STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THE SCOTSMAN PRESS, INC.	:	DECISION
For Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1978 through August 31, 1983.	:	
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Petitioner, The Scotsman Press, Inc., P.O. Box 4970, 250 Bear Street, Stratums, New York 13211-4970, filed an exception to the determination of the Administrative Law Judge issued on November 3, 1988 with respect to its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1978 through August 31, 1983 (File No. 801454). Petitioner appeared by Lombardi, Devorsetz, Stinziano & Smith, Esqs. (Bruce E. Wood, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Petitioner filed a brief on exception. Oral argument was heard at the petitioner's request on March 22, 1989.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether a certain publication produced by petitioner properly qualified as a shopping paper under § 1115(i) of the Tax Law, thereby allowing exemption from tax for petitioner's purchases of ink and paper used in the printing of said publication pursuant to § 1115(a)(20) of the Tax Law.

II. Whether, alternatively, petitioner's publication constituted a newspaper exempt from tax under Tax Law §§ 1115(a)(5) and 1118(5).

III. Whether the distinction in Tax Law § 1115(i) between shopping papers and other publications is unconstitutional.

IV. Whether the Division's method of auditing petitioner's publication (based on a sampling of issues of the publication) and its method of calculating advertising versus nonadvertising space were proper.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except that we modify finding of fact "22". Such facts are stated below. We also find an additional fact as requested by the petitioner which fact is indicated below.

On June 12, 1984, following a field audit, the Division issued to petitioner, The Scotsman Press, Inc., two notices of determination and demands for payment of sales and use taxes due assessing additional tax due for the period June 1, 1978 through August 31, 1983 in the aggregate amount of $79,698.92, plus interest. These notices were preceded by a series of valid consents executed on behalf of petitioner allowing extensions of the period of limitation on assessment. The latest of these consents allowed assessment for the period June 1, 1978 through February 28, 1981 to be made at any time on or before June 20, 1984.

At all times relevant hereto, petitioner published "The Scotsman Pennysaver", a weekly publication commonly referred to as a "shopping paper" or "pennysaver". This publication was distributed free of charge on a community-wide basis. It consisted primarily of paid advertisements, and petitioner derived revenue from the sale of such advertisements. Also forming a part of the publication were community service notices which petitioner included in the publication free of charge, as well as some articles of general community interest. Petitioner's publication of The Scotsman Pennysaver occurred weekly. Each such weekly issue consisted of ten separate individual editions each geared to a certain geographical or regional area.

In addition to publishing The Scotsman Pennysaver, petitioner is involved in the business of printing pennysavers for others and in job printing for various businesses and individuals.

It should be noted that the full amount of tax assessed via the notices of determination herein pertains to tax calculated as due on petitioner's purchases of ink and paper used in the production of The Scotsman Pennysaver. On audit certain other areas of petitioner's business operations were examined, resulting in findings of tax due in substantially lesser amounts than those at issue per the notices of determination. Resolution on those other issues was reached prior to issuance of the notices, hence leaving only the tax assessed on purchases of ink and paper at issue herein.

Upon audit, the Division first attempted to determine whether petitioner's publication constituted a shopping paper as defined by section 1115(i) of the Tax Law. At the commencement of the audit, the Division requested that petitioner provide copies of issues of The Scotsman Pennysaver for certain dates. In a small number of instances, copies of each of the regional editions for some of the issue dates originally requested for review by the Division were unavailable. However, petitioner was able to produce a complete set of regional editions for each of eleven issue dates ultimately settled upon between the Division and petitioner as those issues to be reviewed[1]. The specific issue dates reviewed by the Division (see Footnote "1") were agreed to by petitioner as being representative of petitioner's publication for the entire audit period.

Upon analysis of each of the ten regional editions for each of the eleven issues, the Division determined that petitioner's publication could not be considered a shopping paper during the audit period because during said period more than 90 percent of the printed area of each of the publications consisted of advertisements.

Petitioner challenges the Division's conclusion that its publication is not exempt from tax as a shopping paper. However, the dollar amount of the tax calculated as due by the Division is not in dispute. This calculation was based upon a detailed audit of the amount of ink and paper purchased in total by petitioner, with an allocation thereof to The Scotsman Pennysaver based upon a time and usage study of printing jobs as conducted by petitioner.

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[1]The specific issue dates examined were 5/30/79, 3/12/80, 6/18/80, 6/30/80, 11/5/80, 2/25/81, 4/22/81, 8/5/81, 9/9/81, 12/2/81 and 8/11/82.

In its calculation of the portion of printed area in each issue devoted to advertising, the Division first determined the area available for printing on each page of each edition of the publication. This area amounted to 168 square inches per page and did not include the borders along the edges (tops and sides) of each page. The area available for printing on each page was then multiplied by the number of pages in each edition of each issue to determine the total area available for printing for each issue.

The Division next determined the area on each page consisting of nonadvertising space. Included among the areas considered to be nonadvertising were the front page masthead (banner), the editorial box, public service announcements, and the mail-in coupon portion of an ad wherein a reader could send in his or her own ad for future publication. In its measurements, the Division dealt with "air space" or "gutter space" (the white area between adjacent columns of advertisements, and between columns of advertisements and display ads) in the following fashion: The air space between an advertisement and a nonadvertisement was allocated 50 percent as nonadvertising space and 50 percent as advertising space; the air space between two advertisements was treated as 100 percent advertising; and the area between two nonadvertisements was treated as nonadvertising space. The results of these measurements were totalled and a ratio was established comparing nonadvertising space to total available space per issue. This ratio in turn was used as the basis for determining whether the printed area of the publication consisted of 90% or less of advertising (i.e., total space less nonadvertising equals advertising).

The above described method of calculation, known in the vernacular as the "subtractive" approach, resulted in a conclusion by the Division that none of the editions of petitioner's publications complied with the exemption requirements of Tax Law § 1115(i), in that in each case more than 90% of the publication consisted of advertising. (The criterion for exemption established under Tax Law § 1115[i] was referred to during the course of the proceeding as the "90/10 rule".)

Subsequent to the Division's audit calculations, staff members of petitioner reviewed four issues of the publication (issues published in September 1983), arriving at a calculation whereby 3.89% of petitioner's classified advertisements represented nonpaid advertisements. These nonpaid advertisements were described as "civil service" advertisements, specifically consisting of, inter alia, advertisements placed by policemen, firemen or civil service agencies. The Division accepted petitioner's calculation that 3.89% of its advertisements were "civil service" advertisements. However, even after revision of the original audit results based on this calculation, the Division's method of calculating still resulted in a conclusion that none of petitioner's publications met the 90/10 rule such as to qualify as a shopping paper per Tax Law § 1115(i).

Based upon the foregoing audit calculations, the Division imposed tax on the ink and paper utilized by petitioner in producing The Scotsman Pennysaver based, as noted, upon the time and usage analysis prepared by petitioner.

To further detail the Division's determination with respect to advertisements versus nonadvertisements, the Division considered public service announcements, articles of general interest, and the publication's masthead to be nonadvertisements. The Division determined all paid advertisements, including classified ads (as later adjusted for "civil service" ads), to be advertisements. Sections of the publication which promoted the publication's own services ("house ads") were also considered advertisements, except that any portion of such sections which included an area (mail-in coupon) for use by a reader to write down his or her own advertisement and submit it to petitioner to be published was considered nonadvertisements. Finally, areas of the publication devoted to highlighting advertisements of a similar nature (e.g., a banner heading for "Restaurant Guide" or "Dining Out") were considered to be advertisements in their entirety.

Subsequent to the Division's calculations, and the noted revision thereto, petitioner's staff analyzed four issues of the publication, specifically those issues dated 5/30/79, 2/25/81, 8/5/81,

and 8/11/82 (which issues were also included among the issues reviewed by the Division), utilizing its own method of calculation known in the vernacular as the "additive" approach.

As a starting point under petitioner's method of analysis, the total available area for print on each page was 168 square inches, which amount agrees with that used as a starting point by the Division.

Petitioner's method of analysis centers upon computing the amount of total printed advertising space in each of the issues. In essence, petitioner's approach focuses on totalling the square inches of ad space, and comparing said total to the total printed area per page. The main specific discrepancies between petitioner's method and the Division's method involve the banners or headings for like-groups of advertisements (e.g., "Restaurant Guide"), the house ads, and the air space between ads. The like-group headings themselves are not sold to any particular advertiser or group of advertisers. With respect to the latter items, petitioner's method treats house ads as nonadvertisements and also excludes all of the air space between ads in its calculation of the amount of advertising (since only an advertisement itself is measured).

At hearing, petitioner provided a description of the manner of composing (putting together) its publication. Ads are sold by the column inch (the width of a given column [which is a function of the layout of a particular issue] times the depth of a column measured in half-inch increments). During the period in question, petitioner's publication varied between five, six, and seven columns in width. Layout and presentation are accomplished in large measure by using air space to align the printed pages in a square (or rectangular) format. If an advertiser places an ad which utilizes a printed area encompassing 3-1/4 column inches of space, the advertiser is charged for 3-1/2 inches of column space (thereby being charged for the additional 1/4 inch of space upon which printing does not appear). Air space, being largely a function of format presentation, is not sold per se.

Utilizing petitioner's method of determining compliance with the 90/10 rule, which as noted does not include any measurement of air space and which treats house ads and banner headings

for like-group ads as nonadvertising, the four issues analyzed by petitioner all comply with the 90/10 rule.

To more specifically describe petitioner's method of analysis, petitioner measured the size of each of its display ads to the longest one-half inch, and measured the length and width of each column of classified advertisements. Petitioner also treated house ads (e.g., ads for "carriers wanted", "use our paper", "use Scotsman Printers", and the entire area of advertisement and coupon to be used for a potential advertiser in placing an ad) as well as like-group banners (e.g., Dining Guide) and civil service ads (ads placed by, inter alia, firemen and policemen), as nonadvertisements.

Some articles of general interest or community interest are included in every issue. These articles, as well as other items including photographs and petitioner's own house advertisements, were described in testimony as being "fill" utilized to "finish off" the publication in terms of layout and format presentation. Petitioner never employed any reporters nor did it subscribe to any news services (e.g., Associated Press, United Press International, etc.).

As noted, only a few editions from some of petitioner's issues were unavailable at the time of audit. While the Division initially requested that petitioner furnish issues for certain specific dates for audit review, it is clear that in instances where petitioner was unable to furnish a complete set of editions for a specific issue date, other dates where a complete set of editions was available were agreed upon and substituted. Petitioner agreed to the use of the issue dates specified in footnote "1" for purposes of audit review, and a complete set of all 10 editions of each of the 11 issues on these dates was available and was reviewed. Petitioner admitted that the issues reviewed and analyzed upon audit constitute a representative sample of petitioner's publication.

We modify finding of fact "22" to read as follows:

> In July 1983, the Department of Taxation and Finance published Memorandum TSB-M-83(20)S, "Shopping Papers and Advertising Supplements". The purpose of the memorandum was to state " . . . the [Division's] policy on the application of sales tax to shopping papers and advertising supplements, as a result of Chapter 834, Laws of 1977, effective September 1, 1977."

The memorandum provides, in relevant part, that:

> "For purposes of clarification, the term 'advertisement' . . . is defined as all the material for the publication for which the publisher receives consideration and which calls attention to something for the purpose of getting people to buy it, sell it, seek it, or support it. 'Advertisements' also include any printed area in which the shopping paper advertises its own services. This is consistent with the United States Postal Service definition of advertising. While the shopping paper's own displays advertising its services would constitute advertising, any forms printed in the paper for the submission of advertisements by readers would not be included as 'advertisements.' The area devoted to public service announcements, the publication's banner head and the editorial box should not be considered as 'advertisements' either, when applying the ninety percent rule; nor should any area provided for free classified advertisements." (Emphasis added.)

The memorandum also deals with "advertising supplements" which are distributed with a shopping paper and provides that:

> " . . . although considered part of the shopping paper when distributed with it, [such supplements] are not part of such paper for purposes of applying the 90% rule. The 90% rule applies only to the advertising that is purchased from the shopping paper publisher pursuant to its advertising rate schedule for insertion in the shopping paper, and paginated and otherwise printed as an integral part of the shopping paper.
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> "Advertising material handed out with a shopping paper, but not inserted in the shopping paper will qualify for exemption as an advertising supplement as long as it is distributed with an exempt shopping paper. Such separate advertising material will not be counted in applying the 90% test to a shopping paper that was delivered at the same time. Furthermore, the charge by a shopping paper publisher to the advertiser for distribution of the advertising supplement would not be subject to tax."

We modify the last sentence of the Administrative Law Judge's finding of fact "22" to read as follows:

> The Division used the memorandum as a guideline in making the determination that petitioner's publication did not comply with the 90/10 rule.[2]

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[2] We modify this finding to more accurately reflect the coverage of the TSB-M and the testimony of the auditor regarding its use in the audit. On this latter point, the last sentence of the Administrative Law Judge's finding of fact "22" read as follows:

> "The Audit Division followed the guidelines set forth in the memorandum in making the determination that petitioner's

We find the following additional fact as requested by the petitioner.

Petitioner's publication contained items of news and current events.

OPINION

Tax Law § 1115(a)(20) provides for an exemption from the sales tax imposed pursuant to § 1105(a), and compensating use tax imposed pursuant to § 1110, upon "[p]aper, ink and any other tangible personal property purchased for use in the publication of a shopping paper . . . which is to become a physical component part of such paper."

The term "shopping paper" is defined by Tax Law § 1115(i)(B) and (D) as follows:

> "(B) For purposes of this subdivision, the term 'shopping paper' shall mean those community publications variously known as consumer papers, pennysavers, shopping guides, town criers, dollar stretchers and other similar publications, distributed to the public, without consideration, for purposes of advertising and public information.
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> * * *
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> (D) The term 'shopping paper' shall not include mail order and other catalogs, advertising fliers, travel brochures, house organs, theatre programs, telephone directories, shipping and restaurant guides, racing tip and form sheets, shopping center advertising sheets and similar publications."

For purposes of Tax Law § 1115(i), subparagraphs (B) and (C) thereof set forth requirements to be met by a publication in order to be defined as a shopping paper and thereby gain the benefit of exemption. Of the requirements set forth, only the following requirement is at issue herein:

> "The advertisements in such publication [a shopping paper] shall not exceed 90 percent of the printed area of each issue." (Tax Law § 1115[i][C].)

The Division determined that petitioner's publication was not a shopping paper because it failed to satisfy this criterion, i.e., it contained more than 90 percent advertisements. Key to this determination is the Division's interpretation of the terms "advertisements" and "printed area" as used in the section.

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publication did not comply with the 90/10 rule."

The Administrative Law Judge determined that: (1) petitioner's publication was not a shopping paper entitled to exemption because petitioner failed to meet its burden of establishing that its interpretation of § 1115(i)(C) is the only reasonable interpretation; (2) petitioner's publication was not a newspaper; (3) the constitutionality of § 1115(i)(C) is beyond the jurisdiction of the Division of Tax Appeals; and (4) the methodology used by the Division, i.e., selection of specific issue dates for the publication, was adequate to properly determine the tax due.

On exception, petitioner disagrees with the determination of the Administrative Law Judge on all of the conclusions of law and reiterates its assertion that the Division's reliance on Memorandum TSB-M-83(20)S "Shopping Papers and Advertising Supplements" was improper because it was not properly promulgated as a regulation.

The Division, on exception, reiterates the arguments made at hearing that petitioner's publication was not a shopping paper; that its interpretation of § 1115(i)(C) is proper; that its methodology for conducting the audit was proper and that the constitutionality of § 1115(i)(C) is beyond the jurisdiction of the Division of Tax Appeals.

We affirm the determination of the Administrative Law Judge.

We deal first with TSB-M-83(20)S issued by the Division in July 1983 and petitioner's assertion that the Division's reliance on it was improper because it was not promulgated as a regulation and its effect on the proceedings herein. We agree with petitioner that Technical Services Bureau memoranda ". . . do not meet legal notice and filing requirements and, as such, do not have any definitive legally binding effect." (See, Developing and Communicating Interpretations of the Tax Laws: A Report to the Governor and the Legislature reviewing Department of Taxation and Finance Policies and Practices; March 1989, James W. Wetzler Commissioner, pg. 22.) However, to the extent that the Memorandum embodies the Division's interpretation of these provisions of law at issue in this case, it is relevant. Accordingly, we determine the issues in this case based on the reasonableness of the Division's interpretation of § 1115(i)(C) and the principles of law relevant to such interpretation.

We deal next with the principal issue in this case, namely, whether petitioner's publication is a shopping paper entitled to an exemption from sales and use tax.

Petitioner herein seeks an exemption from tax. As a general proposition, statutes creating tax exemptions are to be strictly and narrowly construed (Matter of Grace v. State Tax Commn., 37 NY2d 193; Matter of Old Nut Company v. State Tax Commn., 126 AD2d 869, 871, lv denied 69 NY2d 609). The burden of proving entitlement to a tax exemption rests with the taxpayer (Matter of Young v. Bragalini, 3 NY2d 602).

The crux of the matter here is whether the Division's interpretation of the terms "advertisement" and "printed area" in section 1115(i)(C) is correct.

In the absence of definitions of the terms in statute or regulation, we resort to the test of common understanding (Matter of Building Contractors Assn. v. Tully, 87 AD2d 909, 449 NYS2d 547).

Advertising is defined in part as "the action of calling something to the attention of the public especially by paid announcements" (Webster's New Collegiate Dictionary, 1981).

The Division included "house ads," which advertised the services of the pennysaver and Scotsman Press, and banners, e.g., Restaurant Guide, denoting a section of like group advertisements, as advertisement for purposes of determining whether petitioner's publication met the 90/10 rule of § 1115(i)(C) notwithstanding that these items did not specifically generate monetary consideration to petitioner. Petitioner asserts that since it received no consideration for "house ads" they are not advertisements. We cannot agree. We find no requirement of compensation for matter to be defined as an advertisement nor do we read the Division's interpretation as expressed in the Memorandum as always requiring compensation in order for material to be considered an advertisement. The Division's definition of advertisement as expressed in the Memorandum covers three distinct areas:

(a) paid advertisements, i.e., all material for which the publisher receives consideration and which calls attention to something for the purpose of getting people to buy it, sell it, seek it or support it;

(b) the shopping paper's own displays advertising its own services, i.e., house ads, for which no consideration is expected; and

(c) advertising supplements distributed with a shopping paper in which case the "charge" by the publisher for distribution is also not considered subject to tax.

Accordingly, treatment of "house ads" as advertisements is proper. The Memorandum does not deal specifically with banners, e.g., Restaurant Guides; however, they undeniably are used to call attention to the individual advertisements thereunder. In our opinion, the Division's interpretation including banners as advertisements is appropriate and within the meaning of the statute.

We next address the issue of the Division's interpretation of the term "printed area." Petitioner asserts that the Division's interpretation of the term "printed area," which includes not only the actual area printed upon but also the blank or gutter space which contains no print, is erroneous and inconsistent with legislative intent. We disagree.

The Division and the petitioner agree that there are 168 square inches of "printable area" per page. Petitioner's General Manager in Charge of Commercial Printing, Mr. Colburn, testified that "[p]rinted area [the term in the statute] is not a publisher's term, so it's very hard to use" and that petitioner calculated the amount of square inches available for printing (i.e., 10 1/2 inches wide by 16 inches deep) per page or 168 square inches and that is what is sold. (Tr., pp. 115-116.) The Division, in determining whether a particular issue complied with the 90/10 rule, placed all blank or gutter space into the category of either advertisement or nonadvertisement depending on the printed material around it, i.e., 100% of the space between two advertisements constituted advertising, 100% of the space between two nonadvertisements constituted nonadvertising. The blank space between an advertisement and a nonadvertisement was allocated 50% as nonadvertising space and 50% as advertising space.

At oral argument on its exception, petitioner asserted that this methodology elevated form over substance in that compliance with the 90/10 rule could be determined solely on the placement of material in the pennysaver rather than on the actual content of such material as either advertisement or nonadvertisement. We do not accept petitioner's assertion. The percentage

allocation of the blank or gutter space as advertisement or nonadvertisement will depend on the percentage allocation of the printed material as advertisement or nonadvertisement. In short, if the printed material is 90% advertisement and 10% non-advertisement, the blank or gutter space will be in the same percentages under the Division's methodology. The percentage calculated should be identical to that reached if blank or gutter space were eliminated from both the numerator and denominator and only column inches (actual printed area) were utilized in each. Petitioner's approach is to include blank or gutter space in the denominator but to exclude it from the numerator, placing only column inches of advertising in the numerator. This unequal treatment of blank or gutter space always works in the favor of petitioner by creating an artificially larger printable base (denominator) against which to apply advertising content (the numerator) to determine compliance with the 90/10 rule.

We next address the issue of whether the petitioner's publication was a newspaper, for purposes of § 1115(a)(5) of the Tax Law which exempts receipts from the sale of newspapers and periodicals from the sales and use taxes imposed pursuant to §§ 1105(a) and 1110 of the Tax Law and § 1118(5) which exempts, specifically, from use tax the paper (but not the ink) used in the publication of newspapers and periodicals. Petitioner seeks exemption under §§ 1115(a)(5) and/or 1118(5) upon the claim that its publication constitutes a newspaper.

We conclude petitioner's publication is not a newspaper, based on Matter of G & B Publishing Co., Inc. v. Dept. of Taxation (57 AD2d 18) which involved a publication described in terms nearly identical to those describing petitioner's publication. The Court held that the publication was not a newspaper.

We deal next with petitioner's assertion that the audit methodology is improper. The crux of petitioner's assertion is that the Division should have reviewed a few more issues published during the audit period than the Division reviewed. Petitioner does not assert that the Division should have reviewed all the issues published during the audit period and in any case petitioner admits that it did not have all the issues available for review. Petitioner characterizes its consent to the use of specific issues as representative of the issues published during the audit period as, at

best, equivocal. We cannot agree. Our review of the record leads to the same factual conclusion reached by the Administrative Law Judge, namely, that petitioner and the Division settled upon eleven issue dates to be reviewed and that petitioner agreed that these issues were representative of the issues throughout the audit period. Under the circumstances we find the methodology proper.

We deal finally with petitioner's assertions that section 1115(i)(C) is unconstitutional on its face in that it denies petitioner its constitutional rights under the first and the fourteenth amendments of the United States Constitution. The jurisdiction of the Tribunal, as prescribed in its enabling legislation, does not encompass such constitutional challenges (see, Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988). It is presumed that statutes are constitutional and that § 1115(i)(C) in particular is constitutional.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of The Scotsman Press, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of The Scotsman Press, Inc. is denied; and

4. The notices of determination and demand issued on June 12, 1984 are in all respects sustained.

DATED: Troy, New York
September 14, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner