

1 Midwest Foundation Independent Physicians Association, d.b.a.

2 ChoiceCare, Appellant, v. Tracy, Tax Commr., Appellee.

3 [Cite as *Midwest Found. Indep. Physicians Assn. v. Tracy* (1996), _____

4 Ohio St. 3d _____.]

5 *Taxation -- Use tax on quarterly magazine published and mailed from*

6 *Boston, Massachusetts, to Ohio residents by Ohio health maintenance*

7 *organization -- R.C. 5741.02(A), applied -- Taxable "use," when.*

8 (No. 94-2058--Submitted September 14, 1995--Decided January 10,

9 1996.)

10 Appeal from the Board of Tax Appeals, No. 92-Z-435.

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12 Midwest Foundation Independent Physicians Association, d.b.a.

13 ChoiceCare, appellant, operates a Cincinnati-based health maintenance

14 organization. ChoiceCare's members reside in Ohio, Kentucky, and

15 Indiana. Approximately eighty-five percent of its members lived in Ohio

16 during the audit period, January 1, 1988 through December 31, 1990.

17 ChoiceCare purchases the Health Journal Magazine, a quarterly

18 magazine published by a company in Boston, Massachusetts. ChoiceCare

19 directs the publisher to mail the magazines from Boston directly to

1 ChoiceCare’s members. The magazine keeps the members abreast of
2 changes at ChoiceCare and in the health care industry. It usually contains a
3 letter from ChoiceCare’s president, ideas for the health-conscious member,
4 and other health-related articles.

5 The Tax Commissioner, appellee, assessed use tax against those
6 magazines sent to Ohio residents. On appeal, the Board of Tax Appeals
7 (“BTA”) affirmed the commissioner’s assessment. The BTA ruled that
8 ChoiceCare exercised a right or power incidental to ownership in Ohio by,
9 from its Ohio office, ordering, paying for, and supplying a mailing list to
10 direct delivery of, the magazine.

11 The cause is now before this court on ChoiceCare’s appeal as of right.

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13 *Frost & Jacobs and Larry H. McMillin, for appellant.*

14 *Betty D. Montgomery, Attorney General, and James C. Sauer,*
15 *Assistant Attorney General, for appellee.*

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17 *Per Curiam.* We affirm the BTA’s decision.

18 R.C. 5741.02(A) imposes a use tax on the “storage, use, or other
19 consumption in this state of tangible personal property ***.” R.C.

1 5741.01(C) defines “use” to mean “the exercise of any right or power
2 incidental to the ownership of the thing used.”

3 ChoiceCare, from its Ohio office, ordered the Boston publisher to
4 print the magazines and mail them to ChoiceCare’s members in Ohio.
5 Apparently, ChoiceCare also issued payment for the magazines from Ohio.
6 ChoiceCare, thus, orchestrated the purchase and distribution of the
7 magazine to Ohio recipients. By these acts, ChoiceCare exercised rights or
8 powers incidental to the ownership of the magazines. Since ChoiceCare
9 exercised these rights or powers in Ohio, ChoiceCare owes Ohio use tax on
10 these activities. *Norandex, Inc. v. Limbach* (1994), 69 Ohio St. 3d 26, 630
11 N.E. 2d 329.

12 We distinguish *Hoffmann-LaRoche, Inc. v. Porterfield* (1968), 16
13 Ohio St. 2d 158, 45 O.O. 2d 486, 243 N.E. 2d 72, cited for support by
14 ChoiceCare. In that case, Hoffmann-LaRoche, a pharmaceutical
15 manufacturer that maintained its principal office in New Jersey and had
16 warehouses in states other than Ohio, mailed samples and promotional
17 materials to Ohio doctors and hospitals. We affirmed a BTA decision
18 reversing that assessment because Hoffmann-LaRoche divested itself of

1 ownership, possession, and control outside Ohio. Thus, Hoffmann-LaRoche
2 did not exercise any right or power incidental to ownership *in Ohio*.

3 ChoiceCare also argues that Am. S. B. No. 303, 143 Ohio Laws, Part
4 I, 1602 (effective July 18, 1990), which expanded the definition of “use” to
5 include distribution by the consumer, without charge, to recipients in this
6 state, prevents the commissioner from assessing ChoiceCare on purchases
7 occurring prior to its enactment. ChoiceCare contends that the instant
8 purchases were not taxable until this amendment became effective. This
9 argument has no merit. We have held above that the definition of “use”
10 existing during the audit period covers the instant situation without
11 bolstering from this amendment. Indeed, the amended definition appears
12 aimed at taxpayers like Hoffmann-LaRoche, which distribute items from
13 outside Ohio.

14 Accordingly, we affirm the decision of the BTA because it is
15 reasonable and lawful.

16 *Decision affirmed.*

17 MOYER, C.J., DOUGLAS, WRIGHT, RESNICK, F.E. SWEENEY, PFEIFER
18 and COOK, JJ., concur.

