

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

LEN RAGOZIN :

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, 1988 through November 30, :
1992.

DETERMINATION
DTA NOS. 814840
AND 815094

In the Matter of the Petition :

of :

LEN RAGOZIN :

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 December 1, 1985 through November 30, :
1992.

Petitioner, Len Ragozin, 465 West 23rd Street, Apt. 2A, New York, New York 10011,
filed petitions for revision of determinations or for refunds of sales and use taxes under Articles
28 and 29 of the Tax Law for the period December 1, 1985 through November 30, 1992.

A hearing was held before Roberta Moseley Nero, Administrative Law Judge, at the
offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 10,
1996 at 10:30 A.M. Petitioner's reply brief was received on May 5, 1997, which date began the
six-month period for the issuance of this determination. Petitioner appeared by Charles L.

Walker, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Brian J. McCann, Esq., of counsel).

ISSUES

I. Whether petitioner's publication, known as The Sheets, is exempt from sales tax pursuant to Tax Law § 1115(a)(5) and 20 NYCRR 528.6 as a periodical (DTA No. 814840).

II. Whether petitioner has proven that sales tax was paid on his purchases during the audit period prior to receiving his Certificate of Authority (DTA No. 815094).

III. Whether certain of petitioner's expense purchases were exempt from sales tax (DTA No. 815094).

FINDINGS OF FACT

1. Petitioner is a sole proprietor whose business is producing The Sheets, a publication devoted to the sport of horse racing. The Sheets provides its readers with information on horses entered in races at a certain track for a given day. The primary purpose of providing this information is to assist in the handicapping of horse races, although the information is used for other purposes such as the purchase or claiming of horses. The Sheets is published five or six days a week, 52 weeks a year and provides information on all horses entered in all races for the tracks operated by the New York Racing Association (hereinafter "NYRA").¹

2. A letter was written to petitioner on July 9, 1990 from the Revenue Enhancement Bureau of the Division of Taxation (hereinafter "Division") informing petitioner that he was

¹There are references in the record to The Sheets being published for other race tracks in the country, but it is not clear where those other race tracks are located.

“providing a taxable information service as defined by Sec. 527.3.” The letter further informed petitioner that he was required to register as a vendor and collect sales tax. Enclosed with the letter were a Sales Tax Registration Kit and returns covering the period June 1, 1987 to the date of the letter. The record is not clear as to what transpired in response to this letter. However, on October 22, 1990 the Division issued a sales tax Certificate of Authority to petitioner.

3. Mr. Oscar Nesbitt, the Division’s auditor in this matter, was assigned the case in January of 1992. Pursuant to a notation in the auditor’s Field Audit Report, his early attempts to schedule an appointment with petitioner were unsuccessful because of petitioner’s insistence that The Sheets was a periodical and therefore exempt from tax. The auditor requested clarification on this issue from other Division personnel and apparently based his initial determination of the taxability of petitioner’s publication on a May 21, 1992 memorandum addressed to Harry Bleiburg from Frank Fleury, both of the Division. The memorandum speaks only to the issue of whether The Sheets was exempt as a newspaper and concludes that since The Sheets relates only to horse racing, and does not contain articles of general interest or reports on current events, it was not a newspaper and was therefore taxable. This memorandum did not mention or discuss whether The Sheets was a periodical. On June 3, 1992, the auditor sent petitioner a letter stating that after review of The Sheets it had been determined that the publication was taxable pursuant to Tax Law § 1105(c)(i) and therefore an audit would be commenced at the Division’s offices on June 22, 1992.

4. The audit was further delayed because petitioner had requested an advisory opinion from the Division on the issue of whether The Sheets was taxable or exempt as a periodical. According to the field audit report the request was withdrawn when petitioner was informed that

if issued the opinion would be adverse to his position. The actual audit began in September of 1993 and consisted of an audit of petitioner's sales and expense purchases.

5. The auditor in this matter testified that his original decision to proceed with this audit was based in part on the May 21, 1992 memorandum from Mr. Fleury. However, the field audit report clearly states that petitioner claimed The Sheets was exempt from taxation as a periodical. Therefore, it may be presumed that the notice issued in this matter was based on the theory that petitioner's publication was not a periodical.

6. On December 5, 1994 the Division issued a Notice of Determination (notice number L-009879250) to petitioner for sales and use taxes for the period December 1, 1985 through November 30, 1992 for taxes due of \$36,144.66, plus interest of \$18,339.78 for a total of \$54,484.44. No penalty was asserted. This notice was the result of the audit of petitioner's expense purchases for the period. Petitioner requested a conciliation conference and on March 8, 1996 a Conciliation Order was issued recomputing the statutory notice to \$14,288.41 in tax due with interest at the applicable rate. A petition contesting this order was received by the Division of Tax Appeals on June 7, 1996. This petition was assigned DTA No. 815094.

7. On December 19, 1994 the Division issued a Notice of Determination (notice number L-009910382) to petitioner for sales and use taxes for the period June 1, 1988 through November 30, 1992 for taxes due of \$109,132.43 and interest of \$53,252.11 for a total of \$162,384.54. No penalty was asserted. This notice was the result of the audit of petitioner's sales for the period and the determination that The Sheets was not exempt from taxation. Petitioner requested a conciliation conference and on December 22, 1995 a Conciliation Order was issued denying petitioner's request and sustaining the statutory notice. A petition contesting this order was

received by the Division of Tax Appeals on March 20, 1996. This petition was assigned DTA No. 814840.

8. It was mutually agreed by the parties that the hearings in these two matters be held at the same time and place.

DTA #815094

9. The majority of petitioner's publication consists of sheets setting forth speed figures for horses racing on the day of the publication. There is one sheet, or page, for each horse entered in each race for that day. Each sheet, or page, of The Sheets is meant to be "the lifetime history of a horse's efforts" (tr., p. 111). "And the idea of the ratings is to look at the horse's lifetime history, to project from its past history what its future is likely to be."(Tr., p. 111.)

Petitioner uses preprinted paper to produce The Sheets. The paper is imprinted with petitioner's name and The Sheets at the top. There are four columns of gray bars of several different shapes running down the length of the page. The bars in the first three columns are labeled by months, with January starting at the bottom of the page and ending with December at the top of the column. Each column represents a year in the life of the horse, starting on the left with figures earned as a two-year old. Therefore, the figure appearing on the top of the column furthest to the right of the page is the horse's most recent race.

