



Houck Transit Advertising

**SUMMARY OF PROPOSED EXEMPTION FOR TRANSIT BUS ADVERTISING
for consideration by the
ARKANSAS TAX REFORM AND RELIEF LEGISLATIVE TASK FORCE**

TOPIC: Sales Tax Exemption for Transit Bus Advertising

Summary of Proposal for Consideration

To extend the sales tax exemption to also cover advertising on transit buses, effective for tax years beginning January 1, 2019.

Fiscal Analysis

It is estimated that the sale or rental of advertising space in newspaper and publications is \$11,766,016 (GR Portion-\$8,145,704) for FY2017.

It is estimated that the sale of billboard advertising is \$6,152,487 (GR Portion-\$4,259,414) for FY2017.

The total estimated sales or rental for advertising for these two media outlets is \$17,918,503 (GR Portion-\$12,405,188).

On the other hand, the estimated sales and rental of transit bus advertising for the Little Rock area and the other transit systems in the state is \$400,000.00.

The transit bus revenue is only 2.2% of the newspaper and billboard advertising revenue.

Transit bus advertising already contributes significantly to the local economies. Every dollar in transit advertising revenue brings in \$4.00 of Federal Match Revenue to the transit systems.

Legal Analysis

Background.

Arkansas currently has a sales tax exemption for newspaper and publication advertising, pursuant to A.C.A. § 26-52-401(13).

Arkansas currently has a sales tax exemption for billboard advertising, pursuant to A.C.A. § 26-52-401(13).

Arkansas does not have a sales tax exemption for transit bus advertising. The Arkansas Department of Finance and Administration aggressively assessed sales taxes for transit bus advertising.

Potential Legal Issues.

Multiple.

First Amendment Challenge:

Judge Strikes Down Tax on Billboard Advertising¹.

As recently as two weeks ago (October 17, 2018), a state Judge in Ohio struck down a city ordinance that would have imposed a tax on billboard advertising.

Billboards enjoy protection under the 1st Amendment as a direct means of disseminating speech, including commercial speech (advertisements).

The City Council isolated and targeted a small group for taxation.

Advertisers would likely choose other media that was exempt from tax.

The targeted tax violates the 1st Amendment.

Nebraska Attorney General Addressed Tax on Advertising.

The approach taken by the Ohio Court is mirrored in an opinion issued by the State of Nebraska Attorney General. The Attorney General was asked by a state Senator for an opinion regarding a proposed law to place a sales tax on certain advertising². Nebraska, like Arkansas, imposed a general sales tax on tangible personal property and services. The Nebraska Senator wanted to know if the legislature imposed a sales tax on advertising by a casino, would it violate the guarantee of free speech under the First Amendment to the U.S. Constitution. The Attorney General concluded that a sales tax imposed on casino advertising would likely inhibit free speech rights in violation of the First Amendment.

The Opinion stated in part:

While it is part of the general sales tax, which includes taxation of a variety of tangible personal property and services, it applies only to casino advertising. By singling out a specific form of advertising for taxation, while exempting other advertising and services, the tax likely cannot be viewed as one of "general application. It also appears to target a relatively small group of speakers. *Id.*

The United States Supreme Court.

The United States Supreme Court has also weighed with regard to taxes imposed on advertising and the First Amendment. In *Minneapolis Star and Tribune Co. V. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), the State imposed a sales tax on advertising if the paper had a circulation of more than 200,000 subscribers. Newspapers with circulation of less than 200,000 was exempt from the tax. The Court stated in part:

¹Case No. A-18-04105 (Court of Common Pleas, Hamilton County, Ohio).

²Neb. Op. Atty. Gen. No. 03015 (Neb.A.G.) 2003 WL 21540493.

Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme. It has asserted no interest other than its desire to have an equitable tax system. *Id.* at 591-92.

In Arkansas, it seems the following advertising media, in addition to newspapers, magazines and billboards are exempt from sales tax:

Yellow Pages ads, Airport ads, Search Lights, ads appearing on the sides of trucks. Bus benches, bus shelters and ads displayed by video when pumping gas.

The Court in *Minneapolis Star* summed it up this way:

And when the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises. *Id.* at 592.

Fourteenth Amendment Challenge.

Under the Fourteenth Amendment to the U.S. Constitution, citizens are guaranteed the right of Equal Protection under the laws. This means, of course that a state must treat citizens the same as it treats others in like circumstances. We need look no further than our own State of Arkansas to see how the First and Fourteenth³ Amendments are construed by the United States Supreme Court.

In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722 (1987), a challenge was brought by an Arkansas magazine company against the imposition of sales taxes by the Arkansas Department of Finance and Administration ("DFA").

In Arkansas, a sales tax was imposed on the sale of tangible personal property, but the tax was exempted for newspapers and certain publications, including religious, professional and sports journals. However, DFA imposed the tax on sales of the Arkansas Times, a general interest magazine that published articles on a variety of subjects, including religion and sports. The Arkansas Times argued that subjecting it to the sales tax, while sales of newspapers and other magazines were exempt, violated the First and Fourteenth Amendments. *Id.* at 225.

The Court found:

Our cases clearly establish that a discriminatory tax on the press burdens rights protected by the First Amendment. *Id.* at 227.

Because the Arkansas sales tax scheme treats some magazines less favorably than others, it suffers from the second type of discrimination identified in *Minneapolis Star*. *Id.* at 229.

³Most of the Opinion centers on the First Amendment but the language is also applied to the Fourteenth Amendment as seen in Footnote 3 which states: "[Taxpayer's] First Amendment claims are intertwined with interests arising under the Equal Protection Clause.

The Court concluded:

We stated in *Minneapolis Star* that [a] tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action. In this case, Arkansas has failed to meet this heavy burden. It has advanced no compelling justification for selective, content-based taxation of certain magazines, and the tax is therefore invalid under the First Amendment. Accordingly, we reverse the judgment of the Arkansas Supreme Court and remand for proceedings not inconsistent with this opinion. *Id.* at 234.

Because of this important United States Supreme Court case, the Arkansas Legislature amended the statute to include ads displayed in magazines.

With regard to Houck Transit Advertising, there is never any transfer of Tangible Personal Property. The advertiser never receives any tangible property and does not control the ad or the bus on which it is mounted. Houck Transit Advertising should receive the same treatment as the Arkansas Times under *Arkansas Writers' Project*.

Other States.

Oklahoma: No sales tax on advertising
Texas: No sales tax on advertising
Louisiana: No sales tax on advertising
Mississippi: No sales tax on advertising
Kansas: No sales tax on advertising
Tennessee: No sales tax on advertising
Missouri: No sales tax on advertising

Other.

Every \$1,000 of bus advertising revenue generated brings in \$4,000 of federal matching dollars. Put another way, every \$1,000 of lost advertising results in a loss of \$4,000 federal dollars. Advertisers will naturally look to newspapers and billboards because they have no sales tax.

National advertisers refuse to pay sales tax on media services and will steer their ad monies to the media that is exempt from sales tax.

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