

Department of Revenue v. Magazine Publishers,  
604 So.2d 459 (Fla. 1992)

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## CASE SUMMARIES

### Department of Revenue v. Magazine Publishers,

604 So.2d 459 (Fla. 1992).

#### INTRODUCTION

Plaintiffs, Magazine Publishers of America, Inc., The Hearst Corporation, Time, Inc., Golf Digest/Tennis Inc., and Meredith Corp. a group of magazine publishers, brought suit against the Florida Department of Revenue challenging the constitutionality of a tax on retail sales of magazines in Florida. The imposition of the tax was found to be unconstitutional under the First Amendment since the tax exempted sales of newspapers and was not narrowly drawn to achieve a compelling state interest. Following Florida law the Florida Supreme Court held that the differentiation between magazines and newspapers was invalid and that the newspaper exemption should be eliminated.

#### FACTS

The Florida Department of Revenue imposed a sales tax on the retail sales of magazines. The statute explicitly exempted the sale of newspapers from the tax. The trial court granted the plaintiff's Motion for Summary Judgment, as well as the Summary Judgment Motions of the intervenors, Miami Herald Publishing Co. and the Florida Press Association, thereby invalidating the tax on magazines. Upon appeal by the Department of Revenue, the First District Court of Appeals certified that the trial court's order passed upon a question of great public importance requiring immediate resolution by the Florida Supreme Court. The Florida Supreme Court heard the case and upon review reversed the trial court's order as to the remedy, concluding that the proper solution under state law was to eliminate the exemption for newspapers. The United States Supreme Court granted certiorari upon petition from the Miami Herald Publishing Co., vacated the judgment of the Florida Supreme Court and remanded for further consideration in light of *Leathers v. Medlock*.<sup>1</sup>

#### LEGAL ANALYSIS

In deciding whether the tax on magazines violates the First Amendment, a determination must be made whether the taxation scheme is a generally applied scheme or a differential scheme.<sup>2</sup> While a state may impose a generally applied taxation scheme on the media without raising First Amendment issues, a taxation scheme which differentiates between members of the media may trigger strict scrutiny under the First

Amendment.<sup>3</sup> A differential taxation scheme is subject to strict scrutiny analysis under the First Amendment if the tax 1) singles out the press; 2) targets a small group of speakers; or 3) discriminates on the basis of the content of the speech.<sup>4</sup> In order to withstand strict scrutiny analysis, the tax must serve some compelling state interest and must be narrowly tailored to achieve that end.<sup>5</sup>

The Florida court compared the facts of this case to *Leathers v. Medlock* and *Arkansas Writers' Project v. Ragland*.<sup>6</sup> In *Leathers*, the United States Supreme Court found an Arkansas differential taxation scheme valid which imposed a sales tax on cable and satellite television, but exempted both magazine and newspaper sales. The court found that Arkansas was simply extending a generally applicable sales tax to cable and satellite services while exempting the print media. This scheme did not single out the press, target a small group of speakers or discriminate on the basis of content, and therefore, did not violate the First Amendment.<sup>7</sup> In *Arkansas Writers'*, the scheme taxed general magazines but exempted religious, professional, trade and sports journals, as well as newspapers. Here the scheme violated the First Amendment because the tax burden fell on a small group of publishers and could not be justified under strict scrutiny.<sup>8</sup> Because the taxation scheme at issue treats magazines differently than newspapers by exempting newspapers from the tax, the Florida Supreme Court found the scheme was differential.<sup>9</sup>

In determining whether the differential taxation scheme was content-based, the court looked beyond the content-neutral language of the statute to consider the deposition of the Assistant Executive Director of the Department of Revenue, and the Florida Administrative Code which guides the Department in implementing the statute. The Director stated that the Department would "review the content of the publication" in determining whether it qualifies for the newspaper exemption under the Florida Administrative Code. The applicable provisions of the Code specify the necessary purpose and content for a publication to constitute a newspaper.<sup>10</sup> Therefore, the court concluded that the statute's differential taxation scheme was content-based and applied strict scrutiny.<sup>11</sup>

In attempting to overcome strict scrutiny, the Department of Revenue first argued that the newspaper exemption served the compelling government interest of encouraging literacy and general knowledge. The court held that although this was a compelling state interest, magazines as well as newspapers provide an enormous amount of information to the public, so the statute was not narrowly drawn to further that end.<sup>12</sup>

Next the state argued that the compelling interest