2d 368 (1947), cert. den. 332 U.S. 749, 68 S.Ct. 69, 92 L.Ed. 336 (municipal license tax of $10 per annum on retailers of newspapers and other periodicals and 0.1% of receipts from newspaper sales over $3,000); see Opinion by Attorney General of Texas (Add. F-1--F-3); and see Chicago Tribune Co. v. Johnson, 119 Ill.App.3d 270, 456 N.E.2d 356 (1983) (general tax on privilege of using tangible personal property applicable to newsprint and presses after Minneapolis Star & Tribune Co.); Sears, Roebuck and Co. v. State of Wash., 97 Wash.2d 260, 643 P.2d 884 (1982) (use tax applicable to catalogs, although newspapers exempted by statute); Steinbeck v. Gerosa, 4 N.Y.2d 302, 151 N.E.2d 170, 174 N.Y.S.2d 1 (1958), app. dism. 358 U.S. 39, 79 S.Ct. 64, 3 L.Ed.2d 45 (gross receipts tax applied to sale or license of rights to literary work).

IV. WHETHER THE TAX MUST BE PAID ON SALES MADE THROUGH VENDING MACHINES OF NEWSPAPERS PRICED AT FIFTEEN CENTS?

If the court accepts the publishers' argument that the tax schedule in Section 53-27 (Add. A-8) determines taxability and

that purchase of items priced eighteen cents or less are simply not taxable items, then the court should also accept the argument that a tax of one cent should always be imposed on an item priced at twenty-five cents. Thus, instead of the 3% rate required by Section 53-28 (Add. A-9), a 4% rate would be firmly established for retailers of the major dailies at current prices. The courts that have examined this issue are not so persuaded.

The phrase "gross taxable sales" in Section 53-28 refers to sales of all items not exempt under Section 53-26 (Add. A-6--A-8). The schedule contained in Section 53-27 is only for the convenience of the retailer in making change. The overriding obligation of the retailer is set out in Section 53-28. Calvert v. Canteen Co., 371 S.W.2d 556 (Tex. 1963); Robert W. Hinckley, Inc. v. State Tax Comm. of Utah, 17 Utah2d 70, 404 P.2d 662 (1965); Piedmont Canteen Serv. v Johnson, 256 N.C. 155, 123 S.E.2d 582, 91 A.L.R.2d 1127 (1962); Virden v. Schaffner, 496 S.W.2d 846 (Mo. 1973); see generally Gannett Satellite Info. Net. v. Metro. Transportation Auth., 745 F.2d 767 (2nd Cir. 1984); compare Winslow-Spacarb, Inc., v. Evatt, 144 OhioSt. 471, 59 N.E.2d 924 (1945).

CONCLUSION

Based upon the foregoing arguments regarding essentially undisputed facts and rather straight forward principles of law, the Manager of Revenue and Denver respectfully pray for the order of this Honorable Court affirming the judgment of the District Court below in all respects.

Respectfully submitted,

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AFFIDAVIT OF MAILING

The undersigned hereby states and affirms that a true copy of the foregoing and annexed Answer Brief Of Appellees was posted in the United States Mails this 19th day of September, 1985, postage pre-paid so as to assure first-class delivery, and addressed to

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Chapter 53

TAXATION AND MISCELLANEOUS REVENUE*

ARTICLE I. IN GENERAL

Sec. 53-1. Examination of and reports concerning real estate assessment records.

(a) *Examinations and reports required.* An examination of the books and records and supporting documents pertaining to the assessment of real estate as maintained by the manager of revenue in the exercise of the powers and the performance of the acts and duties required by the constitution, or general laws of the state, to be exercised or performed by the county assessor, shall be made at least once each year. Such examination shall be made in accordance with generally accepted auditing standards. A report shall be made to the mayor, to the city council, and to the manager of revenue as to the reliability of real estate assessment roll and tax warrant as certified in accordance with the laws of the state, and the effectiveness of the internal control of real estate assessments within the city. Such report shall become a matter of public record within the office of the manager of revenue.

(b) *By whom examinations and reports made.* The examinations and reports required by subsection (a) may be made by the expert accountant employed by the mayor pursuant to Section A1.6 of the Charter (1960 compilation thereof), if so directed by the mayor. In any year in which the expert accountant so employed by the mayor is not directed to make such an examination and report, the examination and report shall be made by the auditor.

*Charter references—Department of revenue, § A5.1 et seq.; finance and taxation, § A6.1 et seq.

Cross reference—Any ordinance levying general taxes saved from repeal, § 1-6(8); any ordinance levying special assessments or taxes saved from repeal, § 1-6(9); administration, Ch. 2; finance, Ch. 20; licenses generally, Ch. 32; tax restrictions on platting, § 50-18.

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(c) *Accessibility of records.* The manager of revenue shall make freely accessible to the expert accountant employed by the mayor, or to the auditor, as the case may be, such of the records in the manager's office as are necessary to permit the examinations and reports required by subsection (a) to be adequately conducted and made.
(Code 1950, §§ 169B.1—169B.3)

Sec. 53-2. Special assessments on land taken by eminent domain.

In all cases where an entire property, or a portion of any parcel, tract or lot of property, is likely to become legally exempt from special assessments through exercise of the power of eminent domain, the manager of revenue shall be joined as a party respondent in any such action and upon joinder and notice of the proceedings the manager shall assert a claim for the amount of all special assessments, penalty interest or charges thereon, with the clerk of the court in which the proceedings are filed. Upon institution of any such proceedings the lien of special assessments levied shall be transferred from the property acquired or sought to be acquired to any money awarded or to be awarded for the taking of such property. Nothing herein contained shall require the manager of revenue to file a claim in any such proceedings involving acquisition of only a portion of any property if the manager is satisfied that there is sufficient taxable property remaining after the taking of such portion to satisfy any lien for the amount of special assessments payable on such portion taken and in such event the lien for special assessments shall be transferred in its entirety from the part of the property taken to the part of the property of the same owner and not taken.
(Code 1950, § 166F)

Sec. 53-3. Charge for unpaid bank checks.

Whenever any person shall give or cause to be given to the city, or any department or agency thereof, a check drawn on a bank in purported payment of any obligation due the city, which check is dishonored or unpaid because of improper signature or by reason of the drawer having no account or having insufficient funds therein or having stopped payment on the check, and the manager of revenue shall determine that the check in all probability will not be honored or paid through normal banking channels within a reasonable period of time, there shall be added to the obligation due the city the sum of five dollars ($5.00) if such check is in the amount of fifty dollars ($50.00) or less, and the sum of ten dollars ($10.00), if such check is in the amount of more than fifty dollars ($50.00), to cover the additional cost to the city thereby entailed. Such sum shall be collected in the same manner as any other indebtedness due the city and any receipt theretofore given in reliance upon such check shall be null and void and no other receipt shall be given for the payment of the original indebtedness until the said charge has also been paid.
(Code 1950, § 169A.1)

Secs. 53-4—53-20. Reserved.

ARTICLE II. SALES TAX*

DIVISION 1. GENERALLY

Sec. 53-21. Name of tax.

This article may be known and cited as the city retail sales tax article. (Ord. No. 666-81, § 1, 12-14-81)

*Editor's note—Ord. No. 666-81, § 1, adopted Dec. 14, 1981, repealed and reenacted Code 1950, Art. 166, which had been codified as Art. II, div. 1, §§ 53-21—53-70, and div. 2, 53-76—53-81 hereof. The reenacted provisions have been codified as div. 1, §§ 53-21—53-53, 53-55—53-57, § 53-59, 53-62—53-70 and div. 2, 53-71—53-78, 53-80, 53-81, at the editor's discretion. Former Art. II has also been amended by Ord. No. 686-80, § 1, adopted Dec. 22, 1980, prior to its repeal and reenactment.

Case law annotation—This article is valid as against state law exemption in C.R.S. 1973, 10-3-209(1)(c). Constitutional power of home rule cities over matters of local concern preempts all state power in that area. This article based upon Art. 20, § 6 of the Colo. Const. preempts state law in so far as it applies to local taxation. *Security Life and Accident Company v. Temple*, 177 Colo. 14, 492 P. 2d 63 (1972).

State law references—County and municipal sales tax, C.R.S. 1973, 29-2-101 et seq.; state sales tax generally, C.R.S. 1973, 39-26-101 et seq.

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Sec. 53-22. Purpose of tax.

The council declares that the purpose of the levy of the tax imposed by this article is for raising funds for the payment of expenses of operating and improving the city and its facilities and for the payment of the principal of and interest due upon any general obligation bonds lawfully authorized and issued by and on behalf of the city; in accordance with this purpose, the proceeds of the tax shall be placed in the unapportioned sales, use and lodger's tax account of the fund plan, section 20-18 of the Code, from which shall be allocated, apportioned, and transferred as therein provided such sums as are required to pay the interest on and principal of general obligation bonds so authorized and issued, not to exceed three million dollars ($3,000,000.00) total of sales and use taxes in any one calendar year and to allocate, apportion, and transfer the remaining balance from said account to the general fund.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 536-83, § 1, 10-3-83)

Sec. 53-23. Administration of article; rules and regulations.

Excepting those provisions of this article concerning licensing specifically referring to the director of excise and licenses, the administration of this article is hereby vested in and shall be exercised by the manager, who may prescribe forms and make reasonable rules and regulations in conformity with this article, by following the procedure set forth in article VI of chapter 2 for the making of returns, the ascertainment, assessment, and collection of the tax imposed hereunder, and for the proper administration and enforcement thereof. The manager may delegate the administration of this article, or any part thereof, subject to limitations, if any, of the Charter, to duly authorized deputies or agents, excepting the waiver of penalty interest as hereinafter provided.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-24. Definitions.

As used in this article the following words, phrases, and where applicable, their declensional and inflectional forms shall have the meanings given to them in this section except where the context in which they are used indicates clearly and requires a different meaning according to customary usage. The word "shall" and "must" are to be construed as mandatory and not directory. In addition to the following definitions, the definitions and general provisions of chapter 1 shall be applicable insofar as not expressly inconsistent with the provisions hereof.

(1) *Automotive vehicle* means any vehicle, including every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, or any device used or designed for aviation or flight in the air, including but not limited to motor vehicles, trailers, or semitrailers and aircraft, but excepting devices moved by human power.

(2) *Business* shall include all activities engaged in or caused to be engaged in with the object of gain, benefit or advantage, direct or indirect.

(3) *City* shall mean the City and County of Denver or the geographical area within its territorial limits, depending upon the context.

(4) *Director of excise and licenses* shall mean the director of excise and licenses in and for the city; and the term "manager" shall mean the manager of revenue, or the duly authorized representative thereof, in and for the city.

(5) *Farm machinery* means self-propelled or power-drawn equipment used directly for plowing, planting, cultivating and harvesting of crops, such as combines, tractors, plows, discs, planters and rakes.

(6) *Gross taxable sales* means the total amount received in money, credits, property, including the fair market value of exchange property which is to be sold thereafter in the usual course of the retailer's business, or other consideration valued in money from sales and purchases at retail or deemed to be at retail, within the city, and embraced within the provisions of this article.

a. Provided however, that the vendor may take credit in his report of gross sales for an amount equal to the sale price

of property returned by the purchaser when the full sale price thereof is refunded, either in cash or by credit;

b. Provided, further, that the fair market value of any exchanged property which is to be sold thereafter in the usual course of the retailer's business, if included in the full price of a new article, shall be excluded from gross taxable sales;

c. Provided, further, that taxes paid on the amount of gross sales which are represented by accounts not secured by conditional sale contract or chattel mortgage and which are found to be worthless and are actually and properly charged off as bad debts for the purpose of the income tax imposed by the laws of the state may be credited upon a subsequent payment of the tax herein provided; but if any such accounts are thereafter collected by the vendor, a tax shall be paid upon the amount so collected. Such credit shall not be allowed with respect to any account or item therein arising either from the sale of any article under a conditional sale contract whereby the vendor retains title as security for all or part of the purchase price or from the sale of any article when the vendor takes a chattel mortgage on the article to secure all or part of the purchase price.

(7) *Manufacturing* is the performance as a business of an integrated series of operations which places personal property in a form, composition, or character different from that in which it was acquired whether for sale or for use by the manufacturer. The change in form, composition or character must result in a different product having a distinctive name, character and use.

(8) *Motor fuel* shall mean gasoline, casing head or natural gasoline, benzol, benzene and naphtha, gasohol and any liquid prepared, advertised, offered for sale, sold for use or used or commercially usable in internal combustion engines for the generation of power for the propulsion of motor vehicles upon the public highways. The term does not include fuel used for the propulsion or drawing of aircraft or railroad cars or railroad locomotives, however.

(9) *Purchase price* means the price to the consumer, exclusive of any direct tax imposed by the federal government, by the state or by this article; and, in the case of all retail sales involving the exchange of property, also exclusive of the fair market value of the property exchanged at the time and place of the exchange; provided, however, that such exchanged property is to be sold thereafter in the usual course of the retailer's business.

(10) *Retail sale* means any sale within the city except a wholesale sale.

(11) *Retailer* or *vendor* means a person doing a retail business, generally known to the trade and public as such, and selling, leasing or granting license to use in the regular and customary course of the retail business tangible personal property or taxable service to the user or consumer, and not for resale.

(12) *Sale* or *purchase* or *sale and purchase* includes installment and credit purchases and sales and the exchange of property as well as the purchase and sale thereof for money; and every transaction, conditional or otherwise, based upon consideration constitutes a sale. The terms also include the sale or furnishing of electricity, natural gas, steam, petroleum and liquid petroleum products used for energy-producing purposes, and telephone, telegraph, television and data processing services that are taxable under the terms of this article. The term "sale," "purchase," or "sale and purchase" in addition to the items included above includes transactions whereby the acquisition of tangible personal property was effected by (a) the transfer, conditionally or absolutely, of title or possession or both of the tangible personal property; or (b), a lease, hire or rental of, or a grant of a license to use (including royalty agreements), tangible personal property.

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(13) *Special fuel* means kerosene oil, kerosene distillate, diesel fuel, all liquefied petroleum gases, and all combustible gases and liquids for use in the generation of power for propulsion of motor vehicles upon the public highways. The term does not include fuel used for the propulsion or drawing of aircraft, railroad cars or railroad locomotives, however.

(14) *Tangible personal property* means and includes corporeal personal property, including but not limited to (a) automotive vehicles as herein defined and (b) data processing programs and equipment as the manager may by regulation provide definition.

(15) *Tax* means either the tax payable by the purchaser of a commodity or service subject to tax or the aggregate amount of taxes due from the vendor of such commodities or services during the period for which the vendor is required to report his collections, as the context may require.

(16) *Taxpayer* shall mean any person obligated to account to the manager for taxes collected or to be collected under the terms of this article.

(17) *Wholesale sale* means:

a. A sale by wholesalers to licensed retail merchants, jobbers, dealers or other wholesalers for resale, and does not include (i) a sale by wholesalers to users or consumers not for resale; (ii) the leasing, hiring, or renting of, or granting of a license to use (including royalty agreements) tangible personal property to a user or consumer thereof, (iii) sales of returnable containers to manufacturers, compounders, wholesalers, retailers, jobbers, packagers, distributors or bottlers; (iv) sales of tangible personal property to persons for resale when there is a likelihood that the city will otherwise lose tax revenues due to the difficulty of policing the business operations because:
   1. of the frequent replacement of independent contractors or agents;
   2. of the lack of a place of business in which to display a city retail sales license;
   3. of the lack of a place of business in which to keep records;
   4. of the lack of adequate records;
   5. the persons engaged in selling, or in the chain of selling events, are minors or transients; or
   6. the persons selling, or in the chain of events leading to sale, are engaged essentially in providing services in transferring tangible personal property;

   but the transactions set forth in items (i), (ii), (iii) and (iv) above shall be deemed retail sales and subject to the provisions of this article;

b. Sales to and purchases of tangible personal property by a person engaged in the business of manufacturing or compounding for use, profit or sale, which tangible personal property meets all of the following conditions: (i) is actually and factually transformed by the process of manufacture; (ii) becomes by the manufacturing or compounding process a necessary and recognizable ingredient, component and constituent part of the finished product; and (iii) its physical presence in the finished product is essential to the use thereof in the hands of the ultimate consumer; shall be deemed wholesale sales and shall be deemed exempt from taxation under this article; and

c. Sales to and purchases of tangible personal property for use as containers, labels and shipping cases by a person engaged in manufacturing, compounding, wholesaling, jobbing, retailing, packaging, distributing or bottling for sale, profit or use, which tangible personal property meets all of the following conditions; (i) is used by the manufacturer, compounder, wholesaler, jobber, retailer, packager, distributor or bottler to contain or label the finished product, (ii) is transferred by said person

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along with and as a part of the finished product to the purchaser; and (iii) is not returnable to said person for reuse, shall be deemed wholesale sales and shall be exempt from taxation under this article.

(18) *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.

(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, §§ 1—6, 12-3-84)

Sec. 53-25. Imposition of tax.

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.

(2) In the case of retail sales involving the exchange of property, on the purchase price paid or charged, including the fair market value of the property exchanged at the time and place of the exchange, excluding however, from the consideration or purchase price the fair market value of the exchanged property if such exchanged property is to be sold thereafter in the usual course of the retailer's business.

(3) Upon the purchase price or charge for telephone and telegraph services, whether furnished by public or private corporations or enterprises for all Denver local telephone service receipts, including zone calls, and intrastate telephone and telegraph service originating within the city.

(4) Upon the purchase price or charge for electric, steam, and natural gas services for energy-producing purposes, whether furnished by municipal, public or private corporations or enterprises, furnished and sold for domestic, commercial or industrial consumption and not for resale.

(5) Upon the amount paid for food or drink served or furnished in or by restaurants, cafes, lunch counters, cafeterias, hotels, drugstores, social clubs, nightclubs, cabarets, resorts, snack bars, caterers, boarding houses, carryout shops and other places at which prepared food or drink is regularly sold, including sales from pushcarts, motor vehicles and other mobile facilities. Cover charges, admission or entrance fees, and mandatory service or service-related charges, whether described as tips, gratuities, or otherwise, shall be included as part of the amount paid for such food or drink.

(6) Upon the purchase price or charge for the furnishing or sale to customers within the city of informational or entertainment service, including, but not limited to, television programming, wherein the relay or transmission of electromagnetic waves through any medium, tangible or intangible, including cable, glass fiber, and ambient air is necessary for the service to be received, excepting, however, telephone and telegraph services described in section 53-25(3) and television, cinema, or similar programming provided at a theater or similar place open to the public.

(7) Upon the purchase price or charge for data processing equipment and services.

(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, §§ 7, 8, 12-3-84)

Sec. 53-26. Exemptions.

There shall be exempt from taxation under the provisions of this article the following:

(1) All sales to the United States government, to the state, its departments and institutions, and the political subdivisions thereof only when purchased in their governmental capacities.

(2) All sales made to religious or charitable corporations when purchased for their regular religious or charitable functions and activities.

(3) All sales of cigarettes.

(4) All sales of motor fuel and special fuel as defined in this article.

(5) All sales and purchases of neat cattle, sheep, lambs, swine and goats; all sales of mares and stallions for breeding purposes.

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(6) All sales and purchases of feed for livestock or poultry and all sales of seeds to farmers, ranchers, truck farmers, florists and horticulturists who sell the crops resulting from the propagation of such seeds or use such crops as feed for livestock or poultry.

(7) The sale and purchase of drugs, artificial arms, artificial eyes, artificial hands, artificial larynxes, artificial legs, permanent catheters, colostomy bags, colostomy sets, colostomy supplies, disposable ostomy tubes, ostomy pouches, ileostomy supplies, orthotics, inserts for orthotics, otology implants, pacemakers, surgical brassieres, breast forms for mastectomy patients, dentures and other items that are designed to restore or replace a dental function, corrective eyeglasses, corrective contact lenses, wheelchairs, crutches, special beds for patients with neuromuscular or similar debilitating ailments, oxygen and hemodialysis products for use at the patient's home, if any of the above is sold to an individual or a member of the individual's immediate family for the personal use of that individual in accordance with a prescription or other written directive issued by a licensed practitioner of medicine, dentistry, or podiatry; and the sale and purchase for direct use by the patient of hearing aids, hearing aid batteries, insulin, insulin measuring and injecting devices, glucose to be used for treatment of insulin reactions, and human whole blood, plasma, and blood products and derivatives.

(8) The sale of food for domestic, household use which is advertised or marketed for human consumption and is sold in the same form, condition, quantities and packaging as is commonly sold by grocers.

a. The term "food" as used in this subsection shall include cereals and cereal products; milk and milk products; meats and meat products; fish and fish products; eggs and egg products; vegetables and vegetable products; fruits and fruit product; sugars, sugar products and sugar substitutes; coffees and coffee substitutes, teas, cocoa and cocoa products; spices, condiments, salt, oleomargarine and water, mineral water and carbonated water marketed in containers. Retailers of such exempt food must post conspicuously a sign approved by the manager at or near the main sales checkout area stating that such food is exempt from taxation under this article.

b. The term "food" as used in this subsection shall not include food or drink served or furnished as described in section 53-25(5); chewing gum; spirituous, malt or vinous liquors; cocktail mixes; proprietary medicines, nostrums, lozenges, tonics, vitamins and other dietary supplements; ice; pet foods; food or drink furnished, prepared or served for consumption at tables, chairs or counters, or from trays, glasses, dishes or other tableware provided by the retailer; prepared food or drink sold by retailers who regularly sell for consumption on or near the premises of the retailer even though such food or drink is sold on a "take-out" or "to go" order and is bagged, packaged or wrapped and taken from the premises of the retailer; and food or drink vended by or through machines on behalf of a vendor.

