

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
RINGIER AMERICA, INC., : DETERMINATION
AS SUCCESSOR TO W. A. KRUEGER CO. :
for Redetermination of Deficiencies or for :
Refund of Corporation Franchise Tax under :
Article 9-A of the Tax Law for the Years 1983, :
1984, 1985 and 1986. :

Petitioner, Ringier America, Inc.,¹ One Pierce Place, Itasca, Illinois 60143-1272, filed petitions for redetermination of deficiencies or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1983, 1984, 1985 and 1986 (File Nos. 806664, 806832 and 806878).

On June 19, 1990 and June 20, 1990, respectively, the Division of Taxation by William F. Collins, Esq. (James Della Porta, Esq., of counsel) and petitioner by White & Case (Evan Michael Drutman, Esq., of counsel) agreed to waive a hearing and have the matter determined on submission of documents. All briefs were due by January 28, 1991. After due consideration of the record, Marilyn Mann Faulkner, Administrative Law Judge, renders the following determination.

ISSUE

Whether printed material delivered via the U.S. Postal Service to points within New York State constitutes a "shipment" within the meaning of Tax Law § 210.3(a)(2)(A) for purposes of computing the business allocation percentage with respect to the corporation franchise tax.

¹The original petitions were filed by W. A. Krueger Co.; however, petitioner's attorney informed the Division of Tax Appeals that W. A. Krueger Co. changed its name to Ringier America, Inc. in July 1989.

FINDINGS OF FACT

In its memorandum of law, the Division of Taxation ("Division") stipulated to the facts as set forth in petitioner's memorandum of law. These facts have been incorporated into the following Findings of Fact.

Petitioner is a web offset printing operation with plants in Arizona, Wisconsin, Illinois, Mississippi and Arkansas and sales offices throughout the country, including a sales office in New York City.

Petitioner produces books, magazines and commercial catalogs for its various customers on a F.O.B. point of manufacture basis. The finished products are shipped or mailed per instructions received from the customers. Petitioner uses two basic methods for delivery. In one case, after petitioner completes the printing, it delivers (by common carrier) the printed material in bulk to the purchaser or purchaser's agent. Petitioner is not disputing allocation to New York of such sales ("bulk-shipped sales") when delivery into New York is made via common carrier. In the other case, petitioner mails the printed material to the customers of the purchaser ("general mailings"). In the case of general mailings, the purchaser provides petitioner with pre-addressed pressure-sensitive labels or magnetic tape detailing the addresses. Petitioner affixes the labels or magnetic tapes to the printed material and delivers these goods to the U.S. Postal Service at its printing plant site.

In filing its New York State and New York City franchise tax returns, petitioner historically included in the sales factor numerator of the ratio used to calculate taxable income allocated to New York all books, magazines and commercial catalogs bulk-shipped via common carrier directly to its customers' locations within the State of New York. Petitioner also reported a census-based allocation of books, magazines and commercial catalogs which petitioner delivered to the U.S. Postal Service at its various points of manufacture, for mailing to various customers of the purchaser specified by petitioner's purchasers.

For example, petitioner prints the Journal of the American Medical Association. The publisher, American Medical Association ("AMA"), is based in Chicago, Illinois. The work is

produced for the AMA in Wisconsin by petitioner and deposited at the direction of the AMA with the U.S. Postal Service at Milwaukee for shipments to points throughout the country, including New York State. Assuming that New York State had 10% of the United States population for a given year, petitioner would then have allocated 10% of the general mailings to New York State and included 10% of the applicable revenues as New York State sales for apportionment purposes.

Subsequently, petitioner believed that the New York allocation for general mailings was in error and, therefore, after its claims for refund were denied, filed three petitions dated March 3, 1989, April 7, 1989 and April 21, 1989 claiming a refund for the respective years 1983, 1984-1985, and 1986. The amounts contested for the respective years were as follows: \$30,311.00, plus interest; \$42,450.00, plus interest; \$53,338.00, plus interest; and \$22,055.00, plus interest. In these petitions, petitioner claimed that the mailing of printed material via the U.S. Postal Service to customers of its purchaser does not meet the criteria of 20 NYCRR 4-4.2(a) which provides that property is considered to be shipped to a point in New York State if:

"the property is shipped via common carrier or via taxpayer's truck to a point in New York State designated on the bill of lading or other shipping document, regardless of the F.O.B. point...."

Petitioner argued that because the U.S. Postal Service was not a common carrier, the general mailings do not constitute New York State sales for purposes of allocating sales to New York pursuant to Tax Law § 210.3(a)(2)(A).

