Opinion
No. 1175

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CLERK OF
SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION

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APR 12 1979

FILED

HUMAN EVENTS, INC., Petitioner	)	
v.	)	Docket No. 2602
DISTRICT OF COLUMBIA, Respondent	)	

MEMORANDUM ORDER

The petitioner appeals from an assessment made against it for sales and use taxes for the period January 1, 1974 to September 30, 1976.[1/] This Court has jurisdiction to hear the appeal pursuant to D. C. Code 1973, §§11-1201 and 47-2403.

This case comes before the Court on a motion for partial summary judgment as to Counts I, and II of the Petition and on a cross motion for partial summary judgment filed by the respondent. The issue addressed on the respective motions is whether the petitioner's leasing of "mailing lists" is subject to the sales and/or use tax. See D. C. Code 1973,

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1/ There appears to be a discrepancy concerning the taxable period included on this appeal. The Petition refers to the period January 1, 1974 to September 30, 1976 (Pet. par. 4) while the affidavit in support of petitioner's motion for partial summary judgment refers to the period January 1, 1973 through September 30, 1976 (Roberts Affidavit, pars. 8, 11, 12, 13, 19, and 22), and the respondent refers to the period October 1, 1973 to September 30, 1976 (Resp. Statement of Material Facts as to Which There is no Genuine Issue, par. 2). The record does not reflect that the petition has been amended. the proposed order submitted pursuant to this Memorandum Order should clearly reflect the precise dates included in the assessment.

§§47-2601, et seq. and 47-2701, et seq.

I

The essential facts in the case are not in dispute and thus the Court finds there are no genuine issues of any material fact. The facts are as follows:

1. Petitioner, Human Events, Inc., is a Delaware corporation registered to do business in the District of Columbia.

2. The corporation publishes a nationally distributed newspaper known as Human Events.

3. Human Events, incident to its newspaper activities maintains certain lists ("mailing lists") of names and addresses of individuals with similar interests.

4. Human Events maintains three primary mailing lists:

a. a list of former subscribers to Human events ("expired subscriber list"), which it prepares from its own records;

b. a list of buyers of books focusing on finance and economics ("financial bookbuyer's list") prepared by Human Events by combining information and lists of its own with others sold to, exchanged with or donated to Human Events; and

c. a list prepared by Human Events by combining information and lists of its own with others sold to, exchanged with or donated to Human Events, and containing names and addresses of contributors to political campaigns, conservative activists and bookbuyers.

5. Human Events continually updates its mailing lists to maintain their response rate, or "pull." The lists are currently updated by preparing computer cards with address corrections, name deletions in the event of the death of the addressee or at the request of the addressee or new names to be added to the list. In addition, the list is entirely re-collated and updated in a single annual operation.

6. The Human Events mailing lists are computerized so that sub-categories of addressees may be made available to list lessees, e.g., expired subscriber addressees who have purchased three hardcover finance books during the past year; addressees for specific states.

7. Some of the mailing lists leased by Human Events to others were leased directly, but many transactions were arranged through list brokers, who specialize in matching list characteristics with the marketing needs of lessees. Human Events sends the brokers a List Rental Data Card describing each list and the brokers arrange rentals. The brokers charge 20% of the rental fee as their commission.

8. The Human Events mailing list is delivered to lease customers in two forms: (1) on computer tape and (2) on computer-printed address sheets containing 44 addressees per sheet which are cut, separated and attached to envelopes by the "Cheshire" process, called "Cheshire labels".

9. During the period January 1, 1973 through September 30, 1976, the cost of computer tapes was comparable to that of Cheshire labels with similar capacity. Where Human Events has employed tapes from its computer center which were

returned after use, no separate charge was made to either Human Events or its lessees.

10. During the period January 1, 1973 through September 30. 1976, blank Cheshire label paper cost approximately $1.60/thousand names.

11. The lists were run off the computer, almost always on Cheshire labels, but sometimes onto computer tape at the lessee's request, and then delivered to a mailing center in Washington, D. C. at the direction of the lessee, for addressing and stuffing of the envelopes.

12. Human Events treats its mailing lists as confidential business information and protects them against unauthorized use by including in each list rental "decoys" which indicate any unauthorized use and identify the user or from whom the user obtained the list.

13. The pull of a well-maintained list is not only a function of the match between the interests of the addressee and the direct mail marketer, but also depends upon the frequency and manner in which the list is used. Thus, Human Events leases its lists on a one-time use basis only and for mailing within specified dates.

14. In order to protect the reputation in the direct mail business of its lists. Human Events reviews the mail packages to be sent out by lessees in order to insure that the mailer will match the interests of the lessees and generate strong pull.

15. The Human Events mailing lists are treated as confidential business information because they have been developed and maintained at considerable expense to Human Events. Because the lists are known to brokers and lessees as very effective ones for a particular market, Human Events was able to charge rental rates significantly higher than the cost of the materials by which the lists were transferred. To further protect the business reputation of its lists as having good pull, Human Events inspects all mailer materials to be sent out by lessees to insure that the materials match the interests of its addressees.

16. During the period January 1, 1973 to September 30, 1976 Human Events leased its lists to direct mailers for rates ranging from Twenty Dollars ($20.00) per thousand names to Forty-five Dollars ($45.00) per thousand names.

17. During the period January 1, 1973, to September 30, 1976 Human Events leased lists from others at rates ranging from Thirty Dollars ($30.00) per thousand names to Forty-five Dollars ($45.00) per thousand names.

18. During the period of time referred to in findings 9 and 10 above, the cost of the physical medium by means of which the mailing list information is transmitted was approximately One and 60/100 Dollars ($1.60) per thousand names.

19. The cost of the medium by which mailing list information is transmitted represents a minimum of 3.5% to a maximum of 8% of the cost of the mailing lists which Human Events has leased to or from others. The cost of the

tangible property transferred in connection with the lease of a mailing list is less than 10% of the value of the services.

20. The value of a mailing list which has been performed in identifying and selecting addressees whose interests are related in some manner and in matching such compilation to the marketing needs of list users.

21. When Human Events purchases mailing lists, it is required to protect the confidentiality of the information they contain.

II

The sales tax is imposed upon every vendor " for the privilege of selling certain selected services (defined as 'retail sale' and 'sale at retail' . . .)", D. C. Code 1973, §47-2602, while the compensating - use tax is imposed upon "every vendor engaging in business in the District and by every purchaser a tax on the use, storage or consumption of any tangible personal property and services sold or purchased at retail sale", D. C. Code 1973, §47-2701. Leases of tangible personal property are included in the definition of sales subject to the sales and use tax. D. C. Code 1973, §§47-2601(14)(a)(6) and 47-2701(1)(a)(4). However, excluded from the definition of sales subject to the sales and use tax are [p]rofessional, insurance, or personal service transactions which involve sales as inconsequential elements for which no separate charges are made". D. C. Code 1973, §47-2601(14)(b)(2) and 47-2701(1)(b)(2). An implementing regulation defines "inconsequential elements" as "any sale of tangible personal

property made in connection with professional, insurance, or personal service transactions, where the sales price of the tangible personal property is less than 10% of the amount charged for services rendered in the transaction". Department of Finance and Revenue Regulations, 16 DCRR 201.2(b)(1970).

The petitioner argues that the lease of the mailing list is a service transaction as that term is defined in the Code since the lists are a collation of names and addresses of persons with related characteristics and since the value of the list is found in the fact that they are being constantly updated. Additionally, what is actually being furnished is information and that information need not be transmitted by list or labels, as in this case, but rather it can be transmitted orally, or by telephone, or from computer, and that in any event the cost of transmission, even by way of list or labels, is less than 10% of the total fee involved.

The District counters that the essence of the transaction is not a service but the selling and leasing of tangible personal property, namely lists and labels, and thus the transaction is subject to the tax.

III

The three primary decisions in this jurisdiction on this point are Washington Times-Herald, Inc. v. District of Columbia, 94 U.S. App. D.C. 154, 213 F.2d 23 (1954); District of Columbia v. Norwood Studios, Inc., 118 U.S. App. D.C. 358, 336 F.2d 746 (1964); District of Columbia v. Universal Computer Associates, Inc., 151 U.S. App. D.C. 30, 465 F.2d 615 (1972).