(9) Sales of tangible personal property to purchasers residing or doing business outside the city, provided delivery thereof is made to such purchaser at such residence or business address of the purchaser outside the city by a common carrier, or by the conveyance of the seller, or by mail.

(10) All sales which the city is prohibited from taxing under the Constitution or laws of the United States or the Constitution of the state.

(11) Sale of automotive vehicles as defined in this article, which sale meets both of the following conditions: (1) the purchaser is a bona fide nonresident of the city; and (2) the vehicle is registered and required by law to be registered outside the city.

(12) All sales of farm machinery as defined in this article.

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(13) Sales of tangible personal property to a construction company for use in its business operations outside the city to the extent said company has paid a use tax in respect to the proposed use of such property to a municipal corporation organized and existing under the authority of the laws or the Constitution of the state. If said use tax already paid is in an amount less than the tax imposed by this article, the tax imposed by this article shall, in such event, be measured by the difference between the rate imposed by this article and the rate previously imposed by the other municipality on the use of said property. If the use tax imposed and paid to the municipal corporation aforesaid is equal to or more than the tax imposed by this article, no tax shall be due hereunder. In either event, in order for the exemption to be given, the property must be actually used and consumed in the municipality imposing said use tax.

(14) Sales of tangible personal property to a natural gas and electric utility or a telephone utility for use in its business operations outside the city, even though the property is delivered and temporarily stored within the city.

(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 346-82, § 1, 6-14-82; Ord. No. 638-84, §§ 9, 10, 12-3-84)

Case law annotation—A federal contractor constructing an office building is subject to the sales tax on materials purchased out of state and incorporated into the federal office building. *Temple v. Arthur Vennevi Company*, 172 Colo. 105, 470 P. 2d 576 (1970).

Sec. 53-27. Retailers to collect tax.

(a) *Schedule.* There is imposed and levied upon all taxable sales of commodities and services specified in this article, except fuel in the form of liquid or gas that is prepared, advertised, offered for sale, sold for use and used or commercially usable for the generation of power for the propulsion or drawing of aircraft or railroad cars or railroad locomotives, a tax in accordance with the following schedule:

Amount of Purchase Price	*Tax*
$0.01 including $0.18	No tax
0.19 including 0.51	$0.01
0.52 including 0.84	0.02
0.85 including 1.00	0.03

On sales in excess of one dollar ($1.00), the tax shall be three cents ($0.03) on each full dollar of the purchase price, plus the tax shown in the above schedule for the applicable fractional part of a dollar of each such price.

(b) *Special note for aviation and railway fuel.* Any fuel in the form of liquid or gas that is prepared, advertised, offered for sale, sold for use and used or commercially usable for the generation of power for the propulsion or drawing of aircraft, railroad cars or railroad locomotives shall be taxed at the rate of one and one-half (1.5) per cent of the purchase price, provided that a tax derived from calculations resulting in a fraction of a cent being part of the tax shall be increased or rounded to the next whole cent.

(c) *Tax to be shown as separate item.* Except as provided in this section, retailers shall add the tax imposed or the average equivalent thereof, to the purchase price, showing such tax as a separate and distinctive item, and, when added, such tax shall constitute a part of such price and shall be a debt from the consumer or user to the retailer until paid, recoverable at law in the same manner as other debts.

(d) *[Liquor by the drink; vending machines.]* Notwithstanding provisions hereinafter regarding the unlawful assumption or absorption of the tax, any retailer selling malt, vinous or spirituous liquors by the drink or vending items through coin-operated vending machines may include in the sale price for the drink or price for the vended item, the tax levied by this article; but no such retailer shall advertise or hold out to the public in any manner, directly or indirectly, that such tax is not included as a part of the sales price to the consumer.

(e) *Retailer as collecting agent.* 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 against the three (3) per cent rate to be paid over by him under the provisions of section 53-28, remitting any excess of collec-

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tions over said three (3) per cent less the two (2) per cent vendor discount allowance, if applicable, to the manager in the retailer's next periodic sales tax return.

(f) *Retailer not to benefit.* No retailer shall gain any benefit from the collection or payment of the tax, except as permitted by this article, and the use of the schedule set forth in this section shall not relieve the retailer from liability for payment over of the amount required by section 53-28.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 11, 12-3-84)

Sec. 53-28. Retailer responsible for payment of tax.

(a) *Amount.* Every retailer shall, irrespective of other provisions of this article, be liable and responsible for the payment of an amount equivalent to three (3) per cent of gross taxable sales made by him of commodities or services specified in this article, and every retailer shall before the twentieth day of each month make a return to the manager, less two (2) per cent of such amount as a discount allowable for prompt payment. If any vendor is delinquent in remitting the tax levied by this article, other than in unusual circumstances shown to the satisfaction of the manager, the vendor shall not be allowed to retain any discount allowable for prompt payment, and an amount equivalent to the full three (3) per cent shall be remitted to the manager by any such delinquent vendor, together with any other applicable penalty or interest payable under the the terms of this article.

(b) *Return; content, form, etc.* Such returns of the taxpayer, or his duly authorized agent, shall contain such information and be made in such manner and upon such forms as the manager may prescribe, and the manager may by regulation duly adopted extend the time up to three (3) months for making returns and paying the tax due.

(c) *Exemption; burden of proof.* The burden of showing that any retailer is exempt from collecting and returning the tax upon any goods sold or taxable services rendered by the retailer, and from paying over the same to the manager, shall be on the retailer under such reasonable requirements of proof as the manager may by regulation prescribe; in the absence of such regulation, such proof shall be made by clear and convincing evidence.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 12, 12-3-84)

Sec. 53-29. Unlawful to assume or absorb tax.

It shall be a violation of this article for any retailer to advertise or hold out or state directly or indirectly to any person, that the tax or any part thereof levied by this article will be assumed or absorbed by such retailer, or that the tax will not be added to the selling price of the property sold, or, if added, that the tax or any part thereof will be refunded.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-30. Duty to keep books and records.

It shall be the duty of every retailer engaging or continuing in business in the city for the transaction of which a license is required hereunder, to keep and preserve for a period of three (3) years following the due date of the return or the payment of the tax suitable records of all sales made by him and such other books or accounts as may be necessary to determine the amount of tax for the collection of which he is or may be liable hereunder. It shall be the duty of every person engaging or continuing in business in the city and selling commodities as part of such business to keep and preserve for a period of three (3) years all invoices of goods and merchandise purchased for resale and all such books, invoices, and other records shall be open for examination at any time by the manager or his duly authorized agents.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 13, 12-3-84)

Sec. 53-31. Special accounting basis for remittance of tax.

If, because conditions of business or the accounting methods regularly employed by the vendor are such that making returns of the tax levied by this article on a monthly basis will impose unnecessary hardship, the manager, upon written request by the vendor, may accept returns at such regular intervals up to three (3) months as will, in his opinion,

better suit the vendor and will not jeopardize the collection of the tax.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-32. Consolidation of returns.

A retailer doing business in two (2) or more locations may file one return covering all business activities in the city.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-33. Tax on rentals

When the right to possession or use of any article of tangible personal property is granted under a lease, hire, rental contract, grant of a license to use (including royalty agreements), the tax imposed by this article shall be computed and paid by the vendor upon the rentals paid, unless the manager approves payments of the tax on another basis.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-34. Tax on credit sales, etc.

Whenever an article is sold to a person who thereby is obligated to the vendor on an account, chattel paper, contract right, general intangible, or a writing which supports a right to the payment of a purchase price, or any part thereof, the tax shall be based on the total purchase price and shall become immediately due and payable. No refund or credit shall be allowed to either party to a transaction in case of repossession by the vendor of collateral securing the purchase price or any part of the purchase price.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-35. Automotive vehicle—Registration license.

(a) No registration certificate or license shall be issued by the manager for the operation of any automotive vehicle unless and until the tax levied by this article upon the purchase and sale of such vehicle has been paid.

(b) No certificate of title evidencing ownership of any automotive vehicle shall be issued by the manager unless and until said tax upon the purchase and sale of such automotive vehicle has been paid.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-36. Same—Transfer of title.

If the applicant for the registration of or the issuance of a certificate of title for an automotive vehicle has not paid the tax levied by this article upon the sale and purchase of such automotive vehicle to the retailer as provided in this article, such tax shall be paid by the applicant directly to the manager; and until paid, no certificate of title or registration certificate or license plates shall be issued by the manager for such automotive vehicle.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 14, 12-3-84)

Sec. 53-37. Application to manufacturers of tangible personal property.

(a) A manufacturer of tangible personal property is taxable under this article upon its use or consumption of items of tangible personal property manufactured by it that it also sells in the ordinary course of its business at retail, but the tax due hereunder shall be levied only upon the gross value of all the materials, labor and services used and employed in the manufacture of said property, and not upon any profit that would be derived from the ordinary retail sale thereof.

(b) The tax is levied upon the full purchase price of articles sold after manufacture or after having been made to order and includes the full purchase price of materials used and service performed in connection therewith, excluding however, such articles as are otherwise exempted in this article. The purchase price is the gross value of all the materials, labor, service, and the profit thereon, included in the price charged to the user or consumer.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-38. Return required upon sale of business; lien on purchaser.

(a) Any retailer, whether or not licensed hereunder, that sells out his business or stock of goods, or quits business within the city, shall be required to return the taxes levied by this article within ten (10) days after the date the retailer sells his business or stock of goods, or quits business, and at said time pay over to the manager all such taxes collected by him and, in addition thereto, the retailer shall pay over to the manager all taxes levied hereunder upon the sale itself, of said business,

stock of goods, fixtures and equipment to the purchaser; and the purchaser thereof, or the successor in business, shall be required to withhold sufficient of the purchase money from said retailer and seller to cover and pay the amount of said taxes due and unpaid by the seller, including the taxes due upon said sale to said purchaser, until such time as the former owner, said retailer and seller, shall produce a receipt from the manager showing that all of said taxes have been paid, or a certificate that no taxes are due.

(b) If the purchaser of a business or stock of goods fails to withhold the purchase money as provided in this section and the taxes are due and unpaid after the ten-day period allowed, the purchaser, as well as the retailer, shall be liable for the payment of the taxes unpaid by the former owner. Likewise, anyone who takes any stock of goods or business fixtures of or used by any retailer under lease, title retaining contract, or other contract arrangement, by purchase, foreclosure sale, or otherwise, takes same subject to the lien for any delinquent sales taxes owned by such retailer, and shall be liable for the payment of all delinquent sales taxes of such prior owner, not, however, exceeding the value of property so taken or acquired.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 15, 12-3-84)

Sec. 53-39. Status of unpaid tax in bankruptcy and receivership.

(a) In the event that the business or property of any taxpayer subject to this article shall be placed in receivership, bankruptcy, debtorship, or assignment for the benefit of creditors, or seized upon distraint for property taxes, all taxes, penalties, and interest imposed by this article and for which said retailer is liable under the terms of this article shall remain a prior and preferred claim and lien against all of the property of said taxpayer, except as to preexisting claims or liens of a bona fide mortgagee, pledgee, judgment creditor, or purchaser whose rights in the taxpayer's property shall have attached prior to the filing of the notice as provided in section 53-63 on the property of the taxpayer other than the goods, furniture and fixtures, tools and equipment of the taxpayer used in conducting the retail business.

(b) No sheriff, receiver, assignee, or other officer shall sell the property of any person subject to this article under process or order of any court, without at first ascertaining from the manager the amount of any taxes due and payable under this article, and if there are any such taxes due, owing, or unpaid, it is the duty of such officer to pay first the amount of said taxes out of the proceeds of said sale before making payment of any moneys to any judgment creditor or other claims of whatsoever kind or nature, except the costs of the proceedings and other preexisting claims or liens as provided in this section.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 16, 12-3-84)

Sec. 53-40. Trust status of tax in possession of retailer

All sums of money paid by the purchaser to the retailer as taxes imposed by this article shall be and remain public money, the property of the city, in the hands of such retailer, and the retailer shall hold the same in trust for the sole use and benefit of the city until returned and paid over to the manager as herein provided, and the failure so to pay over to the manager shall constitute a violation of this article by the retailer.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-41. Excess collections; failure to remit collections.

If any vendor shall, during any reporting period, collect as a tax an amount in excess of three (3) per cent of his total taxable sales during the reporting period, he shall return and pay over to the manager the full amount of the tax herein levied and also such excess. The retention by the retailer of any excess of tax collections over three (3) per cent of the total taxable sales of such retailer or the intentional failure to remit punctually to the manager the full amount required to be remitted by the provisions of this article shall be a violation of this article.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-42. Collection and refund of disputed tax.

Should a dispute arise between the purchaser and vendor as to whether or not any sale is exempt

from taxation hereunder, nevertheless, the vendor shall collect and the purchaser shall pay such tax; provided, however, that the purchaser thereafter may apply to the manager for a refund of such tax, and it shall then be the duty of the manager to determine the question of exemption subject to review by the courts as hereinafter provided. It shall be a violation of this article for any vendor to fail to collect, or for any purchaser to fail to pay, the tax levied by this article.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-43. Refund procedure.

(a) *Generally.* A refund shall be made, or credit allowed, for the tax so paid under dispute by any purchaser who has an exemption as provided in this article. Such refund shall be made by the manager upon entitlement thereto shown by the applicant and only after compliance with the following conditions.

(b) *Application.* Applications for refund must be made within sixty (60) days after the purchase of the goods or the performance of the services on which the exemption is claimed. The application must be supported by the affidavit of the purchaser accompanied by the original paid invoice or sales receipt and be made upon such forms and contain such information as shall be prescribed by the manager.

(c) *Decisions.* Upon receipt of such affidavit, invoice or receipt, and application, the manager shall examine the same with all convenient speed and shall give notice to the applicant by an order in writing of his decision thereon.

(d) *Hearing.* An aggrieved applicant may, within ten (10) days after such decision is mailed postpaid by certified mail to him, petition the manager of revenue for a hearing on the claim in the manner provided hereinafter regarding assessments and estimates of unpaid taxes.

(e) *Refunds not assignable.* The right of any person to a refund under this article shall not be assignable, and application for refund must be made by the same person who purchased the goods and paid the tax thereon as shown in the invoice for the sale thereof.

(f) *Penalty for violating refund provisions.* Any applicant for refund under the provisions hereinabove, or any other person, who shall make any false statement in connection with an application for a refund of any tax shall be deemed guilty of a violation of this article.

(g) *Violations of refund provisions to be used as evidence of fraudulent intent.* If any person be convicted under the provisions of this section, the proof of such conviction shall be prima facie evidence of fraud by that person in any appropriate action brought or taken for recovery of other refunds made by the manager to such person within the prior three (3) years to the conviction. A brief summary of the penalties available under this article for violations of it shall be printed on each form issued by the manager for application for refund.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-44. Information to be confidential.

(a) Except in accordance with judicial order or as otherwise herein provided, the manager, and those working under his supervision, shall not divulge any information gained from any investigation conducted under this article or disclosed in any document, report or any return filed in connection with the tax levied under the provisions of this article.

(b) The officials charged with the custody of such documents, reports or returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the manager in an action under the provisions of this article to which the manager is a party, or on behalf of any party to an action or proceeding under the provisions of this article or to punish a violator thereof when the report of facts shown by such report is directly involved in such action or proceeding, in any of which events the court may require the production of, and may admit in evidence, so much of said documents, reports or returns, or of the facts shown thereby, as are pertinent to the action or proceeding and no more.

(c) Nothing contained in this article shall be construed to prohibit the delivery to a person, or his duly authorized representative of a copy of any return or report filed in connection with that person's

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tax, nor to prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items thereof, nor to prohibit the inspection by employees of the city under the control of the manager or by the city attorney of the city or any other legal representative of the city of the report or return of any person who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding is contemplated or has been instituted under this article; nor to prohibit the manager, in his discretion, from supplying and disclosing information gained from any investigation conducted under this article or reported, scheduled, or disclosed in any document, report, or return filed in connection with the tax levied under the provisions of this article for inspection or copying to the executive director of the state department of revenue, to the commissioner of internal revenue of the United States government, or to the official responsible for collecting sales or use taxes in any political subdivision of the state; provided, however, that such official of a political subdivision of the state similarly be permitted by law to disclose and supply information relating to the imposition and collection of sales or use taxes gained from persons within or doing business within such political subdivision.

(d) Reports and returns shall be preserved for three (3) years and thereafter until the manager orders them destroyed.

(e) Any city officer or employee who shall divulge any information classified herein as confidential in any manner, except in accordance with proper judicial order, or as otherwise provided by law, shall be guilty of a violation of this article.

(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 17, 12-3-84)

Sec. 53-45. Examination of returns; refunds, credits and deficiencies.

(a) As soon as practicable after the return is filed, the manager shall examine it. If it then appears that the correct amount of tax to be remitted is greater or less than that shown in the return, the tax shall be recomputed.

(b) If the amount paid exceeds that which is due, the excess shall be refunded or credited against any subsequent remittance from the same person.

(c) If the amount paid is less than the amount due, the difference, together with interest thereon at the rate of one per cent per month from the time the return was due, shall be paid by the vendor within ten (10) days after written notice and demand to him from the manager.

(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-46. Penalty for deficiency caused by disregard of rules.

If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added ten (10) per cent of to total amount of the deficiency but not less than ten dollars ($10.00) and interest in such case shall be collected at the rate of one per cent per month on the amount due on the deficiency from the time the return was due to the date paid from the person required to file the return, which interest and addition shall become due and payable within ten (10) days after written notice and demand by the manager and such shall be assessed, collected, and paid in the same manner as if the tax itself.

(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 18, 12-3-84)

Sec. 53-47. Penalty for deficiency caused by fraud.

If any part of the deficiency is due to fraud with the intent to evade the tax, there shall be added fifty (50) per cent of the total amount of the deficiency, and in such case the whole amount of the tax unpaid, including the additions, shall become due and payable ten days after written notice and demand by the manager, and an additional one per cent per month on said amounts shall be added from the date the return was due until paid and such addition and interest shall be assessed, collected, and paid in the same manner as the tax itself.

(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-48. Investigation of retailers' books.

For the purpose of ascertaining the correctness of a return, for the purpose of determining the amount of tax due from any person or for the purpose of estimating the tax due from any taxpayer, the man-

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ager is empowered to examine any books, papers, records or memoranda, bearing upon the matters required to be included in the return; and, if the taxpayer refuses to cooperate in such examination, the manager may require the attendance of such taxpayer, or any officer or employee of such taxpayer, by subpoena issued under the hand of the manager, to give testimony and to produce any of the foregoing information in the possession or under the control of the individual, or of any person having knowledge of such sales.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-49. Refusal to make return; estimate of taxes; penalty; notice; assessment.

(a) If any retailer neglects or refuses to make a return in payment of the taxes as required by this article, the manager shall make an estimate, based upon such information as may be available to him, with or without employing investigative powers vested in the manager by this article, of the amount of the taxes due for the period or periods for which the taxpayer is delinquent; and, upon the basis of such estimated amount, compute and assess in addition thereto a penalty equal to ten (10) per cent thereof, together with the interest on such delinquent taxes at the rate of one per cent per month from the date when due.

(b) Promptly thereafter the manager shall notify the delinquent taxpayer and demand payment thereof of such estimated taxes, penalty, and interest in writing served personally or by certified mail.

(c) Such estimated amounts shall thereupon become an assessment, and such assessment shall be final and due and payable from the taxpayer to the city twenty (20) days from either the date of personal service of the notice and demand or the date of mailing of the notice and demand by certified mail; provided, however, that within said twenty-day period the delinquent taxpayer may petition the manager in writing for a revision, modification, or cancellation of such assessment, and, further, said taxpayer shall, within such twenty-day period, furnish the manager a summary written statement of the facts and reasons for and the amount of the requested changes in the assessment, and otherwise comply with the applicable rules and regulations promulgated by the manager relating to petitions and hearings.

(d) Similarly, if any retailer having filed a return of and paid over the tax levied by this article, feels aggrieved, said retailer may apply to the manager by petition in writing within twenty (20) days after the notice is mailed to him by certified mail, or, if applicable, after personal service, and the retailer may demand a hearing and a correction of the amount, or part of the amount, of the tax so assessed, setting forth therein the reasons why the amount should be reduced.

(e) The burden of proof that sales or consumption of commodities and services upon which refunds of taxes are claimed, or for which modifications or cancellations of assessments are sought, are exempt from or not subject to taxation under this article shall be on the taxpayer under such reasonable requirements of proof as the manager may by rule prescribe; in the absence of such rule, proof shall be by clear and convincing evidence.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 19, 12-3-84)

Sec. 53-50. Petition by aggrieved taxpayer to set hearing.

The manager shall notify the petitioning retailer claiming an error in assessment, or the purchaser claiming refund, in writing of the time and place within the city fixed for hearing at least thirty (30) days prior thereto. After such hearing, at which the manager is authorized to administer oaths and take evidence, and hear argument, the manager shall enter findings and make such order in the matter as is proper and furnish a copy to the taxpayer. Said findings and order shall constitute final decision of the manager in the matter.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-51. Compromise.

The manager may compromise any assessment arising under this article prior to reference of the matter to the department of law.
(Ord. No. 666-81, § 1, 12-14-81)

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Sec. 53-52. Hearings, subpoenas and witness fees.

All subpoenas issued under the terms of this article shall be served by any person so enabled under the Colorado Rules of Civil Procedure and in the same manner. The payment of fees to witnesses for attendance and trial before the manager shall be the same as the payment of fees to witnesses before the district courts.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-53. Judge compels attendance.

Any judge of the district court of the second judicial district of the state upon the application of the manager may compel the attendance of witnesses, the production of books, papers, records, or memoranda, and the giving of testimony before the manager by an attachment against such witness for contempt, or otherwise, in the same manner as production of evidence before said court may be compelled.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-54. Reserved.

Sec. 53-55. Decisions of manager, notice; when final.

Every decision of the manager shall be mailed by certified mail to the taxpayer within ten (10) days of entry, and every such decision shall become final upon the expiration of thirty (30) days from its entry.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 20, 12-3-84)

Sec. 53-56. Manager's decision reviewable by district court.

Should the taxpayer be aggrieved by the final decision of the manager, the taxpayer may proceed to have the same reviewed under Colorado Rules of Civil Procedure 106(a)(4), or such similar procedure for the issuance of a writ in the nature of certiorari, only by the district court of the second judicial district of the state. The petition or complaint for review by the district court of the manager's decision must be filed within thirty (30) days from the entry of the decision, and the court proceedings shall be governed by the Colorado Rules of Civil Procedure. If appeal from the district court's decision is perfected, the appellate rules adopted by the supreme court of the state shall apply. Any party may appeal the decision of the district court. Unless otherwise provided by the rules of civil procedure, the standard of review by the district court shall be to determine whether the manager has exceeded the jurisdiction vested by this article in such office or abused the discretion vested by this article in the office.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 21, 12-3-84)

Sec. 53-57. Reserved.

Editor's note—Section 22 of Ord. No. 638-84, adopted Dec. 3, 1984, repealed § 53-57, "Review of manager's decision in district court," which derived from § 1 of Ord. No. 666-81, adopted Dec. 14, 1981. It appears that certain of the provisions of former § 53-57 now can be found in § 53-56.

Sec. 53-58. Reserved.

Sec. 53-59. Tax lien.

(a) The tax imposed by this article, together with the interest and penalties herein provided and the costs of collection which may be incurred, shall be and, until paid, remain a first and prior lien superior to all other liens upon the goods, merchandise, furniture and fixtures, tools and equipment of any retailer, or used by any retailer in conducting his retail business under lease, title retaining contract or other contract arrangement, within the city and shall take precedence on all such property over other liens or claims of whatsoever kind or nature and may be foreclosed by seizing under distraint warrant and selling so much of said merchandise, furniture and fixtures, tools and equipment as may be necessary to discharge said lien.

(b) The real or personal property of an owner who has made a bona fide lease to a retailer shall be exempt from the lien created in this section (1) if such property can reasonably be identified from the lease description and (2) if the lessee is given no right to become the owner of the property leased. This exemption shall be effective from the date of the execution of the lease if the lease is filed or recorded with the clerk and recorder of the city within ten (10) days after the execution of the lease. Where the lessor and lessee are blood relatives, rel-

atives by law, or have twenty-five (25) per cent or more common ownership, a lease between them shall not be considered bona fide for the purposes of this section.

(c) Any retailer who is in possession of property under the terms of a lease, which property is exempt from lien as provided in this section, may be required by the manager to make return of and pay over taxes collected at more frequent intervals than monthly, or may be required to furnish security for the proper payment of taxes whenever the collection of taxes appears to be in jeopardy.

(d) The extension herein contained of the preexisting right of distress to merchandise, furniture and fixtures, tools and equipment of or used by the taxpayer shall apply to tax obligations in default at the time of the passage of this amendment and the existing liens created by Ordinance No. 437, Series of 1964, and Ordinance No. 666, Series of 1981, shall continue to apply, subject to the limitations in this article contained. A sale at retail from a stock of merchandise in the regular course of business shall release the item or items sold from the lien created by this section, but newly acquired merchandise shall come and remain under such lien until sold at retail or until the tax is paid.

(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 23, 12-3-84)

Case law annotation—The mere use of personal property subjects it to lien, notwithstanding lack of ownership in the using party. *Horacek v. Cherry Creek Corporation*, 28 Colo. App. 258, 472 P. 2d 158 (Colo. Ct. of App., Div. II, 1970).

Secs. 53-60, 53-61. Reserved.

Sec. 53-62. Reserved.

Editor's note—Section 24 of Ord. No. 638-84, adopted Dec. 3, 1984, repealed § 53-62, "Release of lien," as derived from § 1 of Ord. No. 666-81, adopted Dec. 14, 1981.

Sec. 53-63. Sale upon distraint.

(a) *Causes.* The manager may issue a warrant directed to any employee, agent, or representative under the control of the manager, the manager of safety, or the sheriff of the city, sometimes in this section referred to collectively as "agent," commanding the agent to distrain, seize, and sell the goods, merchandise, furniture and fixtures, tools and equipment of, or used by, the taxpayer, except such personal property as is exempted from execution and sale by any statute of the United States, for the payment of the tax due together with penalties and interest accrued thereon and cost of execution upon the happening of any one of the following:

(1) When any deficiency in tax is not paid within thirty (30) days from the manager's final decision thereon and no petition for review from such determination has been filed with the district court for the second judicial district within the period of time allowed by law for such review; or

(2) When any amount of tax, penalty, or interest is not paid within twenty (20) days from the mailing or personal service of demand for payment thereof and no protest thereof has been filed with the manager within said period; or

(3) Immediately upon making of a jeopardy assessment or of the issuance of a demand for payment, as provided in this section.

(b) *Service of notice, etc., on taxpayer.* The agent charged with the collection shall make or cause to be made an account of the property distrained, a copy of which, signed by the agent making such distraint, shall be left with the owner or possessor of the property or with some member of such person's family over the age of eighteen (18) years, or at the person's usual place of business with the stenographer, bookkeeper, or chief clerk, or, if the taxpayer is a corporation, with any officer, manager, general agent, or agent for process, with a copy of said warrant stating the sum demanded; and said agent shall forthwith cause to be published a notice of the time and place of sale, together with a description of the property to be sold, in some newspaper of general circulation within the city or, in lieu thereof and in the discretion of the manager, the agent shall cause such notice to be publicly posted at the Denver courthouse, copies thereof to be posted in at least two (2) other places within the city; and the taxpayer and those having possession of, or of public record a security interest in, the property shall be notified of the time and place of sale either in person

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or by certified mail. The time fixed for the sale shall not be less than nine (9) days nor more than sixty (60) days from the date of such notification.

(c) *Management of sale.* Said sale may be adjourned from time to time by said agent if he deems it advisable but not for a time to exceed in all ninety (90) days from the date first fixed for the sale. When any property is advertised for sale under distraint as aforesaid, the agent making the seizure shall proceed to sell such property at public auction, offering the same at not less than a fair minimum price, including the expenses of making the seizure, storing the property, and of advertising the sale, and if the amount bid for the property at the sale is not equal to the fair minimum price so fixed, the agent conducting the sale may declare the same to be purchased by him for the city. The property so purchased may be sold by the agent under such terms as the manager may approve or declared to be surplus property subject to disposition by the manager of general services. In any case of distraint for the payment of taxes, the property so distrained shall be restored to the owner or possessor if, prior to the sale, the amount due is paid together with the fees and other charges, or the property may be so redeemed before sale by any person having a legal or equitable interest in the property.

(d) *Certificate of title; return of surplus.* In all cases of sale, the agent making the sale shall issue a certificate of sale to each purchaser, and such certificate shall be prima facie evidence of the right of the agent to make such sale and conclusive evidence of the regularity of the proceedings in making the sale and shall transfer to the purchaser all right, title, and interest in and to the property sold. Any surplus remaining above the taxes, penalties, costs, and expenses of making the seizure and of advertising the sale, shall be returned upon demand made within one year from the sale to the owner, or such other person having a right thereto.

(e) *Filing of notice of lien.* Any agent to whom warrant has been issued may serve a notice of lien in such form as the manager may prescribe with the person in possession of any personal property or rights to property, without regard to its use in the business of the taxpayer, belonging to the taxpayer or file said notice with the secretary of state and the clerk and recorder and the service or filing of such notice shall operate to perfect a lien upon such personal property or rights to property from the date of such service or filing. The manager may release said lien as to any part or all of the property or rights to property covered by any such lien upon such terms as he may deem proper.

(f) *Action for unlawful seizure.* The manager may be made a party defendant in an action at law or a suit in equity by any person aggrieved by the unlawful seizure or sale of his personal property, but only the people of the city shall be responsible for any final money judgment secured against said manager; and said judgment shall be paid or satisfied as provided by section 24-10-113, C.R.S., upon presentation by the judgment creditor to the manager of two (2) certified copies of said final judgment.

(g) *When collection in jeopardy.* If the manager finds that collection of the tax will be jeopardized by delay, in his discretion, he may declare the taxable period immediately terminated, determine the tax, and issue notice and demand for payment thereof; and, having done so, the tax shall be due and payable forthwith, and the manager may proceed immediately to collect such tax by distraint, levy, and sale, or as otherwise provided in this section. Collection by seizure and sale may be stayed if the taxpayer gives such security for payment as shall be satisfactory to the manager. (Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 25, 12-3-84)

Sec. 53-64. Recovery of unpaid tax by action at law.

(a) The manager may also, after having exhausted the remedies provided for collection hereinabove, treat any such taxes, penalties, or interest due and remaining unpaid, as a debt due the city from the vendor. In case of failure to pay the taxes, or any portion thereof, or any penalty or interest thereon, when due, the manager may recover at law the amount of such taxes, penalties, and interest in any county or district court having jurisdiction of the amounts sought to be collected in the county wherein the taxpayer resides or has his principal place of business. The return of the taxpayer or the assessment

made as provided in this article by the manager shall be prima facie proof of the amount due.

(b) Such actions may be actions in attachments, and writs of attachment may be issued to the sheriff, and in any such proceeding no bond shall be required of the manager, nor shall any sheriff require of the manager an indemnifying bond for executing the writ of attachment, or writ of execution upon any judgment entered in such proceedings; and the manager may prosecute appeals in such cases without the necessity of providing bond therefor.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-65. Manager may waive penalty.

The manager alone is hereby authorized to waive, for good cause shown, any penalty assessed as in this article provided; and interest imposed in excess of twelve (12) per cent per annum shall be deemed a penalty.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-66. Notices to be sent by registered or certified mail.

All notices or other information required to be given to the taxpayer in writing under the provisions of this article if mailed postpaid by registered or certified mail to the last known address of the taxpayer, after reasonable inquiry of such address, shall be deemed complete and effective upon and as of the posting of the same in the mails of the United States postal service. Filings by the taxpayer shall be deemed complete upon mailing to or personal service on the manager of revenue.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 26, 12-3-84)

Sec. 53-67. License and tax in addition to all others.

The license required and the tax levied by this article shall be in addition to all other licenses required and taxes levied by law except as herein otherwise provided. No delinquency in payment and no violation of this article shall be grounds for the suspension or revocation of any license issued to any person engaged in business within the city by any official of the city under any licensing provisions of the Code or other ordinances, neither shall the same be grounds for the suspension or revocation of any state license issued by any licensing authority pursuant to the statutes of the state.
(Ord. No. 666-81, §1, 12-14-81; Ord. No. 638-84, § 27, 12-3-84)

Sec. 53-68. Statute of limitations.

(a) Except as provided in this section and unless such time is extended by waiver, the amount of the tax levied by this article and the penalty and interest applicable thereto shall be assessed within three (3) years after the return was filed, and no assessment shall be made or credit taken and no notice of lien shall be filed, or distraint warrant issued, or suit for collection instituted, or any other action to collect the same commenced after the expiration of such period.

(b) For purposes of this section, a tax return filed before the last day prescribed by law or by regulation promulgated pursuant to law for the filing thereof shall be considered as filed on such last day.

(c) In the case of failure to file a return or the filing of a false or fraudulent return with intent to evade tax, the tax together with penalty and interest may be assessed and collected at any time.

(d) Where, before the expiration of the time prescribed in this section for the assessment of tax, both the manager and the taxpayer have consented in writing to an assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. No lien shall continue under this article beyond the period provided for assessing the tax unless taxes have been assessed within the period, as it may be extended, and the lien shall then continue for one year only after the expiration of any such period, unless otherwise specifically provided in this article.

(e) Nothing in this section shall be construed to limit any right accrued, or revive any liability barred by any such limitation, by ordinance effective prior to the enactment of this section.
(Ord. No. 666-81, § 1, 12-14-81; Ord. No. 638-84, § 28, 12-3-84)

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Sec. 53-69. Expiration of sales tax.

The city retail sales tax article shall continue until the adoption of a new ordinance to the contrary. (Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-70. Violations; evasion of collection or payment of tax.

(a) It shall be a violation of this article for any retailer or vendor to refuse to make any return required to be made by this article, or to make any false or fraudulent return, or by any false statement in any return, or to fail or refuse to make payment to the manager of any taxes collected or due the city, or in any manner to evade the collection and payment of the tax, or any part thereof, imposed by this article, or for any person or purchaser to fail or refuse to pay such tax or evade the payment thereof, or to aid or abet another in any attempt to evade the payment of the tax levied by this article. Any corporation making a false return or a return containing a false statement shall be guilty of a violation of this article and such violation shall be applicable to officers, agents, or members thereof who are responsible for the violation.

(b) Any person who shall violate any of the provisions of this article so stated to be a violation thereof shall be guilty of a violation of this article. The violation of this article by any person shall be unlawful and subject to the penalties imposed by section 1-13. Each and every twenty-four (24) hours continuous of any violation shall constitute a distinct and separate violation for penalty purposes. (Ord. No. 666-81, § 1, 12-14-81)

Secs. 53-71—53-75. Reserved.

DIVISION 2. RETAIL LICENSE*

Sec. 53-76. Required.

(a) No person shall engage in the business of selling within the city at retail without first obtaining a city retail sales license from the director of excise and licenses in accordance with the provisions of article I of chapter 32.

(b) An application for a city retail sales license and renewals of the same shall be made in accordance with the provisions of article I of chapter 32. In instances in which the business of selling at retail is conducted or transacted at two (2) or more separate locations by one person, separate licenses for each location of said business shall be required. (Ord. No. 666-81, § 1, 12-14-81)

*Cross reference—Licenses generally, Ch. 32.

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Sec. 53-77. Exemption.

No license shall be required for any person engaged exclusively in the business of selling commodities which are exempt from taxation under this article.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-78. Approval by manager of revenue.

No application shall be acted upon by the director of excise and licenses unless the application is approved by the manager.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-79. Fee.

The license fee under this division is prescribed in section 32-107.

Sec. 53-80. Revocation.

The city retail sales license shall be revoked by the director of excise and licenses upon the written request of the manager only after notice and hearing as provided in article I of chapter 32.
(Ord. No. 666-81, § 1, 12-14-81)

Sec. 53-81. Appeal from order of revocation.

Any finding or order of the director of excise and licenses made pursuant to article I of chapter 32 revoking the city retail sales license of any person or denying the licensing of any person engaged in the business of selling at retail shall be subject to review in the district court of the second judicial district of the state upon application of the aggrieved person, and the procedure for review shall be in accordance with that set forth in Rule 106(a)(4) of the Colorado Rules of Civil Procedure, as they may be amended from time to time and as any substitutionary provision may be made for review in the nature of certiorari. The decision of the district court may be reviewed in accordance with the Colorado Appellate Rules.
(Ord. No. 666-81, § 1, 12-14-81)

Secs. 53-82—53-90. Reserved.

ARTICLE III. USE TAX*

DIVISION 1. GENERALLY

Sec. 53-91. Name of tax.

This article may be known and cited as the city use tax article.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-92. Legislative intent.

(a) It is hereby declared to be the legislative intent of the city, acting through its duly elected representatives that, for the purposes of this article, every person who stores, uses, distributes or consumes in the city any article of tangible personal property or who consumes or stores a service subject to the provisions of this article, purchased at retail, is exercising a taxable privilege.

(b) It is hereby declared to be the legislative intent of the city, acting through its duly elected representatives that, for the purposes of this article, every vendor who is engaged in business in the city and who shall deliver or cause to be delivered to the purchaser in the city and property or service taxable herein, shall collect the tax imposed by this article upon the basis of an addition of the tax imposed by this article to the purchase price of such service or article or articles of tangible personal property that are purchased at any one time

*Editor's note—Ord. No. 667-81, § 1, adopted on Dec. 14, 1981, repealed and reenacted Art. 166A of the 1950 Code, codified herein as art. III, div. 1, §§ 53-91—53-138, div. 2, §§ 53-146—53-150. At the editor's discretion, the reenacted provisions have been included as a new art. III, div. 1, §§ 53-91—53-121, 53-123—53-125, 53-127, 53-130—53-138, and div. 2, §§ 53-146—53-150.

Case law annotation—This article is valid as against state law exemption in C.R.S. 1973, 10-3-209(1)(c). Constitutional power of home rule cities over matters of local concern preempts all state power in that area. This article based upon Art. 20, § 6 of the Colo. Const. preempts state law in so far as it applies to local taxation. *Security Life and Accident Company v. Temple*, 177 Colo. 14, 492 P. 2d 63 (1972).

State law references—County and municipal use tax, C.R.S. 1973, 29-2-101 et seq.; state use tax generally, C.R.S. 1973, 39-26-201 et seq.

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by every such purchaser, in the manner hereinafter set forth.

(c) It is hereby declared to be the legislative intent of the city, acting through its duly elected representatives that, the provisions of this article shall apply to any person who causes a service or tangible personal property, taxable hereunder, to be used, stored, distributed or consumed in the city, and who has already paid a retail sales tax in respect to the sale of such service or property to a municipal corporation organized and existing under the authority of the laws or the Constitution of the state in an amount less than the tax imposed by this article; but the tax imposed by this article shall, in such event, be measured by the difference between the rate imposed by this article and the rate previously imposed by the other municipality on said sale. If the retail sales tax imposed and paid to such municipal corporation aforesaid is equal to or more than the tax imposed by this article, no tax shall be due hereunder for the exercise of the privilege of using, storing, distributing or consuming such service or personal property in the city.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-93. Purpose of tax.

The council declares that the purpose of the levy of the tax imposed by this article is for raising funds for the payment of expenses of operating and improving the city and its facilities and for the payment of the principal of and interest due upon any general obligation bonds lawfully authorized and issued by and on behalf of the city; in accordance with this purpose, the proceeds of the tax shall be placed in the unapportioned sales, use and lodger's tax account of the fund plan, section 20-18 of the Code, from which shall be allocated, apportioned, and transferred as therein provided such sums as are required to pay the interest on and principal of general obligation bonds so authorized and issued, not to exceed three million dollars ($3,000,000.00) total of sales and use taxes in any one calendar year, and to allocate, apportion, and transfer the remaining balance from said account to the general fund.
(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 535-83, § 1, 10-3-83)

Sec. 53-94. Administration of article; rules and regulations.

Excepting those provisions of this article concerning licensing specifically referring to the director of excise and licenses, the administration of this article is hereby vested in and shall be exercised by the manager, who may prescribe forms and make reasonable rules and regulations in conformity with this article, by following the procedure set forth in article VI of chapter 2 for the making of returns, the ascertainment, assessment, and collection of the tax imposed hereunder, and for the proper administration and enforcement thereof. The manager may delegate the administration of this article, or any part thereof, subject to limitations, if any, of the Charter, to duly authorized deputies or agents, excepting the waiver of penalty interest as hereinafter provided.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-95. Definitions.

As used in this article the following words, phrases, and where applicable, their declensional and inflectional forms shall have the meanings given to them in this section except where the context in which they are used indicates clearly and requires a different meaning according to customary usage. The word "shall" and "must" are to be construed as mandatory and not directory. In addition to the following definitions, the definitions and general provisions of chapter 1 shall be applicable insofar as not expressly inconsistent with the provisions hereof.

(1) *Automotive vehicle* means any vehicle, including every device in, upon or by which any person or property is or may be transported, or drawn upon, a public highway, or any device used or designed for aviation or flight in the air, including but not limited to motor vehicles, trailers, or semitrailers and aircraft, but excepting devices moved by human power.

(2) *Business* shall include all activities engaged in or caused to be engaged in with the object of gain, benefit or advantage, direct or indirect.

(3) *City* shall mean the City and County of Denver or the geographical area within its territorial limits, depending upon the context.

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(4) *Director of excise and licenses* shall mean the director of excise and licenses in and for the city; and the term "manager" shall mean the manager of revenue, or the duly authorized representative thereof, in and for the city.

(5) *Engaged in business in the city* means the selling, leasing or delivering in the city, or any activity in the city in connection with the selling, leasing or delivering in the city of tangible personal property by a retail sale for use, storage, distribution or consumption within the city. This term shall include, but shall not be limited to the following acts or methods of transacting business:

a. The maintaining within the city directly or indirectly or by a subsidiary, of an office, distributing house, sales room or house, warehouse or other place of business.

b. The soliciting, either by direct representatives, indirect representatives, manufacturer's agent, or by distribution of catalogues or other advertising, or by use of any communication media, or by use of the newspaper, radio or television advertising media, or by any other means whatsoever, of business from persons residing in the city, and by reason thereof receiving orders from such persons residing in the city for purchasing, or hiring tangible personal property for use, consumption, distribution or storage in the city; and, the tangible personal property so ordered, purchased or leased actually comes to rest for any length of time in the city and becomes a part of the mass of property in the city, as a result thereof.

(6) *Farm machinery* means self-propelled or power-drawn equipment used directly for plowing, planting, cultivating and harvesting of crops, such as combines, tractors, plows, discs, planters and rakes.

(7) *Gross taxable sales* means the total amount received in money, credits, property, including the fair market value of exchange property which is to be sold thereafter in the usual course of the retailer's business, or other consideration valued in money from sales and purchases at retail or deemed to be at retail, within the city and embraced within the provisions of this article;

a. Provided, however, that the vendor may take credit in his report of gross sales for an amount equal to the sale price of property returned by the purchaser when the full sale price thereof is refunded, either in cash or by credit;

b. Provided, further, that the fair market value of any exchanged property which is to be sold thereafter in the usual course of the retailer's business, if included in the full price of a new article, shall be excluded from gross taxable sales;

c. Provided, further, that taxes paid on the amount of gross sales which are represented by accounts not secured by conditional sale contract or chattel mortgage and which are found to be worthless and are actually and properly charged off as bad debts for the purpose of the income tax imposed by the laws of the state may be credited upon a subsequent payment of the tax herein provided; but if any such accounts are thereafter collected by the vendor, a tax shall be paid upon the amount so collected. Such credit shall not be allowed with respect to any account or item therein arising either from the sale of any article under a conditional sale contract whereby the vendor retains title as security for all or part of the purchase price or from the sale of any article when the vendor takes a chattel mortgage on the article to secure all or part of the purchase price.

(8) *Manufacturing* is the performance as a business of an integrated series of operations which places personal property in a form, composition or character different from that in which it was acquired, whether for sale or for use by the manufacturer. The change in form, composition or character must result in a

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different product having a distinctive name, character and use.

(9) *Motor fuel* shall mean gasoline, casing head or natural gasoline, benzol, benzene and naphtha, gasohol, and any liquid prepared, advertised, offered for sale, sold for use or used or commercially usable in internal combustion engines for the generation of power for the propulsion of motor vehicles upon the public highways. The term does not include fuel used for the propulsion or drawing of aircraft, railroad cars, or railroad locomotives, however.

(10) *Purchase price* or *price* means the aggregate value measured in currency paid or delivered or promised to be paid or delivered to a vendor in consummation of a sale, without any discount from the price on account of the cost of the property sold, cost of materials used, labor or service cost, or any other expense whatsoever; and provided that when articles of tangible personal property are sold after manufacture or after having been made to order, the gross value of all materials, labor, services, and the profit thereon, shall be included in the purchase price; but said price shall be exclusive of any direct tax imposed by the federal government, by the state or by this article; and in the case of all retail sales involving the exchange of property, also exclusive of the fair market value of the property exchanged at the time and place of exchange; provided, however, that such exchanged property is to be sold thereafter in the usual course of the retailer's business. "Price" and "purchase price" shall not include the following:

a. The consideration received for labor or services used in installing, applying, remodeling or repairing the property sold if the consideration for such services is separately stated from the consideration received for the tangible personal property in the retail sale;

b. The amount paid by any purchaser as, or in the nature of, interest or finance charges on account of credit extended in connection with the sale of any tangible personal property if the interest or finance charges are separately stated from the consideration received for the tangible personal property transferred in the retail sale.

(11) *Purchaser* shall mean any person to whom a taxable service has been rendered or who shall have purchased or hired at retail tangible personal property.

(12) *Retail sale* means any sale, as defined in this section, except a wholesale sale.

(13) *Retailer* or *vendor* means a person doing a retail business, generally known to the trade and public as such, and selling, leasing, or granting license to use in the regular and customary course of the retail business tangible personal property or taxable services to the user or consumer, and not for resale. In order to prevent evasion, and in order to provide for more efficient administration of this article, the term "vendor" or "retailer" shall be extended to include any salesman, representative, peddler or canvasser, who as agent, directly or indirectly, of the dealer, distributor, supervisor or employer under whom he operates or from whom he obtains the tangible personal property or services sold by each agent, makes sales of tangible personal property or services subject to the tax imposed herein; and in such event such agent shall be responsible for the collection and payment of the tax imposed by this article, whenever the principal of such agent refuses to become licensed as a vendor hereunder.

(14) *Sale* or *purchase* or *sale and purchase* includes installment and credit purchases and sales and the exchange of property as well as the purchase and sale thereof for money; and every transaction conditional or otherwise, based upon consideration constitutes a sale. The terms also include the sale or furnishing of electricity, natural gas, steam, petroleum and liquid petroleum products used for energy-producing purposes, and telephone, telegraph, television and data processing services that are taxable under the terms of this article.

The term "sale," "purchase," or "sale and purchase" in addition to the items included above includes transactions whereby the acquisition of tangible personal property was effected by (a) the transfer, conditionally or absolutely, of title or possession or both of the tangible personal property; or (b), a lease, hire or rental of, or a grant of a license to use (including royalty agreements), tangible personal property.

(15) *Special fuel* means kerosene oil, kerosene distillate, diesel fuel, all liquefied petroleum gases, and all combustible gases and liquids for use in the generation of power for propulsion of motor vehicles upon the public highways. The term does not include fuel used for the propulsion or drawing of aircraft, railroad cars, or railroad locomotives, however.

(16) *Storage* means any keeping or retention of, or exercise of dominion or control over, or possession for any length of time of tangible personal property under a lease or when purchased at retail within or without the city from a vendor.

(17) *Tangible personal property* means and includes corporeal personal property, including but not limited to (a) automotive vehicles as herein defined and (b) data processing programs and equipment as the manager may by regulation provide definition.

(18) *Tax* means either the tax payable by the purchaser of tangible personal property or of a service subject to tax or the aggregate amount of taxes due from the vendor of such commodities or services during the period for which the vendor is required by this article to report his collections, as the context may require.

(19) *Taxpayer* shall mean any person obligated to account to the manager for taxes collected or to be collected, or from whom a tax is due, under the terms of this article.

(20) *Use* means the exercise, for any length of time, by any person within the city of any right, power or dominion over tangible personal property either under a lease, or pursuant to a transaction whereby tangible personal property together with the services of an operator thereof, is furnished for another person, irrespective of the fact that during all times that the said property is so furnished, the control of the operation of the same remains in the person so providing the said property, or pursuant to a purchase at retail either within or without the city from a vendor.

(21) *Wholesale sale* means:

a. A sale by wholesalers to licensed retail merchants, jobbers, dealers or other wholesalers for resale, and does not include (i) a sale by wholesalers to users or consumers not for resale; (ii) the leasing, hiring, or renting of, or granting of a license to use (including royalty agreements) tangible personal property to a user or consumer thereof, (iii) sales of returnable containers to manufacturers, compounders, wholesalers, retailers, jobbers, packagers, distributors or bottlers; (iv) sales of tangible personal property to persons for resale when there is a likelihood that the city will otherwise lose tax revenues due to the difficulty of policing the business operations because:
   1. of the frequent replacement of independent contractors or agents;
   2. of the lack of a place of business in which to display a city retail sales license;
   3. of the lack of a place of business in which to keep records;
   4. of the lack of adequate records;
   5. the persons engaged in selling, or in the chain of selling events, are minors or transients; or
   6. the persons selling, or in the chain of events leading to sale, are engaged essentially in providing services in transferring tangible personal property;

   but the transactions set forth in items (i), (ii), (iii) and (iv) above shall be deemed retail sales and subject to the provisions of this article;

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b. Sales to and purchases of tangible personal property by a person engaged in the business of manufacturing or compounding for use, profit or sale, which tangible personal property meets all of the following conditions: (i) is actually and factually transformed by the process of manufacture; (ii) becomes by the manufacturing or compounding process a necessary and recognizable ingredient, component and constituent part of the finished product; and (iii) its physical presence in the finished product is essential to the use thereof in the hands of the ultimate consumer; shall be deemed wholesale sales and shall be deemed exempt from taxation under this article.

c. Sales to and purchases of tangible personal property for use as containers, labels and shipping cases by a person engaged in manufacturing, compounding, wholesaling, jobbing, retailing, packaging, distributing or bottling for sale, profit or use, which tangible personal property meets all of the following conditions: (i) is used by the manufacturer, compounder, wholesaler, jobber, retailer, packager, distributor or bottler to contain or label the finished product; (ii) is transferred by said person along with and as a part of the finished product to the purchaser; and (iii) is not returnable to said person for reuse, shall be deemed wholesale sales and shall be exempt from taxation under this article.

(22) *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 or other wholesalers, for the purpose of resale.

(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, §§ 1—6, 12-3-84)

Sec. 53-96. Imposition of tax.

There is levied and there shall be collected and paid a tax in the amount stated in this article, by every person exercising the taxable privilege of storing, using, distributing, or consuming in the city a service subject to the provisions of this article or any article of tangible personal property, purchased at retail, for said exercise of said privilege, as follows:

(1) On the purchase price paid or charged upon all sales and purchases of tangible personal property.

(2) In the case of retail sales involving the exchange of property, on the purchase price paid or charged, including the fair market value of the property exchanged at the time and place of the exchange, excluding, however, from the consideration or purchase price the fair market value of the exchanged property if such exchanged property is to be sold thereafter in the usual course of the retailer's business.

(3) Upon the purchase price or charge for telephone and telegraph services, whether furnished by public or private corporations or enterprises, for local telephone service receipts, including zone calls within the city, and for intrastate telephone and telegraph service originating within the city.

(4) Upon the purchase price or charge for electric, steam, and natural gas services for energy-producing purposes, whether furnished by municipal, public or private corporations or enterprises, furnished and sold for domestic, commercial or industrial consumption and not for resale.

(5) Upon the purchase price for the furnishing or sale to customers within the city of informational or entertainment service, including but not limited to television programming, wherein the relay or transmission of electromagnetic waves through any medium, tangible or intangible, including cable, glass fiber, and ambient air, is necessary for the service to be received, excepting, however, the purchase price for telephone and telegraph services described in section 53-96(3) and the purchase price to members of the public for television, cinema or similar programming provided at a theater or similar place open to the public.

(6) Upon the purchase price or charge for data processing equipment and services.

(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, §§ 7, 8, 12-3-84)

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Sec. 53-97. Exemptions.

There shall be exempt from taxation under the provisions of this article the following:

(1) All sales to the United States government, to the state, its departments and institutions, and the political subdivisions thereof only when purchased in their governmental capacities; and all sales to the city.

(2) All sales made to religious or charitable corporations when purchased for their regular religious or charitable functions and activities.

(3) All sales of cigarettes.

(4) All sales of motor fuel and special fuel as defined in this article.

(5) All sales and purchases of meat cattle, sheep, lambs, swine and goats; all sales of mares and stallions for breeding purposes.

(6) All sales and purchases of feed for livestock or poultry and all sales of seeds to farmers, ranchers, truck farmers, florists and horticulturists who sell the crops resulting from the propagation of such seeds or use such crops as feed for livestock or poultry.

(7) The sale and purchase of drugs, artificial arms, artificial eyes, artificial hands, artificial larnxyes, artificial legs, permanent catheters, colostomy bags, colostomy sets, colostomy supplies, disposable ostomy tubes, ostomy pouches, ileostomy supplies, orthotics, inserts for orthotics, otology implants, pacemakers, surgical brassieres, breast forms for mastectomy patients, dentures and other items that are designed to restore or replace a dental function, corrective eyeglasses, corrective contact lenses, wheelchairs, crutches, special beds for patients with neuromuscular or similar debilitating ailments, oxygen and hemodialysis products for use at the patient's home, if any of the above is sold to an individual or a member of the individual's immediate family for the personal use of that individual in accordance with a prescription or other written directive issued by a licensed practioner of medicine, dentistry, or podiatry; and the sale and purchase for direct use by the patient of hearing aids, hearing aid batteries, insulin, insulin measuring and injecting devices, glucose to be used for treatment of insulin reactions, and human whole blood, plasma, and blood products and derivatives.

(8) The sale of food and food products for domestic, household use which are advertised or marketed for human consumption and are sold in the same form, condition, quantities and packaging as commonly sold by grocers.

(9) Sales of tangible personal property purchased outside the city for use, storage, distribution or consumption outside the city by a nonresident of the city while the property is temporarily within the city for the purchaser's own personal use, storage or consumption.

(10) Sales of tangible personal property to a natural gas and electric utility or a telephone utility that is not used, consumed or distributed in the city but is for use, consumption, or distribution in its business operations outside the city even though the property is delivered and temporarily stored within the city.

(11) All sales which the city is prohibited from taxing under the Constitution or laws of the United States or the Constitution of the state.

(12) Sale of automotive vehicles as defined in this article, and parts and accessories therefor, which sale meets both of the following conditions: (1) the purchaser is a bona fide nonresident of the city; and (2) the vehicle is registered and required by law to be registered outside the city.

(13) All sales of farm machinery as defined in this article.

(14) Sales of tangible personal property and services taxable under the city retail sales tax article, article II of this chapter, upon which a sales tax has been paid to the city.

(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, § 15, 12-3-84)

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Sec. 53-98. Retailers to collect tax.

(a) *Schedule.* There is imposed and levied, and there shall be collected and paid, a tax upon the exercise of the privilege of storing, using, distributing or consuming in the city a service subject to the provisions of this article or any item of tangible personal property purchased at retail, or deemed to be purchased at retail, except fuel in the form of liquid or gas that is prepared, advertised, offered for sale, sold for use and used or commercially usable for the generation of power for the propulsion or drawing of aircraft or railroad cars or railroad locomotives, in accordance with the following schedule:

Purchase Price	*Tax*
$0.01 including $0.18	No tax
0.19 including 0.51	$0.01
0.52 including 0.84	0.02
0.85 including 1.00	0.03

On prices in excess of one dollar ($1.00), the tax shall be three cents ($0.03) on each full dollar of the purchase price, plus the tax shown in the above schedule for the applicable fractional part of a dollar of each such price.

(b) *Special note for aviation and railway fuel.* Any fuel in the form of liquid or gas that is prepared, advertised, offered for sale, sold for use and used or commercially usable for the generation of power for the propulsion or drawing of aircraft, railroad cars or railroad locomotives shall be taxed at the rate of one and one-half (1.5) per cent of the purchase price, provided that a tax derived from calculations resulting in a fraction of a cent being part of the tax shall be increased or rounded to the next whole cent.

(c) *Tax to be shown as separate item.* Except as provided in this section, retailers shall add the tax imposed, or the average equivalent thereof, to the purchase price, showing such tax as a separate and distinctive item, and, when added, such tax shall constitute a part of such price and shall be a debt from the consumer or user to the retailer until paid, recoverable at law in the same manner as other debts.

(d) *Vending machine sales.* Notwithstanding provisions herein regarding the unlawful assumption or absorption of the tax, any retailer vending items through coin-operated vending machines may include in the sale price for the price for the vended item the tax levied by this article; but no such retailer shall advertise or hold out to the public in any manner, directly or indirectly, that such tax is not included as a part of the sales price to the consumer.

(e) *Affixing of tangible personal property on realty.* Every person who attaches and affixes to realty or the improvements and structures located thereon, situate within the city, any article of tangible personal property taxable hereunder, acquired from sources without the city and who has not paid the tax imposed by this article thereon, to a vendor required or authorized to collect the same, shall monthly make a return and pay the tax due to the manager on or before the twentieth day of each calendar month thereafter. The full amount of such unpaid taxes, arising as aforesaid, together with interest and penalties as hereinafter provided, shall constitute a first and paramount lien upon such realty and the improvements and structures located thereon, so benefited by the attaching and affixing of such articles of tangible personal property thereto, which lien shall have precedence over all other liens of whatsoever kind or nature, except as to liens for general taxes created by state law, and except as to preexisting claims or liens of a bona fide mortgagee, pledgee, judgment creditor or purchaser whose rights shall have attached prior to the filing of the notice of lien by the manager as hereinafter provided; and, the manager is hereby authorized to file a notice of lien therefor against said benefited realty and the improvements and structures thereon, with the clerk and recorder of the city; and upon full payment of the amount of taxes, interest and penalties on account thereof, the manager may release and discharge said lien. Unless so released and discharged, said lien shall continue for six (6) years from the date said notice of lien is filed, notwithstanding the general limitation-of-action clause contained in this article.

(f) *Outside-city contracts, deliveries, etc.* Every vendor required or permitted to collect the tax shall collect the tax imposed by the provisions of this article, notwithstanding the following:

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(1) That the purchaser's order or the contract of sale is delivered, mailed, or otherwise transmitted by the purchaser to the vendor at a point outside Denver as a result of solicitation by the vendor through the medium of a catalog or other written advertisement; or

(2) That the purchaser's order or contract of sale is made or closed by acceptance or approval outside of the city or before said tangible personal property enters the city; or

(3) That the purchaser's order or contract of sale provides that said property shall be, or it is in fact, procured or manufactured at a point outside the city and shipped directly to the purchaser from the point of origin; or

(4) That said property is mailed to the purchaser in the city from a point outside the city or delivered to a carrier at a point outside the city, F.O.B., or otherwise, and directed to the vendor in the city, regardless of whether the cost of transportation is paid by the vendor or by the purchaser; or

(5) That said property is delivered directly to the purchaser at a point outside the city, if it is intended to be brought to the city for use, storage or consumption in city.

(g) *Collection mandatory.* Every vendor engaging in business in the city and selling tangible personal property or services taxable hereunder shall collect, and is required to collect, the tax imposed and levied by this article from the purchaser.

(h) *Retailer as collecting agent.* 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 against the three (3) per cent rate to be paid over by him under the provisions of section, 53-99, remitting any excess of collections over said three (3) per cent less the three and one-third (3⅓) per cent vendor discount allowance, if applicable, to the manager in the retailer's next periodic tax return.

(i) *Consumer returns due, generally.* Every person who is engaged in business in the city and who purchases services or tangible personal property for use, storage or consumption in the city in connection with the business, who has not paid the tax imposed by this article thereon to a vendor required or authorized to collect the same, shall, monthly, make a return of and pay over the tax due to the manager, on or before the twentieth day of each calendar month thereafter.

(j) *Retailer not to benefit.* No retailer shall gain any benefit from the collection or payment of the tax, except as permitted by this article, and the use of the schedule set forth in this section shall not relieve the retailer from liability for payment over of the amount required by section 53-99.
(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, § 17, 12-3-84)

Sec. 53-99. Vendor responsible for payment of tax.

(a) *Amount.* Every retailer shall, irrespective of other provisions of this article, be liable and responsible for the payment of an amount equivalent to three (3) per cent of gross taxable sales made by him of services and tangible personal property specified in this article, and every retailer shall before the twentieth day of each month make a return to the manager, less three and one-third (3⅓) per cent of such amount as a discount allowable for prompt payment. If any vendor is delinquent in remitting the tax levied by this article, other than in unusual circumstances shown to the satisfaction of the manager, the vendor shall not be allowed to retain any discount allowable for prompt payment, and an amount equivalent to the full three (3) per cent shall be remitted to the manager by any such delinquent vendor, together with any other applicable penalty or interest payable under the terms of this article.

(b) *Return; content; form, etc.* Such returns of the taxpayer, or his duly authorized agent, shall contain such information and be made in such manner and upon such forms as the manager may prescribe, and the manager may by regulation duly adopted extend the time up to three (3) months for making returns and paying the tax due.

(c) *Exemption; burden of proof.* The burden of showing that any retailer is exempt from collecting and returning the tax upon any goods sold or taxable services rendered by the retailer, and from

paying over the same to the manager, shall be on the retailer under such reasonable requirements of proof as the manager may by regulation prescribe; in the absence of such regulation, such proof shall be made by clear and convincing evidence.
(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, § 18, 12-3-84)

Sec. 53-100. Unlawful to assume or absorb tax.

It shall be a violation of this article for any retailer to advertise or hold out or state directly or indirectly to any person, that the tax or any part thereof levied by this article will be assumed or absorbed by such retailer, or that the tax will not be added to the selling price of the property sold, or, if added, that the tax or any part thereof will be refunded.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-101. Duty to keep books and records.

It shall be the duty of every retailer engaging or continuing in business in the city for the transaction of which a license is required hereunder, to keep and preserve for a period of three (3) years following the due date of the return or the payment of the tax suitable records of all sales made by him and such other books or accounts as may be necessary to determine the amount of tax for the collection of which he is or may be liable hereunder. It shall be the duty of every person engaging or continuing in business in the city and selling commodities as part of such business to keep and preserve for a period of three (3) years all invoices of goods and merchandise purchased for resale and all such books, invoices, and other records shall be open for examination at any time by the manager or his duly authorized agents.
(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, § 19, 12-3-84)

Sec. 53-102. Special accounting basis for remittance of tax.

If, because conditions of business or the accounting methods regularly employed by the vendor or such other person making return of the tax are such that making return of the tax levied by this article on a monthly basis will impose unnecessary hardship, the manager, upon written request by the vendor, or other person, may accept return at such other intervals up to three (3) months as will, in his opinion, better suit the vendor and will not jeopardize the collection of the tax.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-103. Consolidation of returns.

A retailer doing business in two (2) or more locations may file one return covering all business activities in the city.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-103.1. Tax on rentals.

When the right to possession or use of any article of tangible personal property is granted under a lease, hire, rental contract, grant of a license to use (including royalty agreements), the tax imposed by this article shall be computed and paid by the vendor upon the rentals paid, unless the manager approves payment of the tax on another basis.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-104. Tax on credit sales, etc.

Whenever an article is sold to a person who thereby is obligated to the vendor on an account, chattel paper, contract right, general intangible, or a writing which supports a right to the payment of a purchase price, or any part thereof, the tax shall be based on the total purchase price and shall become immediately due and payable. No refund or credit shall be allowed to either party to a transaction in case of repossession by the vendor of collateral securing the purchase price or any part of the purchase price.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-105. Application to automotive vehicles.

(a) No registration certificate or license shall be issued by the manager for the operation of any automotive vehicle, unless and until the tax levied by this article upon the privilege of storing, using, distributing or consuming such vehicle in the city has been paid.

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(b) No certificate of title evidencing ownership of any automotive vehicle shall be issued or transferred by the manager unless and until said tax upon the privilege of storing, using, distributing or consuming such automotive vehicle in the city has been paid.

(c) If the applicant for the registration of, or the issuance of a certificate of title for, an automotive vehicle has not paid the tax levied by this article, such tax shall be paid by the applicant directly to the manager, and until paid no certificate of title or registration certificate or license plates shall be issued by the manager for such automotive vehicle.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-106. Application to manufacturers of tangible personal property.

(a) A manufacturer of tangible personal property is taxable under this article upon the use or consumption by the manufacturer of items of tangible personal property manufactured by it that it also sells or installs for a price in the ordinary course of its business at retail, but the tax due hereunder in such case shall be levied only upon the gross value of all the materials, labor and services used and employed in the manufacture of said property, and not upon any profit that would have been derived from the ordinary retail sale thereof.

(b) The tax is levied upon the full purchase price of articles sold after the manufacture or after having been made to order and includes the full purchase price of materials used and service performed in connection therewith, excluding however, such articles as are otherwise exempted in this article. The purchase price is the gross value of all the materials, labor, service, and the profit thereon, included in the price charged to the user or consumer.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-106.1 Return required upon sale of business; lien on purchaser.

(a) Any retailer, whether or not licensed hereunder, that sells out his business or stock of goods, or quits doing business within the city, shall be required to return the taxes levied by this article within ten (10) days after the date the retailer sells his business or stock of goods, or quits doing business within the city, and at said time pay over to the manager all such taxes collected by him and, in addition thereto, the retailer shall pay over to the manager all taxes levied hereunder upon the sale itself within the city of said business, stock of goods, fixtures and equipment to the purchaser; and the purchaser thereof, or the successor in business, shall be required to withhold sufficient of the purchase money from said retailer and seller to cover and pay the amount of said taxes due and unpaid by the seller, including the taxes due upon said sale to said purchaser, until such time as the former owner, said retailer and seller, shall produce a receipt from the manager showing that all of said taxes have been paid, or a certificate that no taxes are due.

(b) If the purchaser of a business or stock of goods fails to withhold the purchase money as provided in this section and the taxes are due and unpaid after the ten-day period allowed, the purchaser, as well as the retailer, shall be liable for the payment of the taxes unpaid by the former owner. Likewise, anyone who takes any tangible personal property of any retailer under lease, title retaining contract, or other contract arrangement, by purchase, foreclosure sale, or otherwise, takes same subject to the lien for any delinquent use taxes owed by such retailer, and shall be liable for the payment of all delinquent use taxes of such prior owner, not, however, exceeding the value of property so taken or acquired.
(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, § 20, 12-3-84)

Sec. 53-107. Status of unpaid tax in bankruptcy and receivership.

(a) In the event that the business or property of any taxpayer subject to this article shall be placed in receivership, bankruptcy, debtorship, or assignment for the benefit of creditors, or seized upon distraint for property taxes, all taxes, penalties, and interest imposed by this article and for which said retailer is liable under the terms of this article, shall remain a prior and preferred claim and lien against all of the property of said taxpayer, except as to preexisting claims or liens of a bona fide mortgagee, pledgee, judgment creditor, or purchaser whose rights in the taxpayer's property, other than the goods, furniture and fixtures, tools

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and equipment of the taxpayer used in conducting a retail business, shall have attached prior to the filing of the notice as provided hereinafter on the property of the taxpayer.

(b) No sheriff, receiver, assignee or other officer shall sell the property of any taxpayer under process or order of any court, without first ascertaining from the manager the amount of any taxes due and payable under this article; and if there are any such taxes due, owing, or unpaid, it is the duty of such officer to pay first the amount of said taxes out of the proceeds of said sale before making payment of any moneys to any judgment creditor or other claims of whatsoever kind of nature, except the costs of the proceedings and other preexisting claims or liens as provided in this section.
(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, § 21, 12-3-84)

Sec. 53-108. Trust status of tax in possession of retailer.

All sums of money paid by the purchaser to the retailer as taxes imposed by this article shall be and remain public money, the property of the city, in the hands of such retailer, and the retailer shall hold the same in trust for the sole use and benefit of the city until returned and paid over to the manager as herein provided, and the failure to so pay over to the manager shall constitute a violation of this article by the retailer.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-109. Excess collections; failure to remit collections.

If any vendor shall, during any reporting period, collect as a tax an amount in excess of three (3) per cent of his total taxable sales during the reporting period, he shall return and pay over to the manager the full amount of the tax herein levied and also such excess. The retention by the retailer of any excess of tax collections over three (3) per cent of the total taxable sales of such retailer or the intentional failure to remit punctually to the manager the full amount required to be remitted by the provisions of this article shall be a violation of this article.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-110. Collection and refund of disputed tax.

Should a dispute arise between the purchaser and vendor as to whether or not any sale is exempt from taxation hereunder, nevertheless, the vendor shall collect and the purchaser shall pay such tax; provided, however, that the purchaser thereafter may apply to the manager for a refund of such tax, and it shall then be the duty of the manager to determine the question of exemption subject to review by the courts as hereinafter provided. It shall be a violation of this article for any vendor to fail to collect, or for any purchaser to fail to pay, the tax levied by this article.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-111. Refund procedures.

(a) *Generally.* A refund shall be made, or credit allowed, for the tax so paid under dispute by any purchaser who has an exemption as provided in this article. Such refund shall be made by the manager upon entitlement thereto shown by the applicant and only after compliance with the following conditions.

(b) *Application.* Applications for refund must be made within sixty (60) days after the purchase of the goods or the performance of the services on which the exemption is claimed. The application must be supported by the affidavit of the purchaser accompanied be the original paid invoice or sales receipt and be made upon such forms and contain such information as shall be prescribed by the manager.

(c) *Decisions.* Upon receipt of such affidavit, invoice or receipt, and application, the manager shall examine the same with all convenient speed and shall give notice to the applicant by an order in writing of his decision thereon.

(d) *Hearing.* An aggrieved applicant may, within ten (10) days after such decision is mailed postpaid by certified mail to him, petition the manager of revenue for a hearing on the claim in the manner provided hereinafter regarding assessments and estimates of unpaid taxes.

(e) *Refunds not assignable.* The right of any person to a refund under this article shall not be assignable, and application for refund must be made

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by the same person who purchased the goods or services and paid the tax thereon as shown in the invoice for the sale thereof.

(f) *Penalty for violating refund provisions.* Any applicant for refund under the provisions hereinabove, or any other person, who shall make any false statement in connection with an application for a refund of any tax shall be deemed guilty of a violation of this article.

(g) *Violations of refund provisions to be used as evidence of fraudulent intent.* If any person be convicted under the provisions of this section, the proof of such conviction shall be prima facie evidence of fraud by that person in any appropriated action brought or taken for recovery of other refunds made by the manager to such person within the prior three (3) years to the conviction. A brief summary of the penalties available under this article for violations of it shall be printed on each form issued by the manager for application for refund.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-112. Tax information to be confidential.

(a) Except in accordance with judicial order or as otherwise herein provided, the manager, and those working under his supervision, shall not divulge any information gained from any investigation conducted under this article or disclosed in any document, report, or any return filed in connection with the tax levied under the provisions of this article.

(b) The officials charged with the custody of such documents, reports, or returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the manager in an action under the provisions of this article to which the manager is a party, or on behalf of any party to an action or proceeding under the provisions of this article or to punish a violator thereof when the report of facts shown by such report is directly involved in such action or proceeding, in any of which events the court may require the production of, and may admit in evidence so much of said documents, reports or returns, or of the facts shown thereby, as are pertinent to the action or proceeding and no more.

(c) Nothing contained in this article shall be construed to prohibit the delivery to a person, or his duly authorized representative of a copy of any return or report filed in connection with that person's tax, nor to prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items thereof, nor to prohibit the inspection by employees of the city under the control of the manager or by the city attorney of the city or any other legal representative of the city of the report or return of any person who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding is contemplated or has been instituted under this article; nor to prohibit the manager, in his discretion, from supplying and disclosing information gained from any investigation conducted under this article or reported, scheduled, or disclosed in any document, report, or return filed in connection with the tax levied under the provisions of this article, for inspection or copying to the executive director of the state department of revenue, to the commissioner of internal revenue of the United States government, or to the official responsible for collecting sales or use taxes in any political subdivision of the state; provided, however, that such official of a political subdivision of the state similarly be permitted by law to disclose and supply information relating to the imposition and collection of sales or use taxes gained from persons within or doing business within such political subdivision.

(d) Reports and returns shall be preserved for three (3) years and thereafter until the manager orders them destroyed.

(e) Any city officer or employee who shall divulge any information classified herein as confidential, in any manner, except in accordance with proper judicial order, or as otherwise provided by law, shall be guilty of a violation of this article.
(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, § 22, 12-3-84)

Sec. 53-113. Examination of returns; refunds, credits and deficiencies.

(a) As soon as practicable after the return required by this article is filed, the manager shall

examine it. If it then appears that the correct amount of tax to be remitted is greater or less than that shown in the return, the tax shall be recomputed.

(b) If the amount paid exceeds that which is due the excess shall be refunded or credited against any subsequent remittance from the same person.

(c) If the amount paid is less than the amount due, the difference, together with interest thereon at the rate of one per cent per month from the time the return was due, shall be paid by the vendor within ten (10) days after written notice and demand to him from the manager.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-114. Penalty for deficiencies caused by disregard of rules.

If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added ten (10) per cent of the total amount of the deficiency, but not less than ten dollars ($10.00); and interest in such case shall be collected at the rate of one per cent per month in the amount of the deficiency from the time the return was due to the date paid from the person required to file the return, which interest and addition shall become due and payable within ten (10) days after written notice and demand by the manager and such shall be assessed, collected and paid in the same manner as the tax itself.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-115. Penalty for deficiency caused by fraud.

If any part of the deficiency is due to fraud with the intent to evade the tax, there shall be added fifty (50) per cent of the total amount of the deficiency, and in such case the whole amount of the tax unpaid, including the additions, shall become due and payable ten days after written notice and demand by the manager, and an additional one per cent per month on said amounts shall be added from the date the return was due until paid and such addition and interest shall be assessed, collected, and paid in the same manner as the tax itself.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-116. Investigation of retailers' books.

For the purpose of ascertaining the correctness of a return, for the purpose of determining the amount of tax due from any person or for the purpose of estimating the tax due from any taxpayer, the manager is empowered to examine any books, papers, records or memoranda, bearing upon the matters required to be included in the return; and, if the taxpayer refuses to cooperate in such examination, the manager may require the attendance of such taxpayer, or any officer or employee of such taxpayer, by subpoena issued under the hand of the manager, to give testimony and to produce any of the foregoing information in the possession or under the control of the individual, or of any person having knowledge of such sales.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-117. Refusal to make return; estimate of taxes; penalty; notice; assessment.

(a) If any person neglects or refuses to make a return in payment of the taxes as required by this article, the manager shall make an estimate, based upon such information as may be available to him, with or without employing investigative powers vested in the manager by this article, of the amount of the taxes due for the period or periods for which the taxpayer is delinquent and, upon the basis of such estimated amount, compute and assess in addition thereto a penalty equal to ten (10) per cent thereof, together with the interest on such delinquent taxes at the rate of one per cent per month from the date when due.

(b) Promptly thereafter, the manager shall notify the delinquent taxpayer and demand payment of such estimated taxes, penalty, and interest in writing served personally or by certified mail.

(c) Such estimated amounts shall thereupon become an assessment, and such assessment shall be final and due and payable from the taxpayer to the city twenty (20) days from either the date of personal service of the notice and demand or the date of mailing of the notice and demand by certified mail; provided, however, that within said twenty-day period the delinquent taxpayer may petition

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the manager in writing for a revision, modification or cancellation of such assessment, and, further, said taxpayer shall in order to perfect such petition and within such twenty-day period, furnish the manager a summary written statement of the facts and reasons for and the amount of the requested changes in the assessment, and thereafter comply otherwise with the applicable rules and regulations promulgated by the manager relating to petitions and hearings.

(d) Similarly, if any taxpayer having filed a return and paid over the tax levied by this article, feels aggrieved, said taxpayer may apply to the manager by petition in writing within twenty (20) days after the notice is mailed to him by certified mail, or, if applicable, after personal service; and the taxpayer may demand a hearing and a correction of the amount, or part of the amount, of the tax so paid, setting forth therein the reasons why the amount should be reduced.

(e) The burden of proof that sales or storage or consumption of commodities and services upon which refunds of taxes are claimed, or for which modifications or cancellations of assessments are sought, are exempt from or not subject to taxation under this article, shall be on the taxpayer under such reasonable requirements of proof as the manager may by rule prescribe; in the absence of such rule, proof shall be by clear and convincing evidence.
(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, § 23, 12-3-84)

Sec. 53-118. Petitions by aggrieved taxpayers to set hearings.

The manager shall notify in writing the petitioning taxpayer claiming an error in assessment, or claiming refund, of the time and place within the city fixed for hearing at least thirty (30) days prior thereto. After such hearing, at which the manager is authorized to administer oaths and take evidence, and hear argument, the manager shall enter findings and make such order in the matter as is proper and furnish a copy to the taxpayer. Said findings and order shall constitute decision of the manager in the matter.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-119. Compromise.

The manager may compromise any assessment arising under this article prior to reference of the matter to the department of law.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-120. Hearings, subpoenas and witness fees.

All subpoenas issued under the terms of this article shall be served by any person so enabled under the Colorado Rules of Civil Procedure and in the same manner. The payment of fees to witnesses for attendance or trial before the manager shall be the same as the payment of fees to witnesses before the district courts.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-121. Judge compels attendance.

Any judge of the district court of the second judicial district of the state upon the application of the manager may compel the attendance of witnesses, the production of books, papers, records, or memoranda, and the giving of testimony before the manager by an attachment against such witness for contempt, or otherwise, in the same manner as production of evidence before said court may be compelled.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-122. Reserved.

Sec. 53-123. Decision of manager; notice; when final.

Every decision of the manager shall be mailed by certified mail to the taxpayer within ten (10) days of its entry, and every such decision shall become final upon the expiration of thirty (30) days from its entry.
(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, § 24, 12-3-84)

Sec. 53-124. Manager's decision reviewable by district court.

Should the taxpayer be aggrieved by the final decision of the manager, the taxpayer may proceed to have the same reviewed under Colorado Rules of Civil Procedure 106(a)(4), or such similar

procedure for the issuance of a writ in the nature of certiorari, only by the district court of the second judicial district of the state. The petition or complaint for review by the district court of the manager's decision must be filed within thirty (30) days from the entry of the decision, and the court proceedings shall be governed by the Colorado Rules of Civil Procedure. If appeal from the district court's decision is perfected, the appellate rules adopted by the supreme court of the state shall apply. Any party may appeal the decision of the district court. Unless otherwise provided by the rules of civil procedure, the standard of review by the district court shall be to determine whether the manager has exceeded the jurisdiction vested by this article in such office or abused the discretion vested by this article in the office.
(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, § 25, 12-3-84)

Sec. 53-125. Reserved.

Editor's note—Ord. No. 637-84, § 26, adopted Dec. 3, 1984, repealed § 53-125, "Review of manager's decision by district court," as derived from Ord. No. 667-81, § 1, adopted Dec. 14, 1981. A substantive portion of former § 53-125 can now be found in § 53-124.

Sec. 53-126. Reserved.

Sec. 53-127. Tax lien.

(a) In addition to the lien created by section 53-98 hereof, the tax imposed by this article shall be, and until paid remain, a first and prior lien superior to all other liens upon the tangible personal property stored, used, distributed, or consumed within the city, subject only to preexisting claims or perfected liens of a bona fide mortgagee, pledgee, judgment creditor, or purchaser whose rights shall have attached prior to the filing of the notice mentioned in section 53-131 of this article; provided, however, that when the tax is required by this article to be collected by retailers or their agents, the lien created hereby shall be a first and prior lien on all the goods, furniture and fixtures, tools and equipment of or used by the retailer or agent in conducting business, excepting goods that have been sold in the ordinary course of business, whether or not the notice of lien is filed under section 53-131, and said lien shall have precedence over all other liens.

(b) The property of an owner who has made a bona fide lease to a retailer shall be exempt from the lien created in this section if such property can reasonably be identified from the lease description and if the lessee is given no right to become the owner of the property leased. This exemption shall be effective from the date of the execution of the lease if the lease is filed or recorded with the clerk and recorder of the city within ten (10) days after the execution of the lease. Where the lessor and lessee are blood relatives, relatives by law, or have twenty-five (25) per cent or more common ownership, a lease between them shall not be considered bona fide for the purposes of this section.

(c) Any retailer who is in possession of property under the terms of a lease, which property is exempt from lien as provided in this section, may be required by the manager to make return of and pay over taxes collected at more frequent intervals than monthly, or may be required to furnish security for the proper payment of taxes whenever the collection of taxes appears to be in jeopardy.

(d) The extension herein contained of the preexisting right of distress to tangible personal property of the taxpayer shall apply to tax obligations in default at the time of the passage of this amendment and the existing liens created by Ordinance No. 438, Series of 1964, and Ordinance No. 667, Series of 1981, shall continue to apply, subject to the limitations in this article contained. A sale at retail from a stock of merchandise in the regular course of business shall release the item sold from the lien created by this section, but newly acquired merchandise shall come and remain under such lien until sold at retail or until the tax is paid.
(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, § 27, 12-3-84)

Secs. 53-128, 53-129. Reserved.

Sec. 53-130. Release of lien.

Upon application to the manager by a party in interest, any lien for taxes shown on the records of

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the county clerks and recorders recorded or filed as herein provided shall, upon the payment of all taxes, penalties, and interest covered thereby, be released by the manager in the same manner as mortgages or judgments are released.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-131. Sale upon distraint.

(a) *Causes.* The manager may issue a warrant directed to any employee, agent or representative under the control of the manager, the manager of safety, or the sheriff of the city, sometimes in this section referred to collectively as "agent," commanding the agent to distrain, seize and sell the goods, merchandise, furniture and fixtures, tools and equipment of, or used by the taxpayer, except such personal property as is exempted from execution and sale by any statute of the United States, for the payment of the tax due together with penalties and interest accrued thereon and cost of execution upon the happening of any one of the following:

(1) When any deficiency in tax is not paid within thirty (30) days from the manager's final decision thereon and no petition for review from such decision has been filed with the district court for the second judicial district within the period of time allowed by law for such review; or

(2) When any amount of tax, penalty, or interest is not paid within ten (10) days from the mailing or personal service of demand for payment thereof and no protest thereof has been filed with the manager within said period; or

(3) Immediately upon making of a jeopardy assessment or of the issuance of a demand for payment, as provided in this section.

(b) *Service of notice, etc., on taxpayer.* The agent charged with the collection shall make or cause to be made an account of the property distrained, a copy of which, signed by the agent making such distraint, shall be left with the owner or possessor of the property, or with some member of such person's family over the age of eighteen (18) years, or at the person's usual place of business with the stenographer, bookkeeper or chief clerk, or, if the taxpayer is a corporation, with any officer, manager, general agent or agent for process, with a copy of said warrant stating the sum demanded; and said agent shall forthwith cause to be published a notice of the time and place of sale, together with a description of the property to be sold, in some newspaper of general circulation within the city or, in lieu thereof and in the discretion of the manager, the agent shall cause such notice to be publicly posted at the Denver courthouse, copies thereof to be posted in at least two (2) other places within the city; and the taxpayer and those having possession of, or of public record a security interest in, the property shall be notified of the time and place of sale either in person or by certified mail. The time fixed for the sale shall not be less than nine (9) days nor more than sixty (60) days from the date of such notification.

(c) *Management of sale.* Said sale may be adjourned from time to time by said agent if he deems it advisable, but for a time not to exceed in all ninety (90) days from the date first fixed for the sale. When any property is advertised for sale under distraint as aforesaid, the agent making the seizure shall proceed to sell such property at public auction, offering the same at not less than a fair minimum price, including the expenses of making the seizure, storing the property, and of advertising the sale, and if the amount bid for the property at the sale is not equal to the fair minimum price so fixed, the agent conducting the sale may declare the same to be purchased for the city. The property so purchased may be sold by the agent under such terms as the manager may approve or declared to be surplus property subject to disposition by the manager of general services. In any case of distraint for the payment of taxes, the property so distrained shall be restored to the owner or possessor if, prior to the sale, the amount due is paid together with the fees and other charges, or the property may be so redeemed before sale by any person having a legal or equitable interest in the property.

(d) *Certificate of title; return of surplus.* In all cases of sale, the agent making the sale shall issue a certificate of sale to each purchaser, and such certificate shall be prima facie evidence of the right of the agent to make such sale and conclusive evidence of the regularity of the proceedings in making the

sale and shall transfer to the purchaser all right, title, and interest in and to the property sold. Any surplus remaining above the taxes, penalties, costs, and expenses of making the seizure, storing the property, and of advertising the sale, shall be returned upon demand made within one year from the sale to the owner, or such other person having a right thereto.

(e) *Filing of notice of lien.* Any agent to whom warrant has been issued may serve a notice of lien in such form as the manager may prescribe with the person in possession of any personal property or rights to property, without regard to its use in the business of the taxpayer, belonging to the taxpayer or file said notice with the county clerk and recorder of any county in the state in which the taxpayer owns tangible personal property, and the service or the filing of such notice shall operate to perfect a lien upon such personal property or rights to property and constitute notice thereof from the date of such filing. The manager may release said lien as to any part or all of the property or rights to property covered by any such lien upon such terms as he may deem proper.

(f) *Action for unlawful seizure.* The manager may be made a party defendant in an action at law or a suit in equity by any person aggrieved by the unlawful seizure or sale of property in which the person has a legal or equitable interest, but only the people of the city shall be responsible for any final money judgment secured against said manager; and said judgment shall be paid or satisfied as provided by Section 24-10-113, C.R.S., upon presentation by the judgment creditor to the manager of two (2) certified copies of said final judgment.

(g) *When collection in jeopardy.* If the manager finds that collection of the tax will be jeopardized by delay, in his discretion, he may declare the taxable period immediately terminated, determine the tax, and issue notice and demand for payment thereof, and, having done so, the tax shall be due and payable forthwith, and the manager may proceed immediately to collect such tax by distraint, levy and sale, or as otherwise provided in this section. Collection by seizure and sale may be stayed if the taxpayer gives such security for payment as shall be satisfactory to the manager.
(Ord. No. 667-81, §1, 12-14-81; Ord. No. 637-84, § 28, 12-3-84)

Sec. 53-132. Recovery of unpaid tax by action at law.

(a) The manager may also either before or after having exhausted the remedies provided for collection hereinabove, treat any such taxes, penalties, or interest due and remaining unpaid, as a debt due the city from the vendor. In case of failure to pay the taxes, or any portion thereof, or any penalty or interest thereon, when due, the manager may recover at law the amount of such taxes, penalties, and interest in any county or district court having jurisdiction of the amounts sought to be collected in the county wherein the taxpayer resides or has his principal place of business. The return of the taxpayer or the assessment made as provided in this article by the manager shall be prima facie proof of the amount due.

Such actions may be actions in attachments and writs of attachment may be issued to the sheriff, and in any such proceeding no bond shall be required of the manager, nor shall any sheriff require of the manager an indemnifying bond for executing the writ of attachment, or writ of execution upon any judgment entered in such proceedings; and the manager may prosecute appeals in such cases without the necessity of providing bond therefor.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-133. Manager may waive penalty.

The manager alone is hereby authorized to waive, for good cause shown, any penalty assessed as in this article provided, and interest imposed in excess of twelve (12) per cent per annum shall be deemed a penalty.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-134. Notices to be sent by registered or certified mail.

All notices or other information required to be given to the taxpayer in writing under the provi-

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sions of this article if mailed postpaid by registered or certified mail to the last known address of the taxpayer, after reasonable inquiry of such address, shall be deemed complete and effective upon and as of the posting of the same in the mails of the United States Postal Service. Filing by the taxpayer shall be deemed complete upon mailing to a personal service on the manager of revenue.
(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, § 29, 12-3-84)

Sec. 53-135. License and tax in addition to all others.

The license required and the tax levied by this article shall be in addition to all other licenses required and taxes levied by law except as herein otherwise provided. No delinquency in payment and no violation of this article shall be grounds for the suspension or revocation of any license issued to any person engaged in business within the city by any official of the city under any licensing provisions of the Code or other ordinances, neither shall the same be grounds for the suspension or revocation of any state license issued by any licensing authority pursuant to the statues of the state.
(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, § 30, 12-3-84)

Sec. 53-136. Statute of limitations.

(a) Except as provided in this section and unless such time is extended by waiver, the amount of the tax levied by this article and the penalty and interest applicable thereto shall be assessed within three (3) years after the return was filed, and no assessment shall be made or credit taken and no notice of lien shall be filed, or distraint warrant issued, or suit for collection instituted, or any other action to collect the same commenced after the expiration of such period.

(b) For purposes of this section, a tax return filed before the last day prescribed by law or by regulation promulgated for the filing thereof shall be considered as filed on such last day.

(c) In the case of failure to file a return or the filing of a false or fraudulent return with intent to evade tax, the tax together with penalty and interest may be assessed and collected at any time.

(d) Where, before the expiration of the time prescribed in this section for the assessment of tax, both the manager and the taxpayer have consented in writing to an assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. No lien shall continue under this article beyond the period provided for assessing the tax unless taxes have been assessed within the period, as it may be extended, and the lien shall then continue for one year only after the expiration of any such period, unless otherwise specifically provided in this article.
(Ord. No. 667-81, § 1, 12-14-81; Ord. No. 637-84, § 31, 12-3-84)

Sec. 53-137. Expiration of use tax.

The city use tax article shall continue until the adoption of a new ordinance to the contrary.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-138. Violations; evasion of collection or payment of tax.

(a) It shall be a violation of this article for any retailer or vendor to refuse to make any return required to be made by this article, or to make any false or fraudulent return, or any false statement in any return, or to fail or refuse to make payment to the manager of any taxes collected or due the city, or in any manner to evade the collection and payment of the tax, or any part thereof, imposed by this article, or for any person or purchaser to fail or refuse to pay such tax or evade the payment thereof, or to aid or abet another in any attempt to evade the payment of the tax levied by this article. Any corporation making a false statement shall be guilty of a violation of this article and such violation shall be applicable to officers, agents, or members thereof who are responsible for the violation.

(b) Any person who shall violate any of the provisions of this article so stated to be a violation thereof shall be guilty of a violation of this article. The violation of this article by any person shall be unlawful and subject to the penalties imposed by section 1-13, "Penalty," of this Code. Each and every twenty-four (24) hours continuous of any

violation shall constitute a distinct and separate violation for penalty purposes.
(Ord. No. 667-81, § 1, 12-14-81)

Secs. 53-139—53-145. Reserved.

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DIVISION 2. RETAIL LICENSE*

Sec. 53-146. Required.

(a) No person shall engage in the business of selling within the city at retail without first obtaining a city retail sales license from the director of excise and licenses in accordance with the provisions of article I of chapter 32; provided, however, that licenses previously issued are validated hereby and shall remain in force for the applicable period unless revoked as provided in this article.

(b) The license fee for the city retail sales license shall be as set out in section 32-107.

(c) An application for a city retail sales license and renewals of the same shall be made in accordance with the provisions of article I of chapter 32. In instances in which the business of selling at retail is conducted or transacted at two (2) or more separate locations by one person, separate licenses for each location of said business shall be required.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-147. Application.

No application shall be acted upon by the director of excise and licenses unless the application is approved by the manager.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-148. When not required.

No license shall be required for any person engaged exclusively in the business of selling commodities which are exempt from taxation under this article.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-149. Revocation.

(a) The city retail sales license shall be revoked by the director of excise and licenses upon the written request of the manager only after notice and hearing as provided in article I of chapter 32.

(b) No delinquency in payment of the tax herein provided for and no violation or conviction for a violation of this article shall be grounds for the suspension or revocation of any license issued to any person engaged in business within the city by any official of the city under any licensing provisions of the Code or other ordinances, nor shall the same be grounds for the suspension or revocation of any other license issued by any licensing authority pursuant to the statutes enacted by the General Assembly of Colorado.
(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-150. Appeal from manager's order.

Any finding or order of the director of excise and licenses made pursuant to article I of chapter 32 revoking the city retail sales license of any person or denying the licensing of any person engaged in the business of selling at retail shall be subject to review in the district court of the second judicial district of the state upon application of the aggrieved person, and the procedure for review shall be in accordance with that set forth in Rule 106(a)(4) of the Colorado Rules of Civil Procedure, as they may be amended from time to time and as any substitutionary provision may be made for review in the nature of certiorari. The decision of the district court may be reviewed in accordance with the Colorado Appellate Rules.
(Ord. No. 667-81, § 1, 12-14-81)

Secs. 53-151—53-165. Reserved.

ARTICLE IV. LODGER'S TAX

DIVISION 1. GENERALLY

Sec. 53-166. Name of tax.

This article shall be known and cited as the city lodger's tax article.
(Code 1950, § 166B.1)

Sec. 53-167. Legislative intent.

(a) It is hereby declared to be the legislative intent of the city council that for the purposes of this article, every person who purchases in the city any lodging is exercising a taxable privilege.

(b) It is hereby declared to be the legislative intent of the city council that, for the

*Cross reference—Licenses generally, Ch. 32.

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purposes of this article, every vendor who shall make a sale of lodging to a purchaser in the city, shall collect the tax imposed by this article to the total purchase price charged for such lodging furnished at any one time by or to every customer or buyer, in the manner set forth in this article.
(Code 1950, § 166B.3)

Sec. 53-168. Purpose of tax.

The council declares that the purpose of the levy of the tax imposed by this article is for the raising of funds for the payment of the expenses of operating and improving the city, and, in accordance with this purpose, eighty-five (85) per centum of the proceeds of the tax shall, after apportionment, become a part of the general fund of the city, and the remaining fifteen (15) per centum of the proceeds of the tax shall be allocated, apportioned, and transferred as provided in the fund plan from the unapportioned sales, use and lodger's tax account to the Denver Convention and Visitors' Bureau; provided, however, that the distribution of the tax shall be reevaluated in the future with regard to the possible financing of an expansion of the convention facilities of the city.

(1) The Denver Convention and Visitors' Bureau shall annually, on March first of each year, submit a report to the mayor and city council, which report shall contain an account of the bureau's program activities for the prior calendar year in sufficient detail to determine the benefits accruing to the city from the public funds expended. The report shall also describe current year program changes and revised performance projections as well as major changes projected for the ensuing calendar year.

(2) On or before July first of each year, the Denver Convention and Visitors' Bureau shall submit a budget, supported by program plans, for the ensuing calendar year to the mayor and city council. The budget so submitted shall follow the format prescribed by the city budget and management office for the city departments and agencies.

(Code 1950, § 166B.14; Ord. No. 9-81, § 1, 1-12-81; Ord. No. 579-81, § 2, 11-9-81; Ord. No. 553-83, § 1, 10-11-83)

Sec. 53-169. Administration of article; rules and regulations.

Excepting those provisions of this article concerning licensing specifically referring to the director of excise and licenses, the administration of this article is hereby vested in and shall be exercised by the manager of revenue, or the duly authorized representative thereof, who may prescribe forms and make reasonable rules and regulations in conformity with this article for the making of returns, the ascertainment, assessment and collection of the tax imposed under this article, and for the proper administration and enforcement thereof.
(Code 1950, §§ 166B.7-6, 166B.13)

Cross reference—Rules and regulations generally, § 2-91 et seq.

Sec. 53-170. Definitions.

The following words and phrases, when used in this article, shall have the meanings respectively ascribed to them:

(1) *Gross taxable sales* means the total amount received in money, credits, property or other consideration valued in money from sales and purchases, of lodging, subject to the tax imposed in this article.

(2) *Lodging* shall mean the transaction of furnishing rooms or accommodations by any person, partnership, association, corporation, estate, receiver, trustee, assignee, lessee, or any person acting in a representative capacity or any other combination of individuals by whatever name known to a person, or persons who for a consideration, uses, possesses, or has the right to use or possess any room or rooms in a hotel, apartment hotel, lodging house, motor hotel, guest house, guest ranch, mobile home, auto camps, trailer courts and parks, under any concession, permit, right of access, license to use or other agreement, or otherwise.

(3) *Person* means an individual, partnership, society, club, association, joint stock company, corporation, estate, receiver,

DEPARTMENT OF REVENUE

CITY AND COUNTY OF DENVER

RULES REGARDING THE ASSESSMENT AND COLLECTION OF SALES AND USE TAXES ON SALES AND USE OF TANGIBLE PERSONAL PROPERTY ACQUIRED BY CONSTRUCTION COMPANIES

The following rules and regulations are promulgated in accordance with the requirements of Article 123 of the Denver Revised Municipal Code (1950 compilation, as amended) and by virtue of the authority vested in the Manager of Revenue by Articles 166 and 166A of said Code.

1. Any person that performs work in accordance with an agreement, oral or written, on real property for another falls within the terms "contractor" and "construction company" as those terms are used in this regulation. The terms are intended to include all building constructors, excavators, highway and road constructors, electrical, plumbing, and heating constructors, and others engaged in the construction, reconstruction, repair, or wrecking of any physical structure that is part of real estate.

2. Construction companies that purchase in the City tangible personal property that is to be incorporated into a building or structure by them pursuant to agreement shall be regarded for the purposes of applying the City Retail Sales Tax Article (Article 166 of the Denver Revised Municipal Code) as purchasers or consumers after a retail sale, and, therefore, personally liable for the payment of the Sales Tax to the vendor of said personal property

(herein sometimes called "materials"). Further, unless the Sales Tax has been paid, construction companies must pay the Use Tax imposed by Article 166A of the Denver Revised Municipal Code on the storage, consumption or use of all materials purchased for construction jobs if the storage, use, or consumption of the materials is to be within the City. The construction company must pay the Sales or Use Tax directly to the vendor of the materials if the vendor is licensed and authorized to collect and return such tax to the City; however, if the vendor is not so licensed and authorized, then the construction company or contractor shall pay the tax directly to the Manager of Revenue and file a consumer's use tax return.

3. All purchases of tools or equipment within the City are subject to the Sales Tax Article, and all tools or equipment used or stored within the City are subject to the Use Tax Article. The prior use or storage in another jurisdiction of such property brought into the City shall not diminish the Use Tax liability to the City except that 1) it shall be reduced pro rata to the extent that a sales tax has been paid to the City or another municipality or county within the State of Colorado based on the purchase price of the property and 2) the Use Tax liability to the City shall be measured by the cost or fair market value, whichever is lower, of the property at the occasion only of its first use or storage in the City.

4. Any person who contracts services including use of machinery or equipment at an hourly, daily, or other periodic rate is presumed to be a lessor of tangible per-

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sonal property and must collect the Sales or Use Tax on the fees charged for the use of such machinery and equipment. If the charge for the operator or operators of the equipment or machinery is not segregated from the rent for the hire of the machinery or equipment, the measure of the tax will be the total fee charged. Contractors who contract their services including use of machinery or equipment on a lump sum job basis are required only to pay the sales or use tax upon the cost of the machinery or equipment used in their contracting operations in Denver.

5. Because the contractor is deemed to be the consumer of the materials used in construction, the contractor may not avoid the payment of the Sales or Use Tax by use of provisions in the construction agreement or by use of the name of a tax-exempt entity in an invoice or purchase order as the purchaser, whether or not the contractor is indicated thereon as the agent of such tax exempt entity. No exemption certificate issued by the State Department of Revenue or any other taxing authority will be recognized as a basis for exemption from the Sales or Use Taxes levied by the City against construction companies.

6. A vendor or retailer that also acts in the capacity of a construction company must remit the tax on materials removed for use in its construction jobs from its own stock of goods held for sale, and must base the tax on the retail market value at the retail business location of the vendor of the materials so withdrawn.

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7. Sales of stoves, refrigerators, washing machines, clothes dryers, storm windows, storm doors, patio covers, carpeting, fencing, prefabricated swimming pools, lawn sprinkling systems, nursery stock, desert landscaping materials, sod, and other completed units of personal property to be affixed to, installed in or used in conjunction with a structure and which can be removed without substantial damage to the structure and which can be removed without altering the functional use of the structure shall not be regarded as work performed by a contractor. In such cases, the tax will be collected from the purchaser by the vendor, and the contractor may act as agent for a purchaser other than the contractor involved.

In the event a vendor of an appliance such as those named above should contract and charge for services necessary to the installation of the item, and the installation or service charges should be indicated separately in the purchase order or agreement pertaining to the installation of the item, the Sales or Use Tax will be imposed only on the purchase price of the item; on the other hand, if installation charges are not separately stated from the purchase price of the appliance or similar item, the tax will be calculated based upon the total price of the purchase order or agreement. For the purpose of this paragraph, an invoice may be considered to be a purchase order.

8. Under customary circumstances, a City Retail Sales License will not be issued to a construction company because it is presumed to be the user or consumer of the tangible personal property acquired by it for use in fulfilling construction agreements.

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9. The provisions of the Sales and Use Tax Articles pertaining to construction companies are equally applicable to subcontractors.

10. Construction companies that manufacture the materials or other items of tangible personal property that are to be incorporated into a structure in the fulfillment of an agreement of the construction company shall be liable under the Sales or Use Tax Articles to the same extent as other contractors are liable with the following exception: if a manufacturer-contractor manufactures or compounds the items to be incorporated or installed in a structure, the tax shall be measured by the purchase price at retail of the item involved less any profit that would ordinarily be derived from the retail sale thereof by the manufacturer-contractor. This paragraph is inapplicable to a manufacturer that has not within the year prior to the use of the item in question sold a similar manufactured item at retail, as, for example, sold it to a contractor.

11. Sales within the City of tangible personal property to be delivered and used outside the City by a construction company may be tax exempt if delivery of the property is made to the business address or place of proposed use outside the City of the construction company by common carrier, by a truck owned and used by the vendor for delivery of such materials, or if the materials are mailed to the outside address.

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12. A construction company, including a company that sells construction materials, acquiring, or withdrawing from its own stock, materials within the City strictly for use in its construction work in a municipal or county jurisdiction within Colorado in which a use tax a) is collected by that jurisdiction in advance of the purchase of materials and b) is based upon an estimate made at the time a building permit is obtained from that jurisdiction for the work, shall receive pro rata credit, based upon the rates of levy, for the use tax already paid against the Sales or Use Tax liability imposed by the City, to the extent the foreign tax rate does not exceed the rate levied by the City. In order for any credit to be given, however, the property acquired or withdrawn from stock must actually be used in the municipal or county jurisdiction first collecting a use tax on the basis of the estimate made at the time the building permit is obtained. Further, in order to claim the credit, the construction company must consent in writing at the time of sale on a form provided to vendors by the City to an audit of the business records of the construction company by the City within three years immediately following the sale.

SO ORDERED BY THE MANAGER OF REVENUE.

Jerry C. Kempf
Manager of Revenue

Approved by the City Attorney this 22nd day of

ADDENDUM B-6

February, 1982.

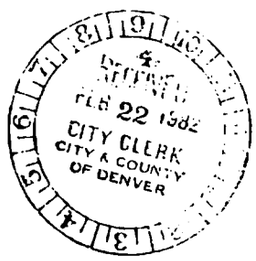
MAX P. ZALL
City Attorney

By Donald E. Wilson
Donald E. Wilson
Assistant City Attorney

Published in The Daily Journal, a daily newspaper of general circulation in the City and County of Denver, on the _____ day of _____, 1982.

William P. Harrison
Editor

ADDENDUM B-7



DEPARTMENT OF REVENUE EXHIBIT 4

CITY AND COUNTY OF DENVER

RULES REGARDING THE ASSESSMENT AND COLLECTION OF SALES AND USE TAXES ON THE SALES AND USE OF NEWSPAPERS AND OTHER PUBLICATIONS

The following rules and regulations are promulgated in accordance with the requirements of Article 123 of the Denver Revised Municipal Code (1950 compilation, as amended), and by virtue of the authority vested in the Manager of Revenue by Articles 166 and 166A of said Code.

1. The sale and purchase, or use, of all written publications, including newspapers, magazines, catalogues, books, directories, maps, newspaper clipping and mailing service or listings, revision services, and trade journals, are subject to taxation under the City Retail Sales Tax Article, Article 166 of the Denver Revised Municipal Code, or the City Use Tax Article, Article 166A of the Denver Revised Municipal Code. Sales-for-resale of such publications to vendors a) who are licensed as retailers pursuant to said Sales and Use Tax Articles and the 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 publications shall be presumed to be retail sales on which the publisher or vendor must collect and remit the Sales Tax, or, in the case of a publisher outside the City, after which

a Use Tax must be paid on the privilege of use of the publication in the City. The presumption may be rebutted by such reasonable proof as the Manager deems adequate.

2. Sales of newspapers by publishers or licensed retailers to independent news carriers or other independent distributors who are neither licensed as retailers by the City nor selling their publications from commercial locations shall be presumed similarly to be sales at retail and taxable transactions. The tax in such case shall be measured by the purchase price paid by the news carrier or distributor to the publisher or licensed retailer. The term "news carriers" as used herein shall mean those persons delivering or hawking newspapers on regularly established routes or at random locations.

3. In cases in which a publication is delivered or sent to a subscriber in the City as a result of a subscription to the publication being sent to a publisher located outside the City, but having commercial and tangible contacts with the City, the use of the publication within the City is subject to the Use Tax, and the publisher is required to obtain a City Retail Sales License and collect the tax and return it to the City. If, however, the publication is printed in the City and delivery is made out of the City by mail, common carrier, or the publisher's truck, the transaction is not taxable.

4. The distribution of newspapers, trade journals, advertising pamphlets, circulars, leaflets, and similar items, which are distributed free of charge by any means, such as car-to-car or house-to-house delivery, or by being included in and distributed as part of a newspaper, are exempt from the Sales and Use Taxes. However, a tax must be paid by the advertiser or distributor, or whoever pays for the preparation and printing of the publication, because the

advertiser, distributor, etc., is presumed to be the user and consumer of the publication after the retail sale thereof. If the printer is licensed as a retailer by the City, the tax must be collected by the printer. If the printer is not licensed by the City, the purchaser must pay the tax to, and file a consumer's use tax return with, the City directly.

5. Publishers or printers of circulars, trade journals, etc., who themselves through their employees or agents distribute them free-of-charge must pay a tax but only based on the purchase price of the items used in the publication, such as printers ink, paper, and so forth, for the publishers or printers are, in those cases, the ultimate consumers of the items used in publishing the circulars, trade journals, etc., and the publication is not thereafter sold at retail. If the carrier receives as compensation the total amount charged by the publisher to the purchaser, the distribution shall be considered a free handout by the publisher or printer thereof.

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 equivalant to 3% of gross sales made through vending machines.

7. All sales of publications by persons exempt from taxation, except the federal and state governments and their agencies, are taxable to the same extent as sales by non-exempt persons.

8. Sales at retail of post cards or envelopes which have printed material added by a printer after having been

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acquired by or on behalf of the printer from the United States Postal Service are taxable, but the purchase price upon which the tax is based shall have deducted therefrom the postage.

9. Persons rendering services consume, many times, tangible personal property incidentally to rendering services. The Sales Tax and, where applicable, the Use Tax apply to the sale or use of such tangible personal property. If these persons rendering services, also sell tangible personal property to their customers, they become retailers with respect to such sales and must obtain the Retail Sales License, collect taxes on such sales, file returns of taxes collected, and remit the taxes as measured by the purchase price of their sales.

10. In determining whether a transaction involves the sale of tangible personal property, or the performance of a service with a transfer of tangible personal property only occuring incidentally to the performance of the service, the Manager will examine the transaction from the purchaser's point of view. If the essence of the transaction is, from the purchaser's point of view, the acquisition of service, as such, the transaction or the use after sale, is not taxable even though some tangible personal property is incidentally transferred with the performance of the service. However, if a service is performed in the production of tangible personal property, and if the essence of the transaction, from the customer's point of view, is the acquisition of the tangible personal property, the transaction, or use after sale, is taxable.

For example, the transfer of an original manuscript by the author thereof for a price to a publisher would not be subject to the tax in ordinary circumstances. The author is the real consumer of the paper constituting the manuscript, and the author would, therefore, pay a tax to his supplier based on the purchase price of the paper, ink, typewriter, etc. The publisher is interested in acquiring a service, i.e., the ideas of the author, not the paper itself. The publisher, then, would not pay a tax based on the price of the manuscript. A tax would, of course, apply to the sale of copies of the book published from the manuscript and transferred for a price by the publisher or another vendor. So also, the tax would apply to a sale of the manuscript itself if the manuscript, perhaps by reason of historic interest, was the item of tangible personal property of primary interest to the purchaser. Similar examples could be given regarding paintings, maps and subscription services for such information as petroleum well data, logs, etc., even if the medium of publication were other than paper, as, for example, magnetic tape.

11. When a transaction is regarded as a sale of tangible personal property, the tax applies to the purchase price transferred from the purchaser, or customer, to the retailer, or seller, without any deduction for the work, labor, skill, thought, or other element of expense incurred in producing the tangible personal property.

SO ORDERED BY THE MANAGER OF REVENUE.

Jerry C. Kempf

Approved by the City Attorney this 22nd day of February, 1982.

MAX P. ZALL
City Attorney

By Donald E. Wilson
Donald E. Wilson
Assistant City Attorney

Published in the Daily Journal, a daily newspaper of general circulation in the City and County of Denver, on the _____ day of _____, 1982.

William P. Harrison
Editor

ADDENDUM B-13

DEPARTMENT OF REVENUE

CITY AND COUNTY OF DENVER

RULES PERTAINING TO DATA PROCESSING SERVICES AND EQUIPMENT

A. Introduction

Persons rendering services consume, many times, tangible personal property incidentally to rendering services. The City Retail Sales Tax and, to the proper extent, the City Use Tax apply to the sale of such tangible personal property to those persons. If these persons, in addition to rendering services, regularly sell tangible personal property to their customers, they become retailers with respect to such sales and must obtain the Denver Retail Sales License, file returns of taxes collected, and remit the tax as measured by the purchase price of their sales.

In determining whether a transaction involves the sale of tangible personal property, or the performance of a service with a transfer of tangible personal property only incidentally to the performance, one must examine the transaction. If the essence of the transaction is, from the purchaser's point of view, the acquisition of a service, as such, the privilege of engaging in the transaction is not taxable even though some tangible personal property is incidentally transferred with the performance of the service. However, if a service is expressed in the form of tangible personal property, which property may be transferred for a price, and if the essence of the transaction, from the customer's point of view, is

to acquire the tangible personal property, the transaction is taxable.

For example, the transfer of an original manuscript by the author thereof for a price to a publisher would not be subject to the tax in ordinary circumstances. The author is the real consumer of the paper constituting the manuscript, and the publisher is interested in acquiring a service, i.e., the ideas of the author, not the paper itself. The tax would, of course, apply to the sale of copies of the book published from the manuscript and transferred for a price. So also, the tax would apply to a sale of the manuscript itself if the manuscript, perhaps by reason of historic interest, was the item of tangible personal property of primary interest to the purchaser. Similar examples could be given regarding paintings and sculptures with the question turning ordinarily upon whether the work was commissioned by the customer or acquired by the customer at an art gallery.

When a transaction is regarded as a sale of tangible personal property, the tax applies to the purchase price transferred from the purchaser, or customer, to the retailer, or seller, without any deduction for the work, labor, skill, thought, or other element of expense incurred in producing the tangible personal property.

B. Definitions of Terms

1. Systems Programs: programs that operate or control automatic data processing equipment, being fundamental to the functioning of the equipment itself.
2. Applicational Programs: programs created to instruct the automatic data processing equipment in performing

functions necessary to solving problems, including monitoring, but not including programs for automated drilling, milling, or other machining work.

3. Custom Programs: applicational programs specially prepared or designed to meet the need or order of a customer where the order or need is unique to a particular function of the customer.
4. Canned Programs (such programs may be referred to as "pre-written"): programs prepared or existing for general applicability to solving problems of or for repeated use by, the customer, including all systems programs and including, also, those canned programs that must be modified, adapted, or tested in order to meet the customer's needs, but only if the charge for the modified, adapted or tested program is not greater than twice the price or consideration paid for the unmodified, unadapted, and untested pre-written program. A canned program is every applicational program that is not a custom program.
5. Input: the data to be transferred from storage devices or media (e.g, punched cards, magnetic tapes) or other external source into the internal storage of the computer.
6. Output: data transferred from the computer to external storage devices or media or tabulated listings, microfilm, printed material, etc.
7. Service Bureaus: businesses rendering automatic data processing services.
8. Other words and phrases, such as tax, purchaser, price, automatic data processing equipment, and so forth, shall have the meanings given in the Retail Sales Tax Article, City Use Tax Article, or in customary usage, unless the

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context clearly indicates another meaning.

C. Miscellaneous Services

Service bureaus often train personnel of the customer or purchaser. In so doing, the service bureau consumes some tangible personal property, taxable at that level, but makes a retail sale only of the books and manuals that it provides to the customer or its personnel for a separate charge. Activities such as determining equipment and personnel needs for implementing data processing, determining what system of communications and input-output terminals are required, studying a customer's needs for automatic data processing, and determining what benefits would be derived if problem-solving were automated, are considered non-taxable services, unless they are included in the price, rental or fee, charged for the data processing equipment itself.

If training and maintenance services are sold with electronic data processing equipment as an inseparable part of the sale, charges for the services are included in the tax base. If the customer has the option to acquire the equipment without the services, the charge for the service is not part of the tax base.

D. Manipulation of Customer Data

Processing of customer-furnished data, i.e. developing original data from unprocessed data, such as sales receipts, furnished by the customer to a service bureau is generally not subject to tax. However, the tax generally applies to the price for conversion of customer-furnished, processed data from one physical form of recordation to another physical form of recordation, including key punching and keystroke

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verification, imprinting for the input medium to an optical recognition system; reformating of data, performing an edit routine, other preprocessing, and using a computer merely for the preparation of repetitious printed material.

The tax also applies in instances in which a service bureau transfers to its customer printed material, such as labels and membership cards (other than those prepared from source material furnished by the customer).

No tax is due when the service bureau contracts to process the customer's raw data and the output is intelligible in Hindu-Arabic numerals or Indo-European languages, as in microfilm or tabulated, printout forms transferred to the customer.

The tax applies to the price paid by the customer for copies in excess of those produced simultaneously with the original and on the same printer. If no separate charge is made for the additional copies, the tax shall be calculated by multiplying the retail job price by the ratio of the cost to the service bureau or other person of the additional services, labor and materials necessary to produce the additional copies to the total cost of the job. Charges for copies made by photocopying, microfilming, multi-lithing, or by other similar means are subject to the tax.

E. The tax applies to canned programs whether the right to possession and use of the device or medium used to

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convey the program passes to the customer or not, and regardless of the period of time during which the customer has the possession or use of the device or medium. The price, rental, or fee paid for canned programs are subject to the tax whether such price, rental, or fee is billed separately or included in the purchase price, rental, or fee paid for the use of the data processing equipment.

F. Custom Programs

The tax does not apply to the sale or use of custom programs.

BY THE ORDER OF THE MANAGER
OF REVENUE

Jerry C. Kempf
Jerry C. Kempf

Approved by the City Attorney this 30th day of July, 1980.

MAX P. ZALL
City Attorney

By Donald E. Wilson
Donald E. Wilson
Assistant City Attorney

Published in the Daily Journal, a daily newspaper of general circulation in the City and County of Denver, on the _____ day of _____, 1980.

William P. Harrison
Editor

ADDENDUM B-19

DEPARTMENT OF REVENUE

CITY AND COUNTY OF DENVER

RULES PERTAINING TO DATA PROCESSING SERVICES AND EQUIPMENT

Pursuant to the authority vested in the Manager of Revenue of the City and County of Denver, State of Colorado, by Articles 166 and 166A of the Denver Revised Municipal Code (1950 compilation, as amended) and in accordance with Article 123 of said Code, the Manager of Revenue hereby adopts as interim rules and regulations governing the levy, assessment, collection, and administration of sales and use taxes with regard to data processing services and equipment those certain rules pertaining to data processing services and equipment duly adopted, promulgated and published on or about the 5th day of August, 1980, a true and conformed copy of which, in form and content, is on file with the Manager of Revenue and with the Clerk and Recorder, Ex-Officio Clerk, of the City and County of Denver, in Room 200, City and County Building; and said Rules duly on file are incorporated by reference herein. Said rules shall be applicable until amended or superseded by rule or ordinance duly adopted or enacted hereafter.

SO ORDERED BY THE MANAGER OF REVENUE.

Jerry C. Kempf

Approved by the City Attorney this 22nd day of

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February, 1982.

MAX P. ZALL
City Attorney

By Donald E. Wilson
Donald E. Wilson
Assistant City Attorney

Published in The Daily Journal, a daily newspaper of general circulation in the City and County of Denver, on the _____ day of _____, 1982.

William P. Harrison
Editor

ADDENDUM B-21

names and addresses of its owners and editors, and is qualified as a medium for publishing legal notices.

Company news-sheets containing, primarily, information of company interest only, distributed by the company to its employees and its clients and owners are not newspapers and are not exempted from the sales or use taxes. This type of material is subject to tax measured by its purchase price. When purchased in Alabama, the printer will be required to collect the tax from the company. When purchased outside of Alabama, the tax will be required to be paid direct to the Department of Revenue by the company making the purchase.

Postage charges over and above the regular price for the publication, separately billed, for mailing to individual readers will not be required to be included in the measure of the tax. Act No. 100, Section 2(a); Section 40-23-2 (1). [Issued 1961.]

[¶ 20-847] Rule N5-013. **Newspapers, Sales of.**—Sales of newspapers are subject to sales tax except where made at wholesale to dealers licensed in accordance with the provisions of Section 4, Act No. 100, Second Special Session, Legislature of 1959 or when made to the United States, the State of Alabama or the counties or cities of the state.

Sales of newspapers made by publishers and licensed dealers to unlicensed independent newsboys will be, in all instances, subject to tax as retail sales, the tax to be measured by the gross proceeds of such sales.

The word *newsboys* as used herein shall be understood to mean street hawkers and newspaper routemen of all ages.

Newsboys who are itinerant vendors who have not filed with the Department of Revenue the bond required by the provisions of Section 22, Act No. 100, Second Special Session 1959, will not be licensed as dealers under said Act. [Issued November, 1959; reissued 1961, January 25, 1977.]

[¶ 20-848] Rule N15-011. **Nonresidents, Sales To.**—Sales to nonresidents are sales at retail subject to the tax even though such purchasers claim that the property purchased is for use outside Alabama, except where the *seller* agrees as a condition of the sale to ship the property outside of this state and does so ship the property. (Act No. 100, Section 3; Section 40-23-4(17).) [Issued January, 1951; reissued 1961.]

[¶ 20-848A] Rule N15-105. **Nonresident Vendor's Liability for Use Tax on Deliveries Made Outside Alabama.**—A nonresident vendor making a sale to a resident of Alabama is not required to collect Alabama use tax on goods delivered to the buyer at the place of business of the vendor located outside Alabama.

Nothing herein is to be construed as relieving a nonresident vendor of responsibility for collecting and remitting Alabama use tax on goods transported by him into Alabama or caused to be transported into Alabama by such vendor by common carrier, contract hauler, or the private transportation facilities of the vendor. [Issued August 13, 1953; reissued 1961.]

[¶ 20-848B] Rule N27-011. **Negatives.**—Gross receipts accruing from the retail sales of black and white negatives or color separations sold to printers to produce plates for offset printing are subject to the sales tax at the machine rate of one and one-half per cent (1½%) where sold for use as parts or attachments of machines used in manufacturing plates.

ADDENDUM C-1

(i) When the tax is not added on to the invoice charge made by the supplier, or the processor does not pay the amount of the tax to his supplier, as aforesaid, the processor is liable for the amount of the tax directly to the State Revenue Commissioner. In such case, the processor shall on or before the twentieth of the month following such purchase, file with the State Revenue Commissioner a use tax return showing all such transactions for that month and compute thereon and remit therewith the required tax.

[¶ 31-676] Rule 560-12-2.76. **Public Utilities.**—Public utilities, whether privately or publicly owned, shall collect the tax on sales of services, including gas, electricity, and steam, the furnishing of local telephone services, and the intrastate transportation of persons, except the sale of water delivered through pipes and mains is exempt. Public utilities shall also collect the tax on retail sales of tangible personal property sold in connection with the services, including stoves, refrigerators, other appliances, etc. [Amended January 13, 1975.]

[¶ 31-677] Rule 560-12-2.77. **Publishers.**—(1) Publishers of newspapers, magazines, periodicals, etc. are required to collect and remit the tax on sales to persons other than registered dealers. Publications sold by subscription are subject to the tax based on the subscription price.

(2) Charges for advertising in newspapers, magazines and periodicals are not subject to the tax.

(3) Industrial materials, including paper and ink, which become component parts of the publications for sale, or which are coated upon or impregnated into the product at any stage of processing, may be purchased tax exempt under Certificates of Exemption. However, publishers must pay the tax on other property used or consumed in the process, including supplies, machinery, equipment, photo engravings, mats, plates and lead.

[¶ 31-678] Rule 560-12-2.78. **Repairs and Alterations.**—(1) Replacement parts, materials, and supplies used or consumed by repairmen in repairing tangible personal property belonging to others are taxable either to the person performing the work or to the owner of the property being repaired, on the following basis:

(a) If the dealer performing the repair work does not state separately, itemize or segregate at a fixed or retail price the materials and supplies so used or consumed, the tax will apply to the total charge for such materials and labor.

(b) If the dealer performing the repair work does separate, itemize, and invoice at a retail selling price the parts, materials and supplies used, stating separately the amount for labor, the tax will apply to the retail selling price of the materials and supplies listed and itemized.

(2) The foregoing applies to dealers engaged in the business of upholstering and repairing motor vehicles, boats, watches, radios, furniture, electrical appliances, clothing, including fur coats, and other articles of tangible personal property.

(3) Dealers engaged in the business of repairing tangible personal property for others may purchase such property for resale under Certificates of Exemption.

(4) Repairmen who are not required by the Commissioner to register as dealers shall pay the tax to their vendors on all tangible personal property purchased by them. If purchases are made from nonregistered vendors, such

ADDENDUM C-2

CITY AND COUNTY OF DENVER

DEPARTMENT OF LAW
STEPHEN H. KAPLAN
CITY ATTORNEY

OFFICE OF CITY ATTORNEY
CITY AND COUNTY BUILDING
DENVER, COLORADO 80202
PHONE (303) 575-2665

FEDERICO PEÑA
Mayor

November 27, 1984

Hon. Sandra I. Rothenberg
District Judge
Second Judicial District
Courtroom 1
City and County Building
Denver, Colorado 80202

Re: Catholic Archdiocese of Denver, et al. v. City and County of Denver, et al., and The Denver Post Corporation, et al. v. City and County of Denver, et al., Actions Nos. 82-CV-2555 and 82-CV-9312, Courtroom 1

Dear Judge Rothenberg:

Please find enclosed for your review proposed Findings of Fact, Conclusions of Law, and Order of Judgment prepared on behalf of defendants in the above-referenced actions. By photocopies hereof, copies of the proposed Order are being sent to counsel of record in each case.

Sincerely,

STEPHEN H. KAPLAN
City Attorney

By _____
Donald E. Wilson
Assistant City Attorney

cc (with enclosure):

Eiberger, Stacy & Smith
Attention: Rodney L. Smith

Cooper & Kelley, P.C.
Attention: Thomas B. Kelley

Baker & Hostetler
Attention: Bruce D. Pringle

ADDENDUM D-1

CT. HM. 1 NOV 28 '84

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 82-CV-2555, Courtroom 1
Civil Action No. 82-CV-9312, Courtroom 1

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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; FRONTRANGE RECORD, 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; EARNEST ZACHMAN,

Plaintiffs,

v.

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

Defendants;

AND

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

Plaintiffs,

v.

CITY AND COUNTY OF DENVER and THOMAS P. BRIGGS, Manager of Revenue for the City and County of Denver,

Defendants.

THESE MATTERS having come before the court on October 3, 1984, for consolidated hearing on cross-motions for summary judgment in the action brought by the Catholic Archdiocese of Denver, et al.,

by Denver and in arguments to the court on October 3, 1984.

II. The Denver Sales and Use Tax Articles.

5. Until September 1982, the sales and use tax ordinances were codified in the 1950 Revised Municipal Code of Denver as Articles 166 (sales tax) and 166A (use tax). In 1982 by authority of Ordinance No. 250 the Denver Code was recodified so that the sales and use tax articles are now found as Article II, Chapter 53 (sales tax) and Article III, Chapter 53 (use tax). On June 9, 1982, when the Manager of Revenue conducted the hearing on the Denver Post and Rocky Mountain News petitions, the 1950 Code was in use. Neither the ordinances, the 1950 codification of the ordinances, nor the 1982 codification were put into evidence before either the Manager in the Denver Post and Rocky Mountain News matters or the court in the Catholic Archdiocese litigation. However, the articles as codified in 1950 are found as attachments in the pleadings before the court. The court will refer to the current codification unless otherwise indicated.

6. The findings herein are supported by the evidence before the Manager of Revenue on review in 82-CV-9312 or they are drawn from admissions in the pleadings, including exhibits.

7. Before January 1, 1982, Denver exempted the sale of newspapers from the sales and use taxes. In late 1981 Ordinances Nos. 666 and 667 were enacted eliminating effective January 1, 1982, various exemptions, including the one for newspapers.

8. Therefore, effective January 1, 1982, the Manager of Revenue was charged with the responsibility of collecting both

3. The court concludes that the regulation adopted by the Manager is a reasonable exercise of his authority under Denver Revised Municipal Code §§53-23 and 53-94, and that the City Council of Denver did not delegate its legislative power by enacting the sections giving the Manager power to issue such regulations.

4. The court concludes that the news carriers are engaged essentially in performing a service and are not selling newspapers as licensed retailers. The ordinances require every person engaging in the business of selling at retail within Denver to obtain a City Retail Sales License from the Director of Excise and Licenses. §§53-76(a) and 53-146(a). The taxes are imposed on the purchase price paid or charged upon all sales and purchases of tangible personal property at retail (§53-25) and by every person exercising the taxable privilege of using in the City an article of tangible personal property purchased at retail (§53-96).

5. The publishers and other plaintiffs do not contend that newspapers are not tangible personal property; therefore, the taxes, being generally applicable to all sales and uses occurring within the City and County of Denver apply unless the sale is otherwise exempt.

6. Wholesale sales are excluded by reason of the definitions found in Denver Revised Municipal Code §§53-25(17) and 53-95(21). In each section "wholesale sale" is defined to mean a sale by wholesalers to retail merchants, jobbers, dealers or other

wholesalers for resale. Because it is a violation of the Sales and Use Tax Articles for anyone to sell at retail without first obtaining a retail sales license (§§53-76 and 53-146), the news carriers, who are unlicensed, do not qualify for the exclusion provided by the wholesale clause.

7. The court concludes that the regulation implementing this application of the ordinances is a reasonable exercise of administrative discretion by the Manager.

8. The court further concludes that the sales and use taxes are levied as generally applicable, revenue-raising measures without the intent or purpose of discriminating or differentiating against or among retail merchants or their customers, and, in particular, against or among those selling newspapers. Therefore, because differential treatment of the press is not involved, Denver need not show a governmental interest of compelling importance outweighing any burden on the press to sustain the taxes against First Amendment challenges. The burden on the vendor of newspapers is no greater than that imposed upon the vendor of other items of tangible personal property.

9. The court expressly concludes that the trade usage in the publishing business of the word "wholesale" is different than the usage and definition found in the City Retail Sales and Use Tax Articles.

10. The court has considered the constitutional challenges set forth in both 82-CV-2555 and 82-CV-9312 and discerns no constitutional invalidity in either the ordinances or the regulation.

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ADMINISTRATIVE DECISION 84-6-B
STATE TAX DEPARTMENT, HERSCHEL H. ROSE III
COMMISSIONER

BUSINESS AND OCCUPATION TAX--NEWSPAPER PUBLISHERS--RETAIL SALES--Home delivery of a publishers newspaper by route carriers constitute "retail sales" sales of the publisher for business and occupation tax purposes. The contract between the publisher and the carrier is for delivery and debt collection rather than the establishment of a wholesale sale.

The taxpayer is a West Virginia corporation. Taxpayer's business activity is the publishing and sale of newspapers.

The issue in controversy relates to newspapers delivered by carriers to West Virginia consumers. As used here, the word "carrier" denotes someone who delivers a newspaper to the ultimate consumer. The Petitioner has two classes of carriers: (1) youth carriers and (2) motor route or adult carriers. Youth carriers make only home deliveries and do so on foot or bicycle. The motor route carriers make both home deliveries and single copy sales, and use a motor vehicle in their distribution. Single copy sales are those made to merchants and through vending machines known as "racks."

The taxpayer delivers the newspapers to the carrier's home or to a point near the carrier's route. If the number of newspapers delivered is short, the carrier can obtain the needed copies without charge. In any other case, when taxpayer delivers, the carrier is liable for the "wholesale" price of the newspapers. If the newspapers are stolen, destroyed or the carrier is unable to collect from a retail customer, the carrier is liable for the payment to the taxpayer.

The carrier also incurs liability if the taxpayer delivers the newspapers in his behalf. If a carrier fails to pick up his newspapers, or a customer complains to the taxpayer of non-delivery, the taxpayer's district sales manager will make the delivery. The carrier is charged for the delivered newspapers at the retail rate.

The taxpayer exerts no control over the carriers' method of delivery. The carriers are free to hire assistants or substitutes and can deliver material in addition to Petitioner's newspaper, provided the material does not appear to be a part of the newspaper. The carrier decides whether the newspapers are folded or wrapped with rubber bands. The carriers can buy carrier bags and rubber bands from the taxpayer but are under no duty to do so. The motor route carriers also have the option of buying or leasing racks for single copy sales.

The carrier may determine the retail price of the newspapers. In almost all instances, however, the carriers charge the "suggested" price published in the newspaper. The taxpayer cited one instance where a carrier charged a price different than the "suggested" price.

The "suggested" time for deliveries is 6:30 a.m., Monday through Saturday, and 7:30 a.m. on Sunday. It is to the carriers' advantage that

they deliver by the "suggested" time since the deadline for notifying taxpayer of short deliveries is 6:30 a.m. The possibility that the taxpayer will view a late delivery as a non-delivery also encourages promptness because the taxpayer might make the delivery and charge the carrier the retail amount.

The taxpayer ordinarily maintains no records of the carriers' routes. The carrier usually learns the route from his predecessor. In those instances when a replacement carrier is not available, the taxpayer does have a record of the route as the district sales manager makes the deliveries.

The taxpayer is involved in the carrier-customer relationship in several ways. The taxpayer provides free delivery tubes for motor route customers and provides receipt books to all carriers. The taxpayer also accepts new orders and pre-paid subscriptions for carrier delivery. New orders are assigned to carriers. Pre-paid subscriptions are retained by the taxpayer and credited to the carriers accounts on a bi-weekly basis. The pre-paid subscriptions are billed at the "suggested" retail price.

Taxpayer's relationship with the carriers is governed by the "Independent Carrier Agreement." This agreement is reproduced below:

_____ Route # _____

INDEPENDENT CARRIER AGREEMENT

THIS AGREEMENT is made on the ____ day of _____, 19__, at _____ _____ between _____ a corporation, hereinafter called "the Company" and _____ of _____ hereinafter called "the Carrier".

WHEREAS, the Company is the publisher of the _____, and the Carrier desires to engage in the independent business of purchasing the Company's newspapers and selling and distributing same, the parties therefore mutually agree as follows:

1. The Company agrees to furnish the Carrier with a delivery schedule, and the Carrier agrees to deliver complete newspapers to all points on such schedule.

2. The Company agrees to sell, and the Carrier agrees to purchase sufficient quantities of newspapers to cover the delivery schedule, together with such additional quantities of newspapers as the Carrier may require in conducting his independent business of selling and delivering the Company's newspapers.

ADDENDUM E-2

3. The Carrier agrees to pay the Company the balance due for all newspapers supplied or delivered to the Carrier on _____ at the then prevailing wholesale rates for such newspapers. The Company, upon 7 days notice, may change such rates in accordance with a general increase or decrease of said wholesale rates.

4. It is understood that the Carrier is free to engage in other business activities, but he agrees that the Company's newspapers will be delivered in a timely manner in accordance with said delivery schedule. The Carrier agrees that he will insert no foreign matter into such newspapers without the prior consent of the Company.

5. The Company and the Carrier agree that either party may terminate this Agreement upon fifteen (15) days written notice, or such shorter time as may be mutually agreed upon.

The _____

FOR THE COMPANY _____

ADDRESS _____

DATE _____

CARRIER _____

ADDRESS _____

DATE _____

_____
(Circulation Director)

SURETY BOND
(If Carrier is a Minor)

I, the undersigned, being the parent or guardian of _____, who is a minor, certify that he has my full permission to enter into this Independent Carrier Agreement. I agree to be responsible for the performance of his obligations under this Agreement, and to pay or cause to be paid all monies owned to the Company by him hereunder.

DATE _____

_____
(PARENT OR GUARDIAN)

The sole issue presented is whether the taxpayer is making a wholesale sale of its newspapers to its carriers. If the taxpayer is making a wholesale sale, then it will be taxed solely as a manufacturer, under W. Va. Code § 11-13-2b, on the wholesale amount. If the taxpayer is deemed not to be making a wholesale sale, it will be deemed to making a retail sale, and will be taxed as both a manufacturer and a retail seller, under W. Va. Code §§ 11-13-2, 11-13-2b and 11-13-2c.

The Business Tax Division argues that the retail sales made by the carriers are attributable to the taxpayer as a result of an agency relationship. It further contends that, even if the carriers are independent contractors, the taxpayer-carrier contract is not one for the sale of newspapers but merely for their delivery.

The taxpayer denies the existence of an agency relationship. It maintains that it fails to exert sufficient control over the carriers' activities for an agency relationship to be established. Taxpayer also denies contracting with the carriers solely for the purpose of delivery. It contends that the carriers have valid sales contracts with the taxpayer.

The terms "selling at wholesale" and "wholesale" sales are defined in West Virginia Code § 11-13-1 to include "sales of any tangible personal property for the purpose of resale in the form of tangible personal property." Thus, the critical question in this case is whether the transactions with its carriers constitute "sales for the purpose of resale" within the meaning of W. Va. Code § 11-13-1.

The newspapers delivered by the carriers consist of home deliveries and single copy sales. These two types of deliveries must be addressed separately. There is little evidence of an agency relationship between the taxpayer and the carriers with regard to the single copy sales. Moreover, the contract clearly appears to be one for a wholesale sale.

In Moore v. Burris, 132 W. Va 757, 54 S.E.2d 23 (1949), the court held the requisite element of an agency relationship to be the publisher's control over the carriers' activities. This element is not present in the single copy sales. The carriers are free to re-sell the newspapers whenever and to whomever they choose. The taxpayer exerts no substantive control over their activities.

The argument that the taxpayer-carrier contract is one solely for delivery must also be rejected in regard to the single copy sales. The taxpayer delivers the newspapers to the carriers and charges them a wholesale rate. The carriers are then free to contract for their re-sale. The carriers assume no duty of delivering the single copy newspapers. Thus the single copy sales are clearly wholesale sales.

The home delivery sales are not as susceptible to brief analysis. The taxpayer has cited a large number of decisions which hold newspaper carriers to be independent contractors of the publisher. See Moore; Mirto v. News-Journal Co. 50 Del. 103, 123 A.2d 863 (1956); Bernat v. Star Chronicle Pub. Co., 84 S.W.2d 429 (Mo. App. 1935); Verrett v. Houma Newspapers, Inc., 305 So. 2d 547 (La. App. 1974). A determination that

the carriers are independent contractors, however, would not resolve the issue. The contract between the taxpayer and the carriers must still be determined to be one for the wholesale sale of newspapers.

Item #2 of the Independent Carrier Agreement provides:

> The Company agrees to sell, and the Carrier agrees to purchase sufficient quantities of newspapers to cover the delivery schedule, together with such additional quantities of newspapers as the Carrier may require in conducting his independent business of selling and delivering the Company's newspapers.

Although this document is some evidence of a wholesale sales contract, it is not conclusive. When examining a contract, its proper construction is not dependent upon the name given by the parties, but upon the entire body of the contract and its legal effect as a whole. Heyford v. Davis, 102 U.S. 235, 26 L. Ed 160 (1880). The intent of the parties governs the contract's construction. U. S. v. Choctaw Nation, 179 U.S. 494, 21 S. Ct. 149, 45 L. Ed. 291 (1900); Peirpoint v. Peirpoint, 71 W. Va. 431, 76 S.E. 848 (1912). Upon the facts in this record, it does not appear that the taxpayer intended a true wholesale sale of the home delivery newspapers.

First, the taxpayer virtually guarantees a delivery. If a carrier misses a delivery, the district sales manager makes the delivery and bills the carrier. In addition, the taxpayer makes home deliveries when a replacement carrier is not available.

Although some subscriptions are handled by the carriers, the taxpayer routinely accepts orders for carrier delivery. Thus, a contractual relationship exists between the taxpayer and the retail customer. In addition, the taxpayer retains prepaid subscription revenue and credits the carriers' accounts bi-weekly. By treating the prepaid revenue as its own, the taxpayer indicates that, in substance, the contract is one between it and the retail customer.

The taxpayer maintains that it is involved in the carrier-customer relationship in order to protect its business interests. Such an argument might be persuasive if the taxpayer's actions were confined to furnishing delivery tubes and receipt books. The taxpayer's interference in the carrier-customer relationship, however, is too substantial to be dismissed as being solely for the protection of business interests. One would be hard-pressed to find another industry in which a wholesaler (1) contracts on behalf of its retailer; (2) guarantees the retailer's performance; (3) fulfills the retailer's contractual obligation without authorization, and then bills the retailerer; and (4) withholds pre-paid revenues arising from the retailer's business. Such actions extend far beyond the protection of one's business interests.

Although theoretically, the carrier is free to establish the retail selling price, in reality, the price is set by the taxpayer. The taxpayer publishes carrier rates for home delivery in its newspaper, and applies this rate when it accepts prepaid subscriptions. The taxpayer could cite only one instance in which a carrier failed to charge the "suggested" price.

The taxpayer's involvement in the carrier-customer relationship is not consistent with its claim of a wholesale sale. Therefore, such activity is considered to be a retail sale by the taxpayer to the customer.

The contract between the taxpayer and the carriers, rather than establishing a retailer-wholesaler relationship, is one for delivery and debt collection. The carrier is strictly liable for both. Failure to deliver results in liability to the carrier for the retail price of the newspaper, if the taxpayer makes the delivery. Similarly, if the the carrier failes to collect for the paper, he is liable for its retail sales price.

Because of the determination that with regard to the home deliveries, a retail sales relationship exists between taxpayer and its customers, the status of carriers as agents or independent contractors has not been addressed, since it will have no bearing on the taxpayer's tax liability.

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The Attorney General of Texas

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ortunity/
tion Employer

December 21, 1984

Honorable Bob Bullock
Comptroller of Public Accounts
L.B.J. State Office Building
Austin, Texas 78774

Opinion No. JM-263

Re: Whether imposition of the limited sales tax on the sale of newspapers violates the First Amendment to the United States Constitution

Dear Mr. Bullock:

Chapter 151 of the Tax Code imposes limited sales, excise, and use taxes on businesses operating within this state engaged in certain specified activities. Legislation enacted during the recently-completed special session repealed section 151.319 of the Tax Code which exempted the sale or distribution of newspapers from the imposition of the sales tax. Acts 1983, 68th Leg., 2nd C.S., ch. 31, art. 12, §3, at 552. The sale of newspapers, therefore, is now subject to the tax.

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom . . . of the press. . . ." It is applicable to the states by virtue of the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940). You ask us the following question:

> Does the imposition of the limited sales tax on the sale of newspapers violate the First Amendment to the United States Constitution?

You assert that the imposition of the tax on the sale of newspapers is a direct burden on freedom of the press. Citing Murdock v. Pennsylvania, 319 U.S. 105 (1943) and Follett v. Town of McCormick, S.C., 321 U.S. 573 (1944), you suggest in your letter that "[t]he fact that the sales tax is a tax of general application does not change this basic premise." We disagree. Subsequent Supreme Court cases suggest that it does not constitute an impermissible burden on the press. We conclude that the above-cited decisions are no longer controlling, and we answer your question in the negative.

Murdock v. Pennsylvania, supra, and its companion cases, Douglas v. City of Jeannette, 319 U.S. 157 (1943) and Jones v. City of Opelika, 319 U.S. 584 (1943), as well as Follett v. Town of McCormick, S.C., supra, each involved the application to religious missionaries

who sold religious tracts door-to-door of license taxes imposed upon those who sold books. The court concluded in each instance that the tax constituted an impermissible burden on the exercise of freedom of religion as applied to itinerant missionaries. The court characterized the activity of selling the religious tracts door-to-door as religious activity and concluded that imposition of the license tax was a direct burden on the free exercise of religion. You suggest that, analogously, the repeal of the sales tax exemption for newspapers is likewise an impermissible burden on freedom of the press.

However, these cases are not the court's last pronouncement on this subject. In Breard v. Alexandria, 341 U.S. 622 (1951), the court upheld, against a claim that it was violative, of the First Amendment, inter alia, a municipal ordinance which prohibited peddlers or canvassers from calling upon the occupants of private residences without having first been invited to do so. The court did not construe its decision as having overruled Murdock and its companion cases and Follett; the dissent, however, explicitly did so. 341 U.S. 622 at 648. Any doubt as to the effect of Breard on Murdock and Follett, however, was dispelled by the recent case of Minneapolis Star and Tribune Company v. Minnesota Commissioners of Revenue, 460 U.S. 575 (1983) [hereinafter Minneapolis Star Tribune]. It is to this case that we now turn.

In Minneapolis Star Tribune, the court struck down a Minnesota use tax imposed on newspaper ink and paper. The court declared the following:

> 9. Star Tribune insists that the premise of the State's argument -- that a generally applicable sales tax would be constitutional -- is incorrect, citing Follett v. McCormick, 321 U.S. 573, (1944), Murdock v. Pennsylvania, 319 U.S. 105, (1943), and Jones v. Opelika, 319 U.S. 103, (1943). We think that Breard v. Alexandria, 341 U.S. 622 (1951), is more relevant and rebuts Star Tribune's argument. There, we upheld an ordinance prohibiting door-to-door solicitation, even though it applied to prevent the door-to-door sale of subscriptions to magazines, an activity covered by the First Amendment. Although Martin v. Struthers, 319 U.S. 141 (1943), had struck down a similar ordinance as applied to the distribution of free religious literature, the Breard Court explained that case as emphasizing that the information distributed was religious in nature and that the distribution was noncommercial. 341 U.S., at 642-643. As the dissent in Breard recognized, the majority opinion substantially undercut both Martin and the cases now relied upon

> by Star Tribune, in which the Court had invalidated ordinances imposing a flat license tax on the sale of religious literature. See 341 U.S. at, 649-650 (Black, J., dissenting) ('Since this decision cannot be reconciled with the Jones, Murdock and Martin v. Struthers cases, it seems to me that good judicial practice calls for their forthright overruling.') Whatever the value of those cases as authority after Breard, we think them distinguishable from a generally applicable sales tax. In each of those cases, the local government imposed a flat tax, unrelated to the receipts or income of the speaker or to the expenses of administering a valid regulatory scheme, as a condition of the right to speak. By imposing the tax as a condition of engaging in protected activity, the defendants in those cases imposed a form of prior restraint on speech, rendering the tax highly susceptible to constitutional challenge. Follett, supra, at 576-578; Murdock, supra, at 112, 113-114; Jones v. Opelika, 316 U.S. 584, 609, 611 (1942) (Stone, C.J., dissenting), reasoning approved on rehearing in 319 U.S. 103 (1943); see Grosjean v. American Press Co., Inc., 297 U.S., at 249; see generally Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931). In that regard, the cases cited by Star Tribune do not resemble a generally applicable sales tax. Indeed, our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible, Branzburg v. Hayes, 408 U.S. 665, 683 (dictum); Grosjean v. American Press Co., Inc., supra, at 250 (dictum); cf. Follett, supra, at 578 (preacher subject to taxes on income or property) (dictum); Murdock, supra, at 112 (same) (dictum). (Emphasis added).

Minneapolis Star Tribune, fn. 9.

The First Amendment does not prohibit all regulation of the press; there is no question that the states or the federal government can subject newspapers to generally applicable economic regulations without violating the Constitution. As the court in Grosjean v. American Press Co., Inc., supra, declared:

> It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government.

297 U.S., at 250. See, e.g., Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (antitrust laws); Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (antitrust laws); Breard v. Alexandria, supra (prohibition of door-to-door solicitation); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (Fair Labor Standards Act); Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) (Fair Labor Standards Act); Associated Press v. United States, 326 U.S. 1 (1945) (antitrust laws); Associated Press v. NLRB, 301 U.S. 103 (1937) (National Labor Relations Act); see also Branzburg v. Hayes, 408 U.S. 665 (1972) (enforcement of subpoenas). In Minneapolis Star Tribune, the court struck down the tax, not because it had the effect of imposing a burden on the press, but because the press was singled out for special treatment:

> Minnesota, however, has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment. Although the [s]tate argues now that the tax on paper and ink is part of the general scheme of taxation, the use tax provision . . . is facially discriminatory, singling out publications for treatment that is, to our knowledge, unique in Minnesota tax law.

460 U.S., at 581. The court then set forth the following test:

> By creating this special use tax, which, to our knowledge, is without parallel in the State's tax scheme, Minnesota has singled out the press for special treatment. We then must determine whether the First Amendment permits such special taxation. A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest. See, e.g., United States v. Lee, 455 U.S. 252 (1982). Any tax that the press must pay, of course, imposes some 'burden.' But, as we have observed, see supra, at 581, this Court has long upheld economic regulation of the press. The cases approving such economic regulation, however, emphasized the general applicability of the challenged regulation to all businesses, e.g., Oklahoma Press Publishing Co. v. Walling, supra, at 194; Mabee v. White Plains Publishing Co., supra, at 184; Associated Press v. NLRB, supra, at 132-133 suggesting that a regulation that singled out the press might place a heavier burden of justification on the State, and we now conclude that the special problems created by differential treatment do indeed impose such a burden.

The Texas scheme of taxation, as opposed to the Minnesota scheme, does not single out the press for special treatment. On the contrary, the repeal of the sales tax exemption merely subjects newspapers to the generally applicable limited sales, excise, and use tax imposed on other businesses. Prior to the repeal, newspapers were singled out for special favorable treatment; that is no longer the case. Accordingly, we conclude that the imposition of the limited sales, excise, and use tax on the sale of newspapers does not violate the First Amendment.

SUMMARY

The imposition of the limited excise and use tax on the sale of newspapers does not violate the First Amendment.

Very truly yours,

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