

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

McGRAW-HILL, INC.

DECISION

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9-A of the Tax Law for the Years
Ended December 31, 1976, December 31, 1977,
December 31, 1978 and December 31, 1979.

Petitioner, McGraw-Hill, Inc., 1221 Avenue of the Americas, New York, New York 10020, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years ended December 31, 1976, December 31, 1977, December 31, 1978 and December 31, 1979 (File No. 53705).

A hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 30, 1986 at 9:15 A.M., with all briefs to be submitted by November 14, 1986. Petitioner appeared by Deborah M. Flanagan, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether receipts earned by petitioner from sales of advertising during the years in issue were allocable entirely to New York, or rather were allocable to New York only to the extent of the ratio established by comparing sales of magazines in New York to total sales.

FINDINGS OF FACT

1. On January 30, 1984, the Audit Division issued to petitioner, McGraw-Hill Inc., four statements of audit adjustment for the tax years ended December 31,

1976, December 31, 1977, December 31, 1978 and December 31, 1979 ("the audit period"). Simultaneously, the Audit Division issued notices of deficiency to petitioner for the same tax years in the following amounts:

<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Total Due</u>
12/31/76	\$108,092.00	\$ 84,535.00	\$192,627.00
12/31/77	197,170.00	136,616.00	333,786.00
12/31/78	180,718.00	109,102.00	289,820.00
12/31/79	177,703.00	91,435.00	269,138.00

2. The only explanation for said deficiencies which was listed on each of the statements of audit adjustment was that the deficiencies were based upon a "recent field audit". Petitioner executed five consents extending the period of limitation of the assessment of tax, all signed by senior vice-president, John L. Cady. The consents ultimately extended the period of limitation on assessment for each of the years in the audit period to any time on or before April 30, 1984.

3. Petitioner is in the business of, among other things, publishing magazines. As part of this activity, petitioner derives revenues from sales of advertisements appearing in said magazines. At all times during the audit period, petitioner included revenues from the sales of advertising which were allocable to New York in the calculation of the amount of franchise tax due. However, petitioner calculated the allocation based upon the ratio which the number of magazines delivered in New York bore to the number of magazines delivered in New York and elsewhere. The Audit Division's position is that all revenues from sales of advertising by petitioner, where the advertising contract is negotiated by petitioner's New York offices, must be allocated to New York.

4. The Audit Division and petitioner stipulated that the type and degree of activities performed by petitioner's New York sales office to solicit orders for advertisements does not affect the allocation of revenues to New York.

charges for advertising are in conformity with published rate cards. Said fees for magazine advertisements are determined almost entirely by the magazine's circulation. This fee fluctuates proportionately with increases and decreases in subscriptions. It should be noted that petitioner did not deny that its contracts for advertising originated in New York nor did it introduce evidence which indicated anything other than that its receipts were derived from New York generated sales of advertising.

5. Petitioner contends that a **1979** amendment to the regulations concerning radio and television advertising should be applicable to the instant situation. Said regulation provided that the receipts received for advertising should be allocated to New York State and another state or states according to the number of listeners or viewers in each state. Further, petitioner contends that the 1981 amendment to Tax Law § 210.3(a) (2) **(B)**, providing that publishers of periodicals shall compute the receipts attributable to the sale of advertising based on the extent that such newspapers and periodicals are delivered to points within the State, **is** applicable to the years in issue. Finally, petitioner contends that the basis of the Audit Division's notices **of** deficiency is in violation of the First and Fourteenth Amendments and the Commerce Clause of the United States Constitution.

6. Petitioner submitted six affidavits signed by persons responsible for various advertising accounts on behalf of Business Week Magazine, a McGraw-Hill publication, which all stated that, to the best of their knowledge and belief, the advertisements carried by Business Week were substantially the same as those carried by radio and television for the same period. **All** the periods were within the audit period.

CONCLUSIONS OF LAW

A. That section 210.3(a) of the Tax Law provides for the allocation to New York of the corporate taxpayer's business income by means of a business allocation percentage consisting of the average of three factors: (1) real and tangible personal property, (2) receipts and **(3)** wages.

B. That during the years at issue herein, section 210.3(a)(2) of the Tax Law provided that the receipts factor was to be determined by:

"(2) ascertaining the percentage which the receipts of the taxpayer ... arising during such period from

(A) sales **of** its tangible personal property where shipments are made **to** points within this state,

(B) services performed within the state...,

(C) rentals from property situated, and royalties from the use of patents or copyrights within the state.. **■** and

(D) all other business receipts earned within the state, bear to the total amount of the taxpayer's receipts, similarly computed, arising during such period from all sales of its tangible personal property, services, rentals, royalties and **all** other business transactions, whether within or without the state;".

C. That section 210.3(a) of the Tax Law was amended by Laws of 1981 (ch 103, § [1][21**(B)**]) to read as follows:

"(B) services performed within the state, provided, however, that in the case of a taxpayer engaged in the business of publishing newspapers or periodicals, receipts arising from the sales of advertisements contained in such newspapers and periodicals shall be attributable only to the extent that such newspapers and periodicals are delivered to points within the state."

This amendment to section 210.3(a)(2)(B) was made applicable to taxable years beginning on or after January 1, 1982, and is not retroactive to prior years.

D. That the receipts from the advertising contracts constituted other business receipts in accordance with section 210.3(a)(2)(D) **of** the Tax Law.

or handled anywhere other than in New York. Accordingly, said receipts earned during the years at issue were allocable to New York. (Conde Nast Publications, Inc. v. State Tax Commission, 51 AD2d 17, lv denied 39 NY2d 842; Matter of Fairchild Publications Division, Capital Cities Media, Inc., State Tax Commission July 15, 1983.)

E. That petitioner's reliance upon the amendment of 20 NYCRR 4-4.3(d) is misplaced since said amendment in 1979 specifically addresses itself to "[t]he broadcasting of radio and television programs and commercial messages by way of radio and television antennae". Further, said amendment does not vitiate the holding in Conde Nast since the Department of Taxation and Finance clearly intended for the regulation to affect only the radio and television broadcast media. (See TSB-M-79[5]C, wherein the allocation of broadcasting receipts with respect to the business allocation percentage is discussed.)


F. That the constitutionality of the laws of the State of New York and their application in particular instances is presumed at the administrative level.

G. That the petition of McGraw-Hill, Inc. is hereby denied and the four notices of deficiency dated January 30, 1984 are sustained, together with such additional interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 20 1987


PRESIDENT


COMMISSIONER


COMMISSIONER