In Washington Times-Herald, the taxpayer, a newspaper publishing company, contracted with several syndicates for the supply of comic strips. The syndicates furnished the newspaper with fiber matrices or mats bearing impressions of a current sequence of strips, the mats having been manufactured from original drawings by a photo engraving process. The newspaper used the mats to produce metal plates from which the comic pages were printed. The blank mats cost less than 10% of the total cost of the service. The court held that the mats were of inconsequential value and that the price was paid for the artists' work, the right to reproduce the impressions on the mats, not for the mats themselves. Moreover, the newspapers use of the mats was limited. The court held then that the transaction was a service rendered and not taxable.

Norwood Studios presented a different situation. Norwood contracted with the AFL-CIO to purchase a series of motion pictures. The District of Columbia Tax Court held that the transactions were personal service transactions, however, the appellate court reversed that decision and held the transactions taxable since the transaction represented a sale of the motion picture film and the films became the property of the AFL-CIO without reservation.

Finally, in Universal Computer, the court ruled that computer software in the form of punched cards was not taxable. It noted that the value of the punched cards themselves was insignificant and that it was the information contained on the cards which was of value.

Similar cases in other jurisdictions have been decided on a variety of tests, such as whether they involve personal or mechanized services[2/], the real object test[3/] or just information service[4/]. While all of the cited cases suggest guidelines which the court should follow they are not dispositive of the issue now before the Court.

IV

After taking into consideration the facts which are not in dispute and the previously cited cases, the Court concludes that the activity of the petitioner was a personal service transaction and nothing more. The service was the furnishing of names and addresses of potential and likely subscribers and customers. Although the "information" or "knowledge" was transmitted by way of written list and in some cases, labels, the information could just as easily have been transmitted orally, by telephone or from computer to computer. It is clear that what was actually furnished was a service, not unlike that in Dun & Bradstreet, the fact that the service

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2/ Recording Devices, Inc. v. Porterfield, 283 NE 2d 626 (Ohio 1972) [mechanical - taxable]; American District Telephone Co. v. Porterfield, 238 NE 2d 782 (Ohio 1969) [personal - non-taxable].

3/ Federated Department Stores v. Kosydar, 340 NE 2d 840 (Ohio 1976) [real object to acquire film and tape and not personal service]; Albers v. State Board of Equalization 47 Cal. Rptr. 69 (1965).

4/ Dun & Bradstreet, Inc. v. City of New York, 11 NE 2d 728 (NY 1937).

in the form of information and knowledge was furnished by way of a list and/or labels is not dispositive. In this sense the case is not unlike Universal Computer where the court held that the software had an inconsequential value as compared to the service, that being the information and knowledge, contained on the software. Here, the information furnished pursuant to the terms of the lease, was updated yearly and its use was restricted.

While it is true that a transfer of personal property, in the sense of the list and Cheshire labels was involved, the value of that property was inconsequential when compared to the overall value of the information contained on the list. What was sought and obtained in this case was service. That value was less than 10% of the amount charged for the services rendered in the transaction. See 16 DCRR 201.2(b) (1970). This being the case it represented an inconsequential element.

A similar result was reached in Fingerhut Productions Co. v. Commissioner of Revenue, 258 NW 2d 606 (Minn. 1977) except that that court distinguished between information furnished by way of list and that furnished by way of Cheshire labels, the latter being held taxable. This Court sees no such distinction. The value of the list and/or labels are approximately the same and in any event as already indicated they are inconsequential elements of the transaction.

Taking everything into consideration then this Court rules that the transactions involved are not taxable and

that accordingly, the petitioner is entitled to a refund of all taxes paid together with interest from the date of payment.

ORDER

It is hereby

ORDERED that the petitioner shall submit to the court within five days, a proposed order consistent with this Memorandum Order, such order to clearly set forth the dates of payment, the periods involved, and the amounts of the payments. Petitioner shall also submit simultaneously a copy of the proposed order to the respondent. Respondent shall then have five days in which to file any objections to the proposed order, to submit a proposed order of its own or to consent to the order submitted by the petitioner. If the respondent does not reply within five days, the Court will deem it that respondent consents to the form of the order.

Dated: April 11, 1979

JOHN GARRETT PENN
Judge

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