

1987

# Mark O. Haroldsen, INC., dba Marko Enterprises, a Utah corporation v. State Tax Commission, an agency of the State of Utah : Reply Brief

Utah Supreme Court

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BRIEF

870468

IN THE SUPREME COURT OF THE STATE OF UTAH

MARK O. HAROLDSEN, INC., d/b/a )  
MARKO ENTERPRISES, a Utah )  
corporation, )

Plaintiff-Appellant, )

vs. )

STATE TAX COMMISSION, an agency )  
of the State of Utah, )

Defendant-Respondent. )

Case No. 870468

(Priority Classification 14b)

REPLY BRIEF OF APPELLANT  
MARK O. HAROLDSEN, INC.

ON APPEAL FROM THE JUDGMENT OF THE TAX DIVISION  
OF THE THIRD JUDICIAL DISTRICT COURT FOR THE COUNTY OF  
SALT LAKE, STATE OF UTAH, HONORABLE TIMOTHY R. HANSON,  
DISTRICT JUDGE, PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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MARKO ENTERPRISES, a Utah	)	
corporation,	)	Case No. 870468
	)	
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	)	(Priority Classification 14b)
vs.	)	
	)	
STATE TAX COMMISSION, an agency	)	
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IN THE SUPREME COURT OF THE STATE OF UTAH

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MARK O. HAROLDSEN, INC.,	)	
d/b/a MARKO ENTERPRISES, a	)	
Utah corporation,	)	Case No. 870468
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
STATE TAX COMMISSION, an	)	
agency of the State of Utah,	)	
	)	
Defendant.	)	

---

REPLY BRIEF OF APPELLANT  
MARK O. HAROLDSEN, INC.

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SUMMARY OF ARGUMENT

1. This appeal is from the lower court's granting of Summary Judgment in favor of the Tax Commission on stipulated facts. The lower court's conclusions of law need be accorded no difference by this court.

2. The undisputed evidence in the record demonstrates that the services performed by the mailing list brokers were essential to the transaction and that the taxpayer's payments were at least as much for the service rendered by the brokers as for the lists themselves.

3. The weight of authority supports the taxpayer's position that the taxpayer purchased the right to use intangible information rather than tangible personal property.

## ARGUMENT

### I.

THE TAXPAYER IS ENTITLED TO A DE NOVO REVIEW ON APPEAL.

The taxpayer, Mark O. Haroldsen, Inc., was entitled to a de novo trial in the district court from the adverse ruling of the State Tax Commission. As this Court held in the case of Parson Asphalt Products, Inc. v. Utah State Tax Commission, 617 P. 2d 397 (Utah 1980), a de novo review means that the tax-payer is entitled to "a new trial in which all questions of law and fact are addressed to that court [the district court]. Such proceedings are governed by the rules applicable to other trials; and appeals may be taken therefrom to this court." Id. at 399. In Pledger v. Cox, 626 P.2d 415 (Utah 1981), this Court noted that a de novo review which involves a complete retrial upon new evidence "affords a party who is about to suffer from administrative action a closer judicial scrutiny than a mere review of the record of agency action, and we think this preferable in view of the seriousness of the administrative action and the relative ease with which the limited factual issue can be subjected to retrial in the district court." Id. at 417.

The de novo review performed by the district court in the present case was a complete retrial. The district court could have received new evidence and heard testimony. As it

was, the parties stipulated to the facts and the case was disposed by motion for summary judgment. Under Sacramento Baseball Club, Inc. v. Great Northern Baseball Company, 748 P.2d 1058, 1060 (Utah 1987), this Court can review the stipulated facts as easily as the district court did, and the district court's conclusions of law from the stipulated facts should be afforded no deference.

## II.

IT IS UNDISPUTED, BASED ON THE STIPULATED FACTS,  
THAT THE USE OF THE MAGNETIC TAPES AND PRINTED LISTS  
WAS INCIDENTAL TO A SALE OF INTANGIBLE SERVICES.

The Tax Commission urges this Court to consider four factors in determining whether the dominant purpose of the transaction was the purchase of services: (1) whether the service involved was consequential or inconsequential to the conveyance of the tangible personal property; (2) whether there was a separate charge for the service in addition to the charge for the products; (3) whether the purchase or renter acquired a tangible personal property interest; and (4) whether the value of the product was temporary or transitory. Respondent's Brief, at 6. Even under this test urged by the Tax Commission, the purchase of a service performed by the mailing list broker was a central purpose of the transactions in question.



1. The service involved was consequential to the conveyance of the magnetic tapes and printed lists. The record, which was stipulated to, demonstrated without dispute that the taxpayer was purchasing a service. Thomas Tolman testified that "the actual money, from our point of view, to the broker, is far more for the broker's services and what he is able to give us than it is for the actual tape and paper." (Tr. 54). Without the assistance of the broker's expertise in selecting and refining the mailing lists, the taxpayer would be left with a "raw" list which would have little value to the company, if any. (Tr. 32, 94). The taxpayer relied on the list broker in selecting the lists and preparing them for usage by the taxpayer. (Tr. 29, 43). The service, under the stipulated facts, was a consequential part of the transaction. There was no other evidence, other than that presented by the taxpayer, regarding the importance of the broker's services. The Tax Commission attempts to minimize the importance of the service rendered by the broker, but does so without any support from the record.

2. There was a separate charge for the service in addition to the charge for the magnetic tapes. The record indicates that after the magnetic tape was used once, it was to be returned, erased, or destroyed. In situations where the tape could be kept, a separate fee was charged for the tape,

from \$15 to \$25. (Tr. 11-14, 44, 46-47). The balance of the fee charged to the taxpayer was for the information contained on the tape and for the service rendered by the broker in tailoring the mailing list information in a way that would be useful to the taxpayer.

3. The taxpayer did not acquire a tangible personal property interest in the information on the magnetic tape.

The taxpayer was entitled only to a one-time use of the information contained on a magnetic tape. Once the magnetic tape was used to input the mailing list information into the computer, the taxpayer was prohibited from utilizing the tape again for the same purpose. The taxpayer would continue to have a tangible personal property interest in the tape itself and could use the tape for other purposes. The taxpayer could not, however, use the tape to generate a mailing list. (Tr. 11-14, 44, 46-47).

4. The value of the tapes was temporary and transitory. As mentioned above, once the magnetic tape has been used it may not be used again to generate a mailing list. The value of the product was clearly temporary and transitory.

The essence of the transaction between the taxpayer and the owners of the mailing lists was the purchase of mailing list information that had been carefully prepared and refined by a mailing list broker. The magnetic tapes used by the

taxpayer in this case are different from the piece of cake to which the Tax Commission analogized in its brief. In the Commission's analogy, the purchase of the cake for the purpose of consumption is the real object of the agreement between the purchaser and the baker. It is the cake itself that the purchaser desires, which can be touched, tasted, smelled, and eaten. Plainly, the baker's services in creating the cake were only of value to the extent that they enhanced the quality of the appearance and the taste of the cake. The services performed by the mailing list brokers are different from those performed by a baker. The mailing list brokers utilize their expertise and knowledge to refine a raw mailing list so as to make it useful for the taxpayer's purposes. The refined list is not tangible, but may be contained or communicated through a number of different media. In the present case, the lists were transferred through magnetic tapes and printed labels. The taxpayer is interested only in the information contained on the tape and printed lists. Once the information is removed from the tape and placed in a computer, the tape ceases to have value, demonstrating that it was not the tape itself that was the real object of the transaction but the information contained thereon.

The lists in this case are also different from the multiple listing book that was at issue in Old West Realty,

Inc. v. Idaho State Tax Commission, 110 Idaho 546, 716 P.2d 1318 (1986), the dress pattern to which the court analogized in the case of Comptroller of the Treasury v. Equitable Trust Co., 296 Md. 459, 464 A.2d 248 (1983), and the toy design package considered in Hasbro Industries, Inc. v. Norberg, 487 A.2d 124 (R.I. 1985), cited by the Tax Commission in its brief, at 5-7. Each of these items could be touched and handled and were clearly tangible. The useful nature of a piece of cake or a dress pattern can never be separated from the tangible physical properties of the item. The information on the magnetic tape, however, consists of millions of magnetic impulses by which the information is coded on the tape. Those impulses constitute the real value of the transaction. Once the information is removed from the tape and placed into the computer, the tape is virtually worthless, even though it still exists in the same form. It has not been eaten as a piece of cake or cut up to make a dress.

The Tax Commission in its brief argues that the mailing lists prepared by the list brokers are not customized but are merely "canned" lists, the form of which has been "merely rearranged" by the broker. Respondent's Brief at 9. The record, however, was to the contrary. According to the record the lists were certainly customized and tailored to the individual needs of the taxpayer. (Tr. 32, 41, 52-57, 62,

94-95). Although the Tax Commission may like to think of the mailing lists as "canned," when it stipulated to the facts in the case below, it agreed to accept all of the facts in the record as true. According to the record, the lists were clearly customized. There was no evidence to the contrary.

### III.

#### THE TAXPAYER PURCHASED AND USED INTANGIBLE INFORMATION.

The Tax Commission cites no case in which the purchase or use of mailing lists was held to be taxable. It ignores the cases cited by the taxpayer that hold that mailing lists transferred by magnetic tape are not tangible personal property, Spencer Gifts, Inc. v. Director, Division of Taxation, 182 N.J. Super. 179, 440 A.2d 104 (1981); Fingerhut Products Co. v. Commissioner of Revenue, 257 N.W.2d 606 (Minn. 1977); and Mertz v. State Tax Commission, 89 A.D.2d 396, 456 N.Y.S.2d 501 (1982).

The Tax Commission attempts to classify the tailor-made magnetic tapes in this case with books, videos, cassettes, and records generally purchased by the public. As argued in the taxpayer's initial Brief, these items are clearly distinguishable and have been so recognized by the majority of cases that have considered the issue. Books, videos, cassettes and records can each be used multiples of times. The value of the item is inseparable from the item itself. The items, once

used, are capable of being used again--whether or not the owner chooses to use them. The value lies in the tangible item itself. The magnetic tape, however, is different. The information is removed and placed in the computer, leaving the tape essentially worthless. The tape may thereafter be destroyed or erased. The separate charge for the tape was minimal.

The Tax Commission cites several cases that hold that the use of customized computer software is taxable as tangible personal property. These cases represent a minority view and demonstrate the difficulty that arises when courts attempt to bend notions of tangibility to encompass computer-age transfers of information. Rather than trying to force the present statute to accomodate a situation for which it was never intended, this Court should defer to the legislature, which certainly has the power to direct by appropriate legislation that the sale or use of information be taxed, as has been done in the State of New York. See Skaggs-Walsh, Inc. v. State Tax Commission, 120 A.D. 2d 786, 501 N.Y.S.2d 520 (1986).

Finally, the taxpayer concedes that there is, in fact, a distinction between information coded on magnetic computer tape and the printed labels that are purchased. If this Court concludes that the money paid by the taxpayer was not for services, and if the Court further determines that the purchase

of the labels ought to be taxed, the taxpayer urges the Court not to tax the use of the magnetic tapes. The preprinted labels purchased by the taxpayer were conceptually and physically different from the magnetic tapes and were used in an entirely different fashion. The labels were applied directly to the envelopes and placed in the mail. The magnetic tape, however, was used only to transfer the information into a computer, following which the tapes could not be used. Although the taxpayer contends that neither the use of the tape or of the labels should be taxed, it recognizes that a distinction does exist between the labels and the tapes that might justify a different tax treatment for the two types of items.

#### CONCLUSION

This court should review this case de novo and ought not to give deference to the lower court's conclusions of law based on the stipulated record. Because the taxpayer was paying for the list broker's services as much as for anything else and because the taxpayer was purchasing intangible information, this Court should reverse the lower court and hold that the transactions at issue were not taxable and that the taxpayer is entitled to a full refund.

DATED this 10<sup>th</sup> day of August, 1988.

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CERTIFICATE OF SERVICE

I hereby certify that I caused four true and correct copies of the within and foregoing Reply Brief to be hand delivered this 7<sup>th</sup> day of August, 1988, to the following:

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