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that the unambiguous language of the regulation (20 NYCRR 4-4.2[a]) controls what method of delivery constitutes a "shipment" allocable to New York for purposes of the corporation franchise tax and that because the U.S. Postal Service is not a common carrier, as specified in the regulation, the "general mailings" to New York are not subject to New York tax. Petitioner cites case law distinguishing a common carrier from the U.S. Postal Service and asserts that this distinction is significant for taxing purposes inasmuch as the "Postal Service acts in a governmental capacity and not as an 'agent' for all senders of parcels, as

does a common carrier with respect to deliveries made on behalf of its customers" (Pet. Brief at 14). Petitioner concludes that it did not earn its income from sales to the ultimate New York recipient but from the out-of-state purchaser when it deposited the items with the U.S. Postal Service pursuant to the purchaser's direction, and that it is at the point of deposit with the U.S. Postal Service that it completed its sale to the purchaser.

The Division argues the regulation was not intended to provide a comprehensive list of shipment methods and that it should not be read to narrow the broad scope of Tax Law § 210.3(a)(2)(A) which taxes sales of tangible personal property "where shipments are made to points within [New York] state." The Division also argues that the U.S. Postal Service comes within the definition of a common carrier within the meaning of the regulation.

The Division contends that, assuming *arguendo* that the U.S. Postal Service is not a common carrier, the items would be taxable under 20 NYCRR 4-4.2(b) which states that tangible personal property is considered to be shipped to a point in New York State if "the property is delivered to a purchaser at a point in New York State." The Division theorizes that the regulation does not specify that the term "purchaser" must be limited to the taxpayer's purchaser.

Finally, the Division asserts that, assuming that the regulation precludes the application of Tax Law § 210.3(a)(2)(A) with regard to the items in question, then Tax Law § 210.8 gives the Commissioner the broad discretion to adjust petitioner's business allocation percentage to include the receipts from goods mailed to New York as New York receipts.

CONCLUSIONS OF LAW

A. Tax Law § 209.1 provides that a franchise tax shall be paid by a corporation for:

"the privilege of exercising its corporate franchise, or of doing business, or of...owning and leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state...."

The method of computing the franchise tax is set forth in Tax Law § 210. The statute provides that the portion of the entire net income of a taxpayer to be allocated within the State shall be determined by use of a business allocation percentage. A taxpayer's business income is

multiplied by a business allocation percentage determined by (1) a property factor, (2) a receipts factor, and (3) a payroll factor (Tax Law § 210.3[a]; Matter of Nekoosa Papers, Inc. v. Chu, 115 AD2d 821, 495 NYS2d 1003, 1004-1005 [and cases cited therein]). The Division also "has discretion to exclude a factor, include alternative factors or make adjustments if it determines that the standard formula does not properly reflect the taxpayer's activity, business or income in New York (Tax Law § 210.8)." (Id.)

Here, petitioner does not dispute that it is subject to the taxing authority of New York State pursuant to Tax Law § 209 inasmuch as it maintains a sales office in New York City. The issue is the computation of the business allocation percentage based on the receipts factor; that is, whether the mailing of the printed material via the U.S. Postal Service constitutes a shipment "made to points within [New York State]" within the meaning of Tax Law § 210.3(a)(2)(A). The Division's regulations state that tangible personal property is considered to be shipped to a point in New York State if:

- "(a) the property is shipped via common carrier or via taxpayer's truck to a point in New York State designated on the bill of lading or other shipping document, regardless of the F.O.B. point; or
- (b) the property is delivered to a purchaser at a point in New York State" (20 NYCRR 4-4.2).

B. Petitioner's argument is that because the U.S. Postal Service is not a common carrier, its mailing of the printed material to New York State does not constitute a shipment under the regulation and, hence, under the statute for purposes of computing the business allocation percentage.

The distinction that petitioner seeks to make between a common carrier and the U.S. Postal Service for purposes of the application of Tax Law § 210.3(a)(2)(A) is without merit.

"A common carrier is one who, engaged in a business necessarily involving a public interest, agrees for a specified compensation to transport persons or property from one place to another, offering his services to the public generally. The test of a common carrier is whether he holds himself out, either expressly or by a course of conduct, to carry persons or property for hire, so long as he has room, for all that may see fit to employ him, indifferently" (17 NY Jur 2d, Carriers, § 2).

Common carriers include such entities as railroads, steamships, ferries, buses, aircraft, trucks,

freight, baggage and transfer companies, and water and pipeline carriers (Id. at §§ 5-17). The interstate shipment of goods by common carrier is regulated by the Federal government (e.g., Interstate Commerce Commission, Federal Department of Transportation) including the licensing of common carriers and approval of rates charged the public (Id. at §§ 19, 67, 152).

Although the U.S. Postal Service is a government entity that regulates itself and technically is not a common carrier, it is involved in a common carrier type of activity inasmuch as it offers to the public the services of transporting property from one place to another (see, e.g., Graphnet Systems, Inc., 73 FCC2d 283). The fact that 20 NYCRR 4-4.2(a) does not include the U.S. Postal Service as a means of transport for the shipment of tangible personal property does not exclude such item from taxation under the statute. As noted by the Appellate Division in Matter of Nekoosa Papers, Inc. v. Chu (supra, 495 NYS2d at 1006):

"[o]n the one hand, an agency is generally bound by the clear wording of its own regulations (Matter of International Harvester Co. v. State Tax Commission, 58 AD2d 125, 127, 396 NYS2d 82). On the other hand, agencies have no authority to create rules out of harmony with or inconsistent with the plain meaning of statutory language (see, e.g., Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman, 62 NY2d 539, 478 NYS2d 846)."

In this instance, at best, the regulation is underinclusive and does not prevent the application of the statute with regard to the items in question. The distinction petitioner seeks between goods delivered via the U.S. Postal Service and goods delivered via common carrier appears to be contrived and does not comport with the legislative intent of Tax Law § 210.3(a)(2)(A).

Nowhere on the face of the statute or in its legislative history is it indicated that shipments via the U.S. Postal Service, as opposed to common carrier, should be exempt from the application of the plain meaning of the words "where shipments are made to points within this state". When that section was amended in 1968, the same legislative bill also changed the method for computing the sales factor in the allocation formula from a 50% origin-50% destination basis to a 100% destination basis. These changes were responsive to contentions by New York manufacturing corporations that they were at a competitive disadvantage because most states used a 100% destination sales factor, whereas New York companies were taxed in New York on a 50% origin basis and then again on a 100% destination basis for goods shipped

out of New York (see, Letter of the Department of Taxation and Finance, Governor's Bill Jacket, L 1968, ch 557). The intent of the bill was to eliminate the inequitable tax burden placed on New York-based companies by making the New York State sales factor more compatible with the sales factors in other states. As noted in the memorandum of the Division of Budget approving the bill:

"[t]here has been a strong trend among the states towards use of a sales factor based on destination. Currently, about two-thirds of the 39 states with corporate income taxes, plus the District of Columbia, has a sales factor using destination only. Many of these states adopted the 100% destination basis when they enacted the Uniform Division of Income for Tax Purposes Act, drafted by the MCCUSL, or the Multistate Tax Compact, drafted by the Council of State Governments." (Id.)

Contrary to petitioner's suggestion (Pet. Brf at 7-9), the memoranda in support of the 1968 amendment to section 210 do not even hint that New York intended to impose a destination rule different from those adopted by other states. As clearly stated by the Division of Budget, "[u]nder this bill all sales of goods that are shipped or delivered to customers within the state would be allocated to the state." (Id. [emphasis added].)

"A statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax" (Matter of Grace v. New York State Tax Commission, 37 NY2d 193, 371 NYS2d 715, 718, lv denied 37 NY2d 708, 375 NYS2d 1027, quoting People ex rel. Mutual Trust Co. v. Miller, 177 NY 51, 57).

Here, the clear import of the words used in the statute is that all shipments or deliveries of goods to customers within New York State are to be allocated to New York. The items in question do not escape taxation merely because the regulation did not contemplate the particular means of delivery in this case. Similarly, I am not persuaded by petitioner's argument that the statute should not apply because petitioner completed its sale outside New York when it deposited the printed material with the U.S. Postal Service or that the statute was to apply only to shipments to purchasers of the printed goods and not to the ultimate recipients. The statute was intended to capture the receipts from the sale of goods whose destination was within New York State -- the very situation involved in this case.

In sum, the statute does not make the type of fine distinctions petitioner seeks to impose.

Given the legislative history of the statute, petitioner has not established any "well-founded doubt" as to the meaning of Tax Law § 210.3(a)(2)(A) that would defeat the application of the statute to the items in question.

C. The petitions of Ringier America, Inc., as successor to W. A. Krueger Co., are denied.

DATED: Troy, New York
3/28/91

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE