

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GENEVA PENNYSAYER, 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, 1981	:	
through February 29, 1984	:	

Petitioner, Geneva Pennysaver, Inc., 40 Castle Street, P.O. Box 751, Geneva, New York 14456, filed an exception to the determination of the Administrative Law Judge concerning a 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, 1981 through February 29, 1984 (File No. 801671). 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.

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 and such facts are stated below. We also find an additional fact as requested by the petitioner which fact is indicated below.

Petitioner, Geneva Pennysaver, Inc., published a shopping paper entitled "Geneva Pennysaver". The paper was published weekly and was distributed in the Geneva, New York local area without charge. The publication contained advertising, community news and community notices.

We find as an additional fact that the Geneva Pennysaver contained matters of current events.

On September 20, 1984, as the result of an audit, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, covering the period June 1, 1981 through February 29, 1984 for taxes due of \$9,486.54, plus interest of \$1,826.44, for a total of \$11,312.98.

On audit, the Division determined that the publication did not qualify for exemption as a "shopping paper" under Tax Law § 1115(i) in that advertisements in the paper exceeded 90 percent of the printed area of each issue. Consequently, the Division found that the charges paid for the service of printing the paper were taxable. The taxes due on printing services amounted to \$9,306.01. The audit also disclosed tax due of \$180.53 on unsubstantiated nontaxable sales. Petitioner did not dispute the latter amount.

In order to determine the ratio of advertising space to nonadvertising space, the Division analyzed 12 issues and made the following calculations:

<u>Issue</u>	<u>Total Area Available for Printing</u>	<u>Total Area of Nonadvertisements</u>	<u>Percent of Nonadvertisements</u>
6-3-81	2,772 sq. in.	97 sq. in	3.50
6-10-81	3,465	149.5	4.31
6-17-81	3,465	150.45	4.34
6-2-82	3,465	215.25	6.21
6-9-82	4,158	215.50	5.18
6-16-82	4,158	370	8.90
9-7-83	2,772	246	8.87
9-14-83	3,465	253.5	7.32
9-21-83	3,465	249.75	7.21
5-16-84	4,158	300.5	7.23
5-23-84	6,237	402	6.45
5-30-84	4,158	348.5	8.38

In its calculations, the Division first determined the area available for printing on each page of the paper. This area amounted to 173¼ square inches which was verified with the printer. The borders along each page were not included in this calculation. The area available for printing on each page was multiplied by the total number of pages to determine the total area available for printing in each issue. The Division next determined the area on each page consisting of nonadvertising space. These amounts were totalled and divided by the total available space per issue to determine whether the advertising space in the paper exceeded 90 percent.

The Division considered the following items as nonadvertisements: the publication's bannerhead¹ public service announcements, articles of general interest, contest winners, community events, cartoons, local school menus, lost and found and like notices. Areas between these nonadvertisements and advertisements were determined to be half advertisement and half nonadvertisement. The space between two advertisements was considered all advertising; and the area between two nonadvertisements was counted as nonadvertising space. The Division deemed all paid advertisements, including classified ads, to be advertisements. Sections of the paper which promoted petitioner's own services were also considered advertisements, except that portion of such sections which included an area with a form to be returned by the reader. Finally, the paper devoted certain pages of each issue to advertisements for similar businesses. These sections, for example, "Automotive Sales & Services" and "Good Times Guide", had banners

¹The term "bannerhead" refers to the publication's name on the front page.

across the top of the page consisting of the title of the section. The space for the banners was considered advertising.

In July 1983, the Department of Taxation and Finance published a memorandum (TSB-M-83[20]S) entitled "Shopping Papers and Advertising Supplements" for purposes of clarifying the Department's policy regarding the term "advertisements" and the 90 percent rule for shopping papers. The memorandum defined advertisements 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. The area devoted to public service announcements, the publication's bannerhead and the editorial box should not be considered as advertisements when applying the 90 percent rule, nor should any area provided for free classified advertisements." The Division followed the guidelines set forth in the memorandum in making the determination that the shopping papers did not comply with the 90 percent rule.

Petitioner sold advertising space by column inches. If an ad was placed in a section with a banner, the advertiser did not pay for the banner space.

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.

(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.

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 and (2) the constitutionality of § 1115(i)(C) is beyond the jurisdiction of the Division of Tax Appeals. With respect to the issue of whether the Geneva Pennysaver was a "newspaper", the Administrative Law Judge determined the issue moot (1) because the pennysaver was distributed without charge, thus making inapplicable Tax Law § 1115(a)(5) which provides an exemption from sales and use tax for receipts from sales of newspapers and periodicals and (2) because the Division did not impose tax on purchase of paper, thus making inapplicable § 1118(5) which provides an exemption from use tax with respect to [among other things] paper used in the publication of newspapers and periodicals.

On exception, petitioner disagrees with the determination of the Administrative Law Judge on all of the conclusions of law.

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 § 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 Geneva Pennysaver and banners, e.g., Automotive Sales and Services, 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 such 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.

In its calculations herein, the Division first determined the area available for printing on each page of the paper. This area amounted to 173¼ square inches and was verified with the printer. The borders on each page were not included in this calculation. 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 nonadvertisements constituted nonadvertising. The air space between advertisement and nonadvertisement was allocated 50% as nonadvertising space and 50% as advertising space.

Petitioner asserts that this methodology elevates 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 which the Administrative Law Judge determined to be moot, namely 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 finally with petitioner's assertions that § 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 Geneva Pennysaver, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Geneva Pennysaver, Inc. is denied; and
4. The notice of determination and demand issued on September 20, 1984 is in all respects sustained.

DATED: Troy, New York
September 11, 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