

BUREAU OF LAW

MEMORANDUM

Julius T. Peter

TO: State Tax Commission

FROM: Vincent P. Molineaux, Hearing Officer

SUBJECT: Werbel Publishing Co., Inc.
Application for review of
determination of sales tax

A hearing on the above matter was held before me at 80 Centre Street, New York, New York, on August 14, 1968.

At issue is whether receipts from the sale of the General Insurance Guide published by Werbel Publishing Co., Inc. are subject to sales tax.

The guide consists of approximately 2,000 pages which the purchaser places in two binders, with dividers, which are provided by the publisher. The original purchase price of \$18.00 includes three quarterly supplements consisting of substitute pages and some new pages. Subsequent supplements are provided on a yearly basis at \$22.00 but may be purchased singly at \$5.75 each.

It is claimed on behalf of the publisher that the service and the supplements are exempt from the sales tax as periodicals under Tax Law section 1115(a)(5).

The definition of a periodical adopted by the Sales Tax Bureau is the paraphrase of a portion of the Post Office Appropriations Bill of March 3, 1879 set forth in Houghton v. Payne, 194 U.S. 88 and adopted by the Comptroller of the City of New York in regulations for the New York City sales tax which also excluded newspapers and "periodicals" from the application of the said tax.

Under this definition to constitute a periodical a publication must;

- (1) be published at stated intervals, at least as frequently as four times a year,
- (2) it must have the element of general availability to the public,
- (3) it must have continuity as to title in general nature of content from issue to issue,

(4) it must not either singly or when successive issues are put together constitute a book and,

(5) each number must contain a variety of articles by different authors devoted to either literature, the sciences, or the arts, some special industry, profession, sport or other fields of endeavor.

It is obvious in the present case that the publication does not fit the definition in that the publication is itself a book (paragraph (4) above). The fact of it being bound loose-leaf makes it no less so and the quarterly supplements are not periodicals as they are only pages, useless in themselves until they become part of the book. Furthermore, the editorial comment by the publisher even though emanating from a large staff would not be considered "articles by different authors" (paragraph (5) above).

This question of definition of a periodical was considered twice by the Court of Appeals under the New York City Sales Tax Statute. In Moody's Investors Service v. McGoldrick, ('38) 254 App. Div. 726, (affirmed without opinion) 200 N.Y. 281, a limited edition financial information service was considered not to be a periodical and consequently subject to the sales tax. However, in Matter of Business Statistics Organization, Inc. v. Joseph, ('49) 299 N.Y. 443, business reports on economical, political and labor conditions, affecting commerce finance and industry published at regular periods were considered periodicals and exempt from the sales tax. It should be noted that Matter of Business Statistics Organization, Inc., supra, was decided under a statute which did not impose a tax on information services. Such a tax is now imposed under Sections 1105(c)(1) and 1110(c). Also, neither of these cases cover the current situation involving what is generally known as a "service". In a memorandum to the director of the Sales Tax Bureau, a copy of which is included in the annexed file, Futures Market Service, and Commodity Chart Service, both published weekly, were not considered to be periodicals, on the ground of the absence of "articles by different authors".

In view of the foregoing, I recommend that the determination of the State Tax Commission denying the application for revision be substantially in the form submitted herewith.

Hearing Officer

VPM:aa
Enc.

January 29, 1969

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(2) That Werbel Publishing Co., Inc. filed sales and use tax returns for the periods ended August 31, 1965, November 30, 1965, February 28, 1966, May 31, 1966, August 30, 1966 and November 30, 1966 on which the taxes shown on such returns to be due were paid.

(3) That upon audit the State Tax Commission issued Notice No. 90,752,229, dated July 12, 1967, assessing taxes against Werbel Publishing Co., Inc. in the amount of \$3,688.76 for the periods commencing August 1, 1965 and ending November 30, 1966 based upon failure to collect and remit any local sales or use taxes on the sale of the General Insurance Guide and its supplements.

(4) That the said tax has not been paid.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

DECIDES:

(A) That the General Insurance Guide constitutes a book and the supplements are separate pages of such book and their sale or use is taxable under Section 1105(a) of the Tax Law as a retail sale of tangible personal property or under Section 1110 as the use of tangible personal property purchased at retail and their sale or use is taxable under the local sales and use taxes enacted pursuant to Section 1210(a) of the Tax Law.

(B) That neither the General Insurance Guide nor its supplements are periodicals within the meaning and intent of Section 1115(a)(5) of the Tax Law which exempts the purchase or use of periodicals from the sales or use tax on the receipts from retail sales of tangible personal property imposed under Sections 1105(a) and 1110 of the Tax Law since the General Insurance Guide and its supplements constitute a book, do not contain a variety of articles by different authors and do not otherwise have the characteristics of a periodical.

(C) That Section 1105(c)(1) imposes a tax on the receipts from every sale except for resale of the service of " * * * furnishing of information by printed, mimeographed or multigraphed matter or by

duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, * * *." and Section 1110 imposes a compensating use tax for the use of any of the services described in Section 1105(c)(1) of the Tax Law.

(D) That if the sales or use of the General Insurance Guide and its supplements are not taxable under Sections 1105(a) and 1110 of the Tax Law, their sale or use is taxable under Sections 1105(c)(1) and 1110 of the Tax Law and the local sales and use taxes enacted pursuant to Section 1210(a) of the Tax Law.

(E) That the Notice No. 90,752,229 assessing tax against Werbel Publishing Co., Inc. for the periods ending August 31, 1965, November 30, 1965, February 28, 1966, May 31, 1966, August 30, 1966 and November 30, 1966 is correct.

(F) That the taxpayer's application is hereby denied.

DATED: Albany, New York this 9th day of March, , 1970.

STATE TAX COMMISSION

/s/ Norman Gallman
President

/s/ A. Bruce Manley
Commissioner

/s/ Milton Koerner
Commissioner