

STATE OF TENNESSEE

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Opinion No. 03-045

Constitutionality of Imposing the Tennessee Sales Tax on Newspaper Sales

QUESTION

Is it constitutionally permissible to remove the sales tax exemption for newspapers contained in Tenn. Code Ann. § 67-6-329(a).

OPINION

Yes. There is nothing constitutionally suspect in applying a generally applicable tax to newspapers or other types of media, so long as the press or a segment of the media is not singled out for discriminatory taxation based upon the content of its publications or services.

ANALYSIS

The instant request concerns whether it would be constitutionally permissible for the General Assembly to remove the present exemption of newspaper purchases from sales tax. Tenn. Code Ann. § 67-6-201 imposes a tax on the privilege of selling tangible personal property at retail in the state. Currently, a tax at the rate of 7% of the sales price is levied on each item of tangible personal property sold. Tenn. Code Ann. § 67-6-202(a). In addition, cities and counties may by local option impose an additional tax of up to 2 3/4%. Tenn. Code Ann. §§67-6-701 *et seq.* The General Assembly, however, has exempted several items and categories of items from the sales tax, including “[p]eriodicals printed on newsprint or bond paper and regularly distributed twice monthly or on a biweekly or more frequent basis, and advertising supplements or other printed matter distributed with such periodicals.” Tenn. Code Ann. § 67-6-329(a)(21). HB 515, which is currently before the General Assembly, would delete subdivision (21) of Tenn. Code Ann. § 67-6-329(a) in its entirety. Thus, if enacted, this legislation, by removing the current exemption, would impose the sales tax on newspaper sales.

The General Assembly may grant specific exemptions from a tax that otherwise would apply through the broad wording of the levying statute. As a sale of tangible personal property, the sale of a newspaper would be subject to the sales tax were it not for the current statutory exemption. We recognize, however, that implicit in the instant request is a reasonable concern regarding the constitutionality of imposing a tax on the “press” or newspapers. The First Amendment of the

United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press” This right of free speech is protected from state infringement through the application of the Due Process Clause of the Fourteenth Amendment. *Grosjean v. American Press Co.*, 56 S. Ct. 444 (1936). Article I, Section 19 of the Tennessee Constitution also provides that “every citizen may freely speak, write, and print on any subject”

The right of free speech is not a right to be free of taxes. As noted by Justice O’Connor, writing for the majority in *Leathers v. Medlock*, 499 U.S. 439, 447, 111 S.Ct. 1438, 1444 (1991), “We have said repeatedly that a state may impose on the press a generally applicable tax.” (*citations omitted*). Yet, if a tax is applied only to the press or “singles out” the press for special treatment, it is constitutionally suspect. In fact, “[d]ifferential taxation of the press, then, places such a burden on the interests protected by the First Amendment that it is presumptively unconstitutional.” *Id.* at 111 S.Ct. 1442, *citing Minneapolis Star and Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 1371 (1983). The proposed legislation, however, would simply remove newspapers from the list of exemptions from the sales tax, making newspaper purchases subject to the sales tax like those of most other items of tangible personal property. Exemptions from the sales tax are the exception, not the rule.

Another concern always addressed in United States Supreme Court case law is whether or not some segment of the press has been targeted for taxation when other segments of the press have not. The fear is censorship of specific viewpoints or particular ideas. *See Arkansas Writers Project Inc. v. Ragland*, 481 U.S. 221, 233, 107 S.Ct. 1722, 1727-1729 (1987). But, this proposed legislation would simply return sales of newspapers to the same status as sales of tangible personal property generally, so far as the tax laws are concerned. There is nothing in the sales tax scheme, even as changed with this proposed legislation, that would cause newspapers to be taxed in a different manner than many other segments of the press or media. Indeed, sales of cable television, movie rentals, books, and magazines are all currently subject to the sales tax.

Finally, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech. *Leathers*, 111 S.Ct. 1444. The proposed legislation, because it would tax all newspapers as defined in Tenn. Code Ann. § 67-6-329(a), just as all newspapers are currently exempt from taxation, does not impact taxpayers based on content.¹ If the General Assembly enacts this legislation, sales of newspapers will be taxed just as sales of clothing, food, and the media items listed *supra*, regardless of their content.

¹The Tennessee Supreme Court did hold that the statute and regulation that previously exempted newspapers were unconstitutional because they discriminated between different types of publications, giving newspapers with “reports of current events” an exemption that magazines did not have. Because this exemption was not premised on a content-neutral requirement, and the State did not demonstrate that the immediate provision of news is a compelling governmental interest, the tax was held invalid under the First Amendment. *See Newsweek, Inc. v. Celauro*, 789 S.W.2d 247 (Tenn. 1990). The current newspaper exemption statute was enacted to avoid this problem — its provisions are content neutral. In any event, the removal of the newspaper exemption, as a result of the proposed legislation, would mean that newspapers and magazines were taxed in the same manner, thus avoiding the *Newsweek* issue.

The Court in *Leathers* upheld a sales tax that was very similar to Tennessee’s current sales tax. The Court observed that “[t]he Arkansas sales tax is a tax of general applicability. It applies to receipts from the sale of all tangible personal property and a broad range of services, unless within a group of specific exemptions.” 111 S.Ct. 1444. Because the tax did not present any of the concerns or types of discrimination discussed *supra*², the Court held that it did not violate the First Amendment. *Id.* Relying on the Court’s earlier decision in *Regan v. Taxation with Representation*, 461 U.S. 540, 103 S.Ct. 1997 (1983), Justice O’Connor reiterated the principle that a state legislature “is not required to subsidize First Amendment rights through a tax exemption or a tax deduction.” 111 S.Ct. 1445.

This Office is of the opinion that the removal of the tax exemption for newspaper sales, as embodied in section 2 of HB 515, with the result that such sales would be subject to the sales tax, is constitutionally permissible.

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²We note that the sales tax at issue in *Leathers* did apply to some segments of the press or media — cable television services — but exempted print media, and did not impose tax on satellite broadcast television services. Thus, the Arkansas scheme was somewhat similar to Tennessee’s current scheme. Yet, even with this differentiation among segments of the media, the statute was upheld.

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