Petitioner places the name of the horse and the race number, with certain other information, on the top of each page. The top of each column (to the left of the gray boxes) is headed with the year and the number of races the horse ran that year. Underneath each header appears the speed figures for those races. These figures are arranged graphically in that the slower figures are shifted to the left and the faster figures are shifted to the right. Onto the gray

blocks petitioner enters symbols which provide the reader with further information about the particular race that is not a component of the speed figures. The key to these symbols appears approximately in the middle of each publication of The Sheets.²

Petitioner introduced two publications of The Sheets, one dated December 5, 1996 and one dated December 8, 1996. The Division introduced a photocopy of The Sheets from the audit period dated July 11, 1992, which was the copy petitioner had originally submitted with his request for an advisory opinion.

10. The July 11, 1992 copy of The Sheets for Belmont Park is 111 pages. Page one lists where to get The Sheets. Page two consists of a humorous article entitled *Tout-Speak* by Paul W. Page three is an article entitled *Beyer Beware*. No author is listed. However, it can be presumed to have been written by someone connected with The Sheets since it refers to The Sheets as “ours”. Page four is a reprint from the autobiography of Lincoln Steffens. No author is listed. While it might be presumed that since it is an autobiography Mr. Steffens is the author, this is a difficult presumption to make since many times such books are written by the person in combination with an author. Pages 5 through 54 are the actual sheets which are described in Finding of Fact “9”. Between pages 54 and 55 are a series of 8 unnumbered pages. The first of these is the Ragozin Symbol Sheet which is a key, with examples, to the various symbols used throughout the actual sheets. The second and third pages are a listing of the July 11, 1992 entries for Belmont. The fourth page is simply a blank preprinted sheet. The fifth page is an article on

²To assist in visualization of “a sheet” one has been attached to this determination as Appendix A.

horse racing trading cards entitled "Pick a Card, Any Card" by Michael Dash. The sixth page is entitled "Maiden Winners" and is a listing of such horses by name with certain other information. The seventh and eighth pages are reprints from the Thoroughbred Daily News. The reprints consist of two narrative paragraphs, a listing of European Stakes Results, and a listing of Allowance and Handicap Races (five races listed with information and one or two sentences on each race). The next page is page 55. Pages 55 through 107 consist of actual sheets.

11. The Sheets for December 5, 1996 for Aqueduct is 94 pages. Page one lists where to get The Sheets. Pages two through four contain an article written by petitioner about how he had placed bets using The Sheets combined with a certain system. Pages 5 through 47 are the actual sheets which are described in Finding of Fact "9". Between pages 47 and 48 are a series of 5 unnumbered pages. The first of these is the blue Ragozin Symbol Sheet which is a key, with examples, to the various symbols used throughout the actual sheets. The second page is a notice to customers that the sales sites for The Sheets in Atlantic City had changed. Pages marked n1 and n2 are reprints from the December 3, 1995 Thoroughbred Daily News (It appears to be six different subjects about a paragraph each). There is no page marked n3 and the page marked n4 is merely a listing of the phone number to subscribe to the Thoroughbred Daily News. The next page is page 48. Pages 48 through 89 consist of actual sheets.

12. The Sheets for December 8, 1996 for Aqueduct is 76 pages. Page one lists where to get The Sheets. Pages two through four contain an article written by petitioner about how he had placed bets using The Sheets combined with a certain system.³ Pages 5 through 38 are the actual

³This is the same article that appeared in the December 5, 1996 publication of The Sheets described in Finding of Fact "11".

sheets which are described in Finding of Fact “9”. Between pages 38 and 39 are a series of unnumbered pages. The first of these is the blue Ragozin Symbol Sheet which is a key, with examples, to the various symbols used throughout the actual sheets. The second page is a notice to customers that the sales sites for The Sheets in Atlantic City had changed. Pages marked n1 and n2 are reprints from the December 6, 1995 Thoroughbred Daily News (It appears to be nine different subjects about a paragraph each). There is no page marked n3 and the page marked n4 is merely a listing of the phone number to subscribe to the Thoroughbred Daily News. The next page is page 39. Pages 39 through 71 consist of actual sheets.

13. Customers may purchase The Sheets on track, off track at a vendors, or directly through petitioner. The Sheets sells for \$35.00 each. There is a yearly subscription available at a rate of \$9,240.00.⁴

14. There is an average staff of about 13 people working in the office of The Sheets. Also working for The Sheets are the track observers, the majority of whom are paid as independent contractors on a per-day basis and are not full time. Some of the observers have other jobs as well, such as working for the Daily Racing Form (hereinafter “DRF”).

There are four employees who do the variant-making work on a daily basis, including petitioner and Mr. Leonard Friedman, and two others who do this part-time. This many people are needed because figures are collected on horses that run in the major circuits throughout the United States and Canada.

⁴This is the yearly subscription price appearing on the cover of both 1996 publications. The yearly subscription price appearing on the cover of the copy of the 1992 publication is illegible.

15. Mr. Leonard Friedman, who works at The Sheets, testified on petitioner's behalf. Mr. Friedman has worked at The Sheets since the late 1970s and has been employed full time by The Sheets since the early 1980s. Mr. Friedman has written articles that have appeared in the DRF. Eighty to ninety percent of Mr. Friedman's work consists of "variant making, which determines what numbers horses get for the efforts that they put out" (tr., p. 107). Mr. Friedman explained his view of The Sheets as follows:

"To us, The Sheets is a lifetime history of a horse. It's a history of the efforts that the horse has put out in races, which enables us to read what their direction and development is.

"And we found that there's recurrent patterns of development that horses have. That is, they are not exactly the same; but they fall within certain categories.

"And there are certain things we look for to say that this is a healthy horse that's developing in a good and [sic] way and therefore, that there are patterns which would lead you to feel this is a horse that is developing in a healthy way and therefore, you'd expect that it would be more likely to run well in the immediate future.

"And conversely, there are patterns to development that indicate the horse has problems, and you would expect, perhaps, it to run poorer races." (Tr., p.108.)

In Mr. Friedman's opinion, the only way to discern these patterns is by reading The Sheets.

16. Mr. Friedman explained that there are five factors that are used in arriving at the speed figures in The Sheets and they are:

"how fast the horse ran in the race; the weight that it carried; the wind; the path that the horse took around the track -- that is, whether it went outside and lost ground or saved ground along the rail; and the sophisticated judgment that has to be made every day as to how resilient the track was that day — that is, did the track help or hinder the horse to run that day." (Tr., p.112.)

Mr. Friedman explained that employees calculate their own timing of the race, rather than using published times, to factor in the location of the starting gate. This information is necessary

in the calculation of speed figures because the farther away the starting gate is from where the race is timed the faster start the horses have. Mr. Friedman added that this information may also need to be calculated into the speed figures because it may affect the actual length of the race. Exactly how this information is calculated into the final speed figures is a question of judgment. With regard to the wind calculations, Mr. Friedman testified that the individual judgment of the observer is required because there is no other information available from which to judge the wind at the track at the time of the race. He also explained that obtaining the distance a horse is from the rail at a given point in time in the race requires an observer's personal judgment.

The Sheets has observers at every race track for which sheets are produced. The Sheets does not, however, have observers at every track that it does numbers for. For some tracks without observers the video method of timing the race is used. This method is discussed in Finding of Fact "19". For the remainder of the tracks, information on the timing of the race, the weights, and the position of the horses is obtained from the DRF. The Sheets then has a program that estimates the ground loss based on the way the race was run and the post position of the horse. That information is printed out and proceeds through the remainder of the process in the same manner as the observers' reports.

17. Mr. Friedman explained specifically how The Sheets speed figures were arrived at by running through several forms that were introduced into evidence. The first was a standard sheet used by The Sheets' observers at the track. It lists the horses for the race, paths (the observer's opinion as to the location of the horse at different points around the turn), time of the race for the first and last placed horse and has a line marked wind. These are the forms turned in by The Sheets' observers.

Mr. Friedman then explained the track variant sheet. It has columns for: number (the number of the race); the distance of the race (official length per track); time (times done by observers, tapes or other information sources); the clock and the direction of the wind (both wind measurements are usually a combination of the wind as reported at the nearest airport and the observer's opinion determined by someone at the office); the velocity of the wind (usually a combination of the wind as reported at the nearest airport and the observer's opinion determined by someone at the office); whether a rail was put up (makes the race longer and a correction is required); the run-up (distance from the starting gate to the timing pole); standard run-up (if the run-up is different from the standard run-up for the track a correction has to be made); TV correction (a correction made if the race was timed off the TV); the short or long run-up correction; the run-up converted into time (internal checking device, if this time is subtracted from the race time the result should be close to the posted time); then a column for the strip which converts the time into Ragozin figures using a scale; and wind points (multiply the direction times the velocity and then a factor used by The Sheets for this purpose). At this stage the number resulting from adding or subtracting the wind factor to or from The Sheets' time for the race is known as the raw score. Then there is a column for zero time which is the time that would have produced a zero in The Sheets figures, or a championship race. There is a column for new points per trick which is used in calculating the speed for the remainder of the horses in the race besides the one that placed first. All of these steps merely produce a raw number.

The next step is to determine the resiliency of the track on the day of the race. A mechanical variant is used as an aid in the first step of the process. This is a "comparison of older claiming horses that ran on this day with what you would expect horses of that class to run

it” (tr., p. 131). The process begins with analyzing the older horse claiming races. These races are compared with the pars which have been established by petitioner for what a \$25,000.00 six-furlong race in New York “would be expected to go, averaging the first four horses of the race, or sometimes a few more if its a large field.” (Tr., p. 132.) The race for the day in question is compared to that par. Points may be added or subtracted from the raw score based on this comparison.

All of this is preliminary to the work done by Mr. Friedman and petitioner which is to determine the resiliency of the track for that day by looking at all of the horses that ran that day, the numbers that are projected to this point, and deciding whether that number should be added to or subtracted from. This is done on a race-by-race basis, but if there is no major change in the tack on a given day there will only be minor variations between the races. This work is based on personal judgment. It involves looking at all the horses that raced that day and knowing what was expected of them, and the actual conditions of the track that day and surrounding days and knowing how to apply that knowledge to the particular track in question. (i.e., knowing what effect such conditions are known to have on a particular track).

18. The Sheets produced a series of videotapes and a User’s Guide to assist its customers in interpreting The Sheets. The User’s Guide consists of two parts. The first part contains a letter from petitioner, information about obtaining The Sheets and the videos, samples and explanations and articles. The articles are entitled *Hoof Prints*, *Between the Sheets* and *Len Friedman on Recovery Lines*. The second part of the User’s Guide consists of articles that appeared in various other publications concerning petitioner and The Sheets. Mr. Friedman testified that the articles that appear in the first part of the User’s Guide were published in The

Sheets at one time or another, but that he couldn't say exactly when. He also stated that the articles were written by staff members. However, none of the three examples of The Sheets contains any of these articles or any other articles entitled *Hoof Prints*, *Between the Sheets* and *Len Friedman on Recovery Lines*. Furthermore, on one of the pages where the articles appear it specifically states, on the top of the page, that the articles are from the quarterly newsletter, not from The Sheets.

19. Petitioner explained the timing of horse races from a video.⁵ He began by explaining that he had purchased expensive equipment for this project and that, while in the beginning he was the only person timing the races from video, he had since trained several other people.

There are approximately 30 frames per second of video. Videos of the races are obtained from tapes, telecasts or the track itself. The numbers of the frames are imprinted on the video by petitioner using his own equipment. Instead of relying on the person with the stop watch and whatever reaction time he might have, the video allows the operator to stop the tape and write down the frame number at the beginning of the race and then fast forward and write down the number at the end of the race. The beginning frame number is subtracted from the ending frame number and then calculations are done based on 30 frames per second to get an exact time for the race. Petitioner testified that, as with the observers, races on tape are timed from the gate, and that it can be a matter of judgment (several frames) as to when the gates are completely opened. Petitioner also mentioned that when a horse does not quite start at the same time as the others from the gate, this is to be considered. Observers remain necessary for determining things like

⁵Petitioner utilized an actual video tape for assistance in his presentation.

which horse is on the outside and which is on the rail from the tape. As with the observer-timed races, these numbers are compared to the DRF charts as an accuracy check.

20. Petitioner was questioned, on cross examination about the information appearing in the July 11, 1992 publication of The Sheets. With regard to the listing of the entries for Belmont on that day petitioner admitted that he did not know where the information came from, that he was not aware they ever printed such information in that form, that obviously they had, but that they do not print such information in that form anymore. Petitioner testified that he had made it known around the office and to other people that he would pay for brief articles on the subject of horse racing and furthermore, that people submitting these articles used pseudonyms. With regard to the article attributed to Michael Dash petitioner stated that it sounded like it was a pseudonym and admitted that while he did not think that he had ever sold ads “It could turn out I’m all wrong. It could turn out they paid us for putting that in as an ad” (tr., p. 202). With regard to the page entitled Maiden Winners, petitioner testified that the information probably came from Thoroughbred Daily News. Petitioner explained that Mr. Paul Weinstein would be the person on staff who would select articles for The Sheets. Petitioner testified that generally articles appeared in the front and in the middle of The Sheets. However, occasionally if there were a number of announcements to make, the articles would only appear in the middle. Finally, petitioner testified that even articles from outside sources that appear in The Sheets would be assembled by his staff and edited if required because of space limitations.

21. Petitioner purchases information from Bloodstock Research Information Services, Inc. This information consists of lists of races by track with the names of the horses and the order of finish. This information is collected by petitioner but purchased in computerized format from

Bloodstock to avoid excessive data entry. As mentioned previously this information is also purchased from the DRF, apparently to double check both petitioner's information for those tracks with observers and the Bloodstock information for those tracks without observers.

22. Petitioner testified that it was during the audit in this matter that he became aware that he might be eligible for second class mailing privileges. Petitioner applied and was granted second class mailing privileges effective April 24, 1993.

23. Testifying on behalf of petitioner as an expert witness was Steven Crist. Mr. Crist is vice-president of NYRA. NYRA owns and operates Aqueduct Racetrack, Belmont Park and Saratoga Racecourse. He travels throughout the State, working at whatever track is open at the time. Mr. Crist received a bachelor's degree from Harvard College in 1978. From 1980 to 1990 he worked as a reporter and columnist for the New York Times on the topic of horse racing. He was the founding editor-in-chief of The Racing Times, a horse racing newspaper, from 1990 to 1992. From 1992 to 1994 he was on the Governor's Advisory Commission for Racing in the 21st Century. Mr. Crist has worked for NYRA since November of 1994. During his tenure writing for the New York Times, Mr. Crist made his own speed figures and, for the major races, might publish them in the paper.

24. Mr. Crist has never subscribed to or purchased The Sheets. He is familiar with The Sheets because petitioner had made The Sheets available to members of the press for major races. Mr. Crist was paid \$2,500.00 for his appearance at the hearing. He met petitioner for the first time personally the morning of the hearing. He had however, spoken with petitioner on the telephone four or five times over the past 15 years to get petitioner's opinion about certain

horses, or the speed figures petitioner had assigned to a horse, for the purpose of writing an article.

25. Mr. Crist described the term “speed figures” during his testimony as follows:

“Speed figures are an attempt to quantify each horse’s previous races, each individual race with a numerical representation.

‘There are many different methods and makers of speed figures. The common goal of them is to try and assign a number that indicates the quality of a performance.’ (Tr., p. 45,46.)

Mr. Crist testified that being the vice-president of NYRA he was familiar with the various publications sold at the race tracks. He stated that The Sheets is available for purchase at the NYRA tracks everyday. Mr. Crist then described the daily publication of NYRA entitled Post Parade. The Post Parade is sold to a majority of NYRA’s customers each day. The Post Parade is available at the track (for a price of \$1.50) and at various off-track locations (for a price of \$2.00). When asked on direct if the Post Parade charged sales tax Mr. Crist responded, “I don’t believe it does; no.” (Tr., p. 44, 45.) On recross, Mr. Crist asserted that the record reflected that sales tax was not charged on the Post Parade.

The Post Parade provides primarily information on past performances of the horses entered to race at a given track on a given day. It also contains advertising for special events at the NYRA tracks and “brief news stories involving horse racing” (tr., p. 45). Mr. Crist testified that all but one or two pages of Post Parade consisted of information on the past performances of the horses. This is consistent with the December 8, 1996 copy of the Post Parade introduced into evidence. The information on past performances of the horses includes speed figures. The speed figures in the Post Parade are provided by the firm Thoroughbred Sports Network located in Lexington, Kentucky. Mr. Crist testified on redirect examination that prior to the Post Parade

(prior to the spring of 1992) NYRA produced a publication entitled the Track Program that was smaller in size, contained only the names of the horses entered in the races with the jockey and trainer names, and “did not include any past performances, any selections or articles” (tr., p. 79). Mr. Crist testified that sales tax was charged on the Track Program.

26. Mr. Crist explained that there were many different methods of producing speed figures, that all methods started with some type of formula that takes the raw data available and converts it to a number, but that only the bad speed figures ended there. Usually that is a starting point and then the person making the figures has to make subjective decisions as to what factors to include in the calculation, and what each factor is. Taken into account are things like how fast the race track was, how hard the wind was blowing, the position of the starting gate and how deep the soil on the track was.

27. Mr. Crist went on to explain the difference between the Post Parade (or Thoroughbred Sports Network) speed figures and the speed figures contained in The Sheets. One way in which these publications differ is that for the Post Parade numbers the higher numbers represent the better performance and for The Sheets the lower numbers represent a better performance. The Post Parade figures are largely mechanical with little human judgment involved. They start with the running times of the races as posted by NYRA on the tote board and modify those times with their own opinion as to how fast the track was that day. The Thoroughbred Sports Network which provides the speed figures to NYRA is located in Kentucky and has no personal representation at the New York race tracks.

The Sheets on the other hand does not use the tote board times as a starting point, rather it has personal representatives at the tracks who time the races. Mr. Crist’s knowledge of this is

based on meeting people in the press box at the race tracks who had stop watches and were timing the races for The Sheets. The reason for independently timing the races has to do with the position of the starting gate. The starting gate is moved throughout the day simply for maintenance reasons. If left in the same place it would create large holes in the track and eventually sink into the dirt of the track. Some people in horse racing believe that this makes a difference because if the gate is further away from the pole where the race is officially starting the horses have, in effect, a running start. If however, the gate is close to the pole where the timing of the race begins, these horses would be going slower when they reached the timing pole because they had just started to run. The Sheets times the races from the time the gate opens rather than from the starting pole to provide a more accurate time. Wind is also taken into account by the representatives of The Sheets at the track. Mr. Crist's knowledge of this also stems from having seen individuals from The Sheets making notations on their programs concerning whether the wind was blowing fast or not. These judgments were made from observing the flags or weathervanes in the infield. The Sheets also takes into account the weight carried by a horse and the position that the horse ran on the track. A horse that has more weight than the rest and runs wide during the race is given a better speed figure than a horse that ran the exact same time but carried less weight and rode the inside of the track. The position of a horse during a race (i.e., wide or inside) is also determined by individuals at the track.

28. With all these considerations, most of which require independent judgment, it is unlikely that any two people will come up with the same speed figure. Speed figures can actually be adjusted. Mr. Crist testified that in his NYRA position he has called the company that supplies

the figures for the Post Parade and asked that they review certain figures if he thought they were incorrect. Changes have been made in response to his requests.

29. Mr. Crist explained that it was possible that when comparing two horses racing the same length the horse with the slower time could get the better speed figure depending on the remainder of the variables. He noted that the symbols used by The Sheets provided additional information about how a horse ran in a particular race that was not used in calculating the speed figures, such as whether the horse had gotten off poorly or had to be taken up. Mr. Crist also explained that people can read The Sheets for a given race, or even a given horse, and reach opposite conclusions as to how the horse will do in the race.

30. When Mr. Crist was asked on direct examination whether the speed figures listed in The Sheets constituted articles, the exchange proceeded as follows:

- “Q Do you know if the speed figures are articles on the subject of horse racing?
‘A I’m sorry?
‘Q In your opinion are the speed figures in The NY Sheets articles on the subject of horse racing?
‘A I’m sorry; I don’t understand the question. Are the figures articles?
‘Q Yes, reflecting judgment and opinion on the subject of horse racing?
‘A Yes; in my opinion the figures reflect judgment and opinion about horse racing.” (Tr., p. 68.)

Mr. Crist further testified that: the speed figures and other information in The Sheets was not available from other sources; that the speed figures in The Sheets constituted “interpretational narrations”; that the speed figures contained in the sheets were not “mere abstractions of information available to the public in other forms” (tr., p.69); and that it would not make sense to purchase the sheets at a cost of \$35.00 if the information was merely

abstracted from other sources. Mr. Crist testified that it was his “anecdotal experience” that people who used The Sheets were bigger bettors.

31. Also testifying on behalf of petitioner as an expert witness was Mr. David Litfin. Mr. Litfin is the lead handicapper and a columnist for the DRF in New York. In this capacity he writes a handicapping analysis of races in New York on a daily basis, a national column on Saturdays and a regional column that appears in the DRF on Wednesdays, Saturdays and Sundays. Mr. Litfin is the author of a book on handicapping horse races entitled Dave Litfin’s Expert Handicapping, Winning Insights Into Betting Thoroughbreds.⁶ Mr. Litfin has been writing for the DRF since 1991. From January of 1990 until December of 1991, Mr. Litfin worked for a related publication entitled MetroTurf.

32. Mr. Litfin does not subscribe to, but has purchased The Sheets. He was paid \$3,500.00 for appearing at the hearing in this matter. Mr. Litfin has only met petitioner several times at various functions, but has known of petitioner for approximately 25 years.

33. Mr. Litfin explains petitioner’s influence in the world of handicapping as follows:

“Long before *Picking Winners* was published, Len Ragozin was making a living at the track with speed figures refined from a basic approach devised by his father, Harry Ragozin, back in the late 1940s. Today, Len Ragozin’s figures - *The Sheets* - have acquired a reputation for their almost fanatical accuracy. They sell for \$35 per day and exert the single most powerful influence on the

⁶Introduced into evidence by petitioner as Exhibit 5 was a bound galley of this book with a publication date of September 1, 1995. The galley contains a specific warning that this is an uncorrected advanced copy of the book and that all quotes should be taken from the published version or should be checked by the publisher. Therefore, all citations to the galley in this determination will be to Exhibit 5, as introduced in this matter.

toteboard in New York, not to mention the fact that many stables use *The Sheets* as a basis for buying and selling horses.”⁷ (Exhibit 5, p. 4.)

34. Mr. Litfin testified that the DRF is sold at the track throughout the year and that, while he did not know for certain, he did not think that sales tax was charged on the DRF. The DRF costs \$3.00 on the track and \$3.50 off the track. The DRF contains: listings of horses entered in races for a particular day; race results; “records” of all the horses entered that day; statistics on jockeys and trainers; articles on upcoming major races; editorial commentary; and, letters. Mr. Litfin testified that approximately 20% of the DRF consisted of articles. The speed figures contained in the DRF are produced by Mr. Andy Beyer.

35. Mr. Litfin was also familiar with *The Sheets*, *Post Parade* and *Thoro-graph* speed figures. According to Mr. Litfin a speed figure “expresses the quality of a horse’s performance” (tr., p.87). He testified that he thought the “primary attraction” of his book was the section on how to interpret speed figures and analyze the figures to forecast a result in the current horse race. Furthermore, he thought analyzing speed figures was the most important part of handicapping a race. Mr. Litfin supports Mr. Crist’s opinions concerning the different methods employed by speed figure producers.

36. Mr. Litfin explains that *Thoro-graph* was started by Mr. Jerry Brown, a former associate of petitioner at *The Sheets*, in 1982. In referring to *Thoro-graph* and *The Sheets*

⁷*Picking Winners* was written by Andrew Beyer and is credited by Mr. Litfin with bringing “speed handicapping to the mainstream” (Exhibit 5, p.3).

together as sheets, he states that sheets differ from the Beyer speed figures appearing in the DRF as follows:

A horse's sheet contains its entire history, beginning with figures earned as a two-year-old; they are placed in the left-most of four vertical columns. Figures for three-year-olds are in the column just left of center. Four-year-old figures are just right of center. Five-year-old figures are in the right-most column. Each column begins with January and ends with December at the top. A horse's most recent race, therefore, is always at the top of the column farthest to the right.

"Sheet-style figures include adjustments for ground loss on turns: horses that run wide are credited for having run farther. Because of this feature, sheet numbers are sensitive to track biases.

"The sheets also include adjustments for wind velocity and direction and for the amount of weight carried, the theory being that these are things that can be accurately measured.

"*The Sheets* and *Thoro-graph* employ their own clockers, who time races from the starting gate so as to include the 'run-up' to the timing pole—the point where official timing of a race begins; run-up distances may vary, usually depending upon the proximity of a turn to the start of the race.

"On sheets, the lower the number, the faster the race. Theoretically, a champion runs a 0 (zero) on its best day; the figures measure how far a horse's effort was from championship performance. Typically, Grade 1 races are run in the neighborhood of 5, give or take a point or two; good allowance runners and high-priced older claimers generally run in the range of 10; maiden claimers in New York usually run in the mid to upper 20s.

"Plus and minus signs to the right of a figure on *The Sheets* indicate a quarter of a point slower or faster, respectively. A figure of 8+ is read 8¼; a figure of 8- is read as 7¾. A quotation mark following the number indicates half a point: 8" is read as 8½. *Thoro-graph* uses superscript figures to indicate quarter- and half-points: 8¹ is read as 8¼; 8² is read as 8½; 8³ is read as 8¾.

"The figures are arranged graphically, with the faster figures shifted to the left and the slower ones to the right. This makes patterns easy to spot . . ." (Exhibit 5, p. 7.)

In describing the Beyer figures Mr. Litfin explains:

"The Beyer figures are based on the more traditional 'higher number is better' scale. The highest ever Beyer figures will be in the 120s, and these rarified figures are earned by horses with championship potential; for example Black Tie Affair earned a 120 winning the 1991 Breeders' Cup Classic. A figure of 110 wins most stakes races for older horses. A figure of 100 wins lesser-quality stakes and allowance races on major circuits such as New York and California. A figure of 90 wins an average \$25,000 claiming race; a figure of 80 wins an

average \$14,000 claimer in New York, which is the lowest level at which previous winners compete.” (Exhibit 5, p. 7.)

37. Mr. Litfin testified that the public, in general, tends to concentrate on the speed figures for the last race that each horse ran. The Sheets are intended to be utilized by concentrating more on patterns of the horse’s development. For example, if two horses had the same speed number for the prior race, one would be more likely to pick the horse whose speed figures in The Sheets had declined gradually, rather than the one whose last race involved a large decline from the race before.

38. In the opinion of Mr. Litfin, those purchasing The Sheets are doing so to obtain the opinions and judgments of petitioner and his staff. Furthermore, in Mr. Litfin’s opinion the speed figures in The Sheets constitute articles of opinion and judgment and are interpretational narrations. Mr. Litfin testified that the speed figures as presented in The Sheets do not consist of information that is otherwise available.

39. Each of the witnesses appearing on behalf of petitioner included in their testimony a comparison, for given races, of petitioner’s speed figures with those of other publications. It is clear, as a result of this testimony, that petitioner produces speed figures that are different from those of other producers of speed figures.

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40. There was also an audit of petitioner’s purchases. The Notice of Determination issued regarding petitioner’s purchases was for taxes due of \$36,144.66, excluding penalty and interest. This was based on test period audit conducted by reviewing petitioner’s purchases in 1992 and then applying the results to the entire audit period.

A Conciliation Order was issued recomputing the statutory notice to \$14, 288.41 in taxes due, exclusive of penalties and interest. The Division submitted into evidence as Exhibit "O", a revised calculation of tax due on petitioner's purchases in accordance with the conciliation order.

41. Included in the remaining purchases at issue are purchases from Shadow Lithographers for letterhead, envelopes and printed stock. The Division in its brief concedes these items are not taxable pursuant to Tax Law § 1101(b)(4) and 20 NYCRR 526.6(c)(1). Therefore, all invoices listed in the Division's Exhibit "O" for Shadow Lithographers should be excluded, and the tax due on purchases recalculated without these transactions.

42. The petition indicates that petitioner is not objecting to the disallowance of item number 75 in paragraph five of his request for a conciliation conference. Therefore, the only issue remaining on the purchase audit is petitioner's objection to the Division's disallowing sales prior to the receipt of his Certificate of Authority on the basis that prior to that he could not issue a valid resale certificate and that therefore, tax must have been paid to the vendors.

43. Petitioner introduced four invoices and three service contracts that included the purchase of equipment dated during the audit period, but prior to the date of being issued the Certificate of Authority, showing that sales tax was being charged to petitioner. Petitioner also introduced a Field Service Agreement from Digital with "No" appearing next to exempt on the form. Petitioner also introduced several letters from vendors stating that they had received petitioner's exempt certificate in 1990 or 1991 and that petitioner had not been charged sales tax since the certificate had been received.

SUMMARY OF THE PARTIES' POSITIONS

44. Petitioner argues that The Sheets qualifies as a periodical under case law first because each issue contains several verbal articles written by different authors or staff members and the regulations require only a variety of articles without any substantiality requirement. Second petitioner contends that the speed figures appearing in The Sheets constitute articles because they are “numerical and symbolic expressions of opinion and editorial judgment” (Petitioner’s Brief, DTA #814840, p. 12).

With regard to the audit of petitioner’s expense purchases petitioner contends that tax was paid on all purchases prior to his being issued a sales tax Certificate of Authority because his vendors would have to require either payment of tax or a resale certificate which he could not issue prior to receiving the authority. Specifically, petitioner contends that purchase of information from Bloodstock Research, Inc. is exempt from sales tax as dissemination of news pursuant to Tax Law § 1105(c)(1).

45. The Division argues that with regard to the verbal articles appearing in The Sheets, petitioner has not proven that either a variety of articles appeared in each publication or that the articles that did appear were by different authors. The Division argues that the speed figures appearing in The Sheets can not be considered articles and more resemble listings or statistical data presented in a rigid format which has been determined by the courts not to constitute a periodical. Based on this comparison the Division contends that petitioner’s publication is a taxable information service and if it is not such a service then it is a sale of tangible personal property subject to tax. The Division also argues that petitioner’s expert witnesses should not be considered experts for the purpose of determining if petitioner’s publication fits within the definition of a periodical under the regulations.

With regard to the audit of petitioner's expense purchases the Division contends petitioner has not met its burden of showing that all the transactions were exempt or excluded from tax. On the specific issue of the Bloodstock Research, Inc. transactions the Division argues that the exemption contained in Tax Law § 1105(c)(1) is not available to petitioner because petitioner is not a newspaper or broadcaster.

46. In reply petitioner primarily argues that case law does not limit the definition of an article to information conveyed in a narrative form but allows for the conveyance of ideas in any written form, including the speed figures as conveyed in The Sheets. Petitioner also notes that its expert witnesses were not presented for the purpose of stating that petitioner's publication fit within the legal definition of periodical in the regulations, but were to present testimony regarding the nature of speed figures and petitioner's publication.

CONCLUSIONS OF LAW

A. Tax Law § 1115(a)(5) exempts from sales tax all receipts from the sale of newspapers and periodicals. A periodical is defined in 20 NYCRR 528.6(c) as follows:

“(1) In order to constitute a periodical, a publication must conform generally to the following requirements:

 “(i) it must be published in printed or written form at stated intervals, at least as frequently as four times a year;

 “(ii) it must not, either singly or, when successive issues are put together, constitute a book;

 “(iii) it must be available for circulation to the public;

 “(iv) it must have continuity as to title and general nature of content from issue to issue; and

 “(v) *each issue must contain a variety of articles by different authors devoted to literature, the sciences, or the arts, news, some special industry, profession, sport or other field of endeavor.*”(Emphasis added.)

The parties are in agreement that the only requirement at issue in these proceedings is the fifth requirement of the regulation. Indeed, since a review of the record indicates that there is no question that petitioner's publication is devoted to the sport of horse racing, the only remaining question is whether each issue of *The Sheets* produced during the audit period contained "a variety of articles by different authors."

B. It is presumed that the sales made by petitioner were taxable and it is petitioner's burden to prove that its receipts were exempt (Tax Law § 1132[c]). The issue is one of statutory and regulatory interpretation as to whether the regulation as applied by the Division in this case comports with the intent of the statute. Contrary to petitioner's assertion that taxing statutes are to be construed in favor of the taxpayer and against the Division, when the issue to be decided is whether the taxpayer is entitled to an exclusion or exemption from tax, the taxpayer is required to prove that its interpretation of the statute is the only reasonable interpretation, or that the Division's interpretation is unreasonable. (*Matter of Blue Spruce Farms v. NYS Tax Commn.*, 99 AD2d 867, 472 NYS2d 744, *affd* 64 NY2d 682, 485 NYS2d 526, *Matter of Grace v. State Tax Commn.*, 37 NY2d 193, 371 NYS2d 715). These principals of statutory construction also apply to the interpretation of regulations (*see, Cortland-Clinton v. NYS Dept. Of Health*, 59 AD2d 229, 399 NYS2d 492).

C. Both parties discuss the case of *Business Statistics Org. v. Joseph* (299 NY 443), and certain cases following it.⁸ *Business Statistics* was decided prior to the adoption of the regulation

⁸Not included in the following discussion are *Matter of Sun Electric Corp.* and *Matter of Standard and Poors* cited by petitioner in support of his position. These are Administrative Law Judge opinions of the Division of Tax Appeals and as such are not precedential and may not be cited by petitioner (Tax Law § 2010[5]).

in question in 1979, and involved the issue of what constituted a periodical. The Court of Appeals in *Business Statistics* determined that, in the absence of a definition of periodical in local law, statute or case law, the test of common understanding should be applied, meaning that “A tax law should be interpreted as the ordinary person reading it would understand it” (*Business Statistics Org. v. Joseph, supra* at 449, citing, *Howitt v. Street & Smith Publications*). The Court stated that determinations pursuant to Federal copyright and postal regulations based on the difference between periodicals and newspapers on one hand and books on the other, while not controlling, were helpful in that they provided guidance in determining what the common understanding of a periodical was. The Court noted that the publication in question was classified as a periodical in the copyright office and set forth the following comments of the United States Supreme Court concerning the definition of periodical under the postal requirements:

“A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature of some special branch of learning or to a special class of subjects.” (*Houghton v. Payne*, 194 US 88, 97, 48 L Ed 888.)

The Court continued by concluding that the publications at issue were periodicals especially in light of language from another United States Supreme Court case which defined literature in the context of the postal requirements as “no more than productions which convey ideas by words, pictures, or drawings” (*Hannegan v. Esquire*, 327 US 146, 153, 90 LEd 586).

The court in *Business Statistics* clearly stated that its reliance on the Federal cases and regulatory requirements was because there existed no regulatory definition of periodical. Petitioner argues that, even so, this case and the postal requirement cases cited therein, should be relied on for assistance in construing the definition of article under the regulation. In particular

petitioner argues that since the regulation is similar in language to the test as set forth in *Business Statistics*, it is preferable to be guided by the language in the decision rather than resorting to dictionary definitions. While I agree with this general proposition, I find that there is simply no guidance available in *Business Statistics* or the cases cited therein, that would assist in defining article under the present circumstances.

To begin with, the Court in *Business Statistics* was concerned with defining the term periodical in general in the absence of legislative or administrative definition; it did not attempt to define the term article. Second, the court in *Business Statistics* and the United States Supreme Court cases cited therein, were focused on the issue of defining periodical in the context of whether the publication at issue was a periodical as opposed to a book, which is not the issue in the present case. Moreover, the courts' definition of periodical relied on by petitioner requires that the articles be devoted to "general literature of some special branch of learning or to a special class of subjects" (*Houghton v. Payne, supra* at 888), which is different from the regulatory requirement that the articles be devoted to "literature, the sciences or the arts, news, some special industry, profession, sport or other field of endeavor" under the circumstances of this case. Petitioner's reliance on the further definition of literature as contained in *Hannegan* (and the even more expansive definition contained in the concurring opinion) is misplaced. Under the court opinions and prior to the adoption of the regulation petitioner may have argued that his publication was general literature concerned with horse racing, but under the current regulation literature stands apart and petitioner's publication is devoted to the sport of horse racing. Therefore, the definition of literature is irrelevant. Furthermore, the context of the court's inquiry in *Hannegan* was a concern with the first amendment in that the post office was

denying a periodical rate of mailing to a publication based on the content of the publication, which is quite different from the focus of the current inquiry. Finally, petitioner in *Business Statistics* is described as being “engaged in the business of collecting and compiling information and statistics concerning present economic, political and labor conditions affecting commerce, finance and industry, as well as forecasts and predictions of trends and future conditions.” (*Business Statistics Org. v. Joseph, supra*, at 446, 447.) Other than a description including titles, when published and how many pages each publication contains, there is no description in the case as to the appearance of the articles contained in the publications, making a comparison to petitioner’s publication impossible. In short, petitioner has simply not explained how the general definition of periodical, or the discussions of the term literature assist in defining the word “article” under the regulation.

In *G&B Publishing Corp. v. Dept. of Taxation and Finance* (57 AD2d 18, 392 NYS2d 938), a “pennysaver” case, the court followed *Business Statistics* in applying a test of common understanding in the absence of a statutory or regulatory definition of periodical. The publication in this case was held to be a periodical because it seldom contained current events or happenings of general interest, it did not regularly supply information on a variety of subjects, it was not a proper medium for legal notices, it never presented internally generated thoughts or expressions of editorial opinion, and it exercised no independent control over content. As expressed, this case used a sort of combination of the present requirements of periodical and those of a newspaper, so that its application to the current case is minimal. Again the Court utilized the definition of periodical centered primarily on differentiating a newspaper or periodical from a book because

that was what determined second class postal privileges. This case did conclude that exemptions are to be construed against the taxpayer.

In *Research Institute of America v. Dept. of Taxation and Fin.* (99 Misc 2d 243, 415 NYS2d 928) the court concluded that since there still was no regulatory definition of periodical it again had to resort to the common understanding test (citing, *Business Statistics and Houghton*). As asserted by petitioner the court held that ambiguities would be read in favor of the taxpayer and a statute must be read to avoid an unjust result. However, the court then stated the taxpayer had the burden of proof in a case involving an exemption, but in the absence of a regulation the taxpayer only had to prove that it was a periodical as that term was generally understood. In the present case since there is no statutory or regulatory definition of the word “article”, it is petitioner’s burden to prove that the speed figures as they appear in The Sheets are articles as that word is commonly understood.

Standard Rate & Data Service v. State Tax Commn. (72 AD2d 659, 421 NYS2d 423) involved a publishing company that gathered information about various media organizations and published such information in a variety of publications. This was the first case after the adoption of the regulations. The Court held that the Division was entitled to great deference in regards to its definition of a periodical and that the fifth requirement of the regulation, the one at issue here, was not unreasonable. The Court determined the publications were not periodicals because each publication had “rigid standardized formats and their respective contents were composed almost entirely of listings and statistical data” (*Standard Rate & Data Service v. State Tax Commn.*, *supra*, 421 NYS2d at 424). While petitioner’s publication in the current matter is presented in a rigid standardized format, the contents of the publication are not as asserted by the Division mere

listings and statistical data.⁹ Therefore, again the relevance of this case to the present inquiry is minimal.

Twin Coast Newspapers v. State Tax Commn. (101 AD2d 977, 477 NYS2d 718) was heard after the adoption of the regulations, but the regulations were not in effect for the audit period so the Court resorted to the common understanding test, citing *G&B Publishing Corp.* The Court held that the publication involved was not a periodical because it was not published an appropriate number of times per year, nor did it contain the “requisite news stories or editorial content on any single subject.” Furthermore, the publication was again a “rigid standardized format composed almost entirely of listings and statistical data” and as such did not qualify as a periodical. Again, this case is not particularly helpful because The Sheets are not merely listings and statistical data.

Petitioner also relies on *Matter of West Publishing Co.* (State Tax Commission, December 5, 1984) in support of his position. Petitioner continually refers to a phrase from the decision that held the publication at issue did not contain interpretational narrations. At issue in the case was the issue of whether the publication contained any interpretations, not whether the interpretations were in narrative form or required to be in narrative form. Again, the facts are dissimilar enough from the current case to make its relevance minimal.

The present inquiry appears to be a case of first impression. The definition of article was not addressed in any of the cases occurring prior to the adoption of the regulations. Furthermore, since these cases specifically qualified the holdings that the common understanding test would be

⁹A further discussion of this issue is contained in Conclusion of Law “G”.

used absent any statutory or regulatory definition of periodical, we must now proceed under the regulations. The cases occurring after the adoption of the regulation also simply do not involve the definition of the word article in any manner that would provide assistance in the present case. Also, the cases relied on by the parties all dealt with narrative publications in the traditional sense, or statistical data and listings. The Sheets does not fit entirely into either of these categories.

D. It is reasonable, since there is no statutory definition of the word “article”, to resort to the dictionary in an attempt to define the term as it is commonly understood (*see, Cortland-Clinton v. NYS Dept. Of Health, supra; In the Matter of Publishers Clearing House, Tax Appeals Tribunal, July 22, 1997*). Article is defined as “a generally short nonfictional prose composition usu.[ally] forming an independent portion of a publication” (Webster’s Third New International Dictionary 123 [1986 ed]). Prose is defined as “the ordinary language of men in speaking or writing” (Webster’s Third International Dictionary 1820 [1986 ed]). Variety is defined as “the quality or state of having numerous forms or types: the quality or state of being various or varied” (Webster’s Third International Dictionary 2534 [1986 ed]). In turn, the definition of various applicable to the regulations is “consisting of an indefinite number greater than one” (Webster’s Third International Dictionary 2534 [1986 ed]).¹⁰

¹⁰ I disagree with the Division’s selection of the definition of varied as being of different types or forms. This is because the regulation requires that the publication be devoted to, in this instance, a given sport, which of necessity makes all the articles similar in type. Therefore, the correct interpretation to be applied to variety in this instance in the numerical definition.

E. The first question to be determined is whether the articles on various subjects concerning horse racing appearing in the front and middle of The Sheets meet the requirements of the regulation for a variety of articles by different authors. There is only one copy of The Sheets produced during the audit period in evidence. This is the July 11, 1992 publication for Belmont. There are five possible articles and authors in this publication. The first is an article entitled *Tout-Speak* by Paul W. This is an article within the ordinary meaning of this term. The second is *Beyer Beware* which is also an article within the ordinary meaning of the term. There is no name on this article. The third is a reprint of an article from the autobiography of Lincoln Steffens, again with no name. The fourth is an article entitled *Pick a Card, Any Card* by Michael Dash. While this appears to fit the definition of article, the Division raised an issue at the hearing that it more resembled an advertisement since it contained an address to contact if one wished to purchase the trading cards that the article was describing. On cross-examination petitioner stated that it could be that he was paid for an advertisement, but he did not believe so. He did not think they took ads. Since petitioner is unsure whether this is an article or an advertisement, it can not be counted. The first and second paragraphs of the sixth page after the symbol sheet consist of a reprint from *Thoroughbred Daily News*. This is an article within the meaning of the definition. Again there is no author listed. The remainder of those pages consist of listings of information which are not articles. The Division implies that the reprints do not count as articles, but I can not find any support for that proposition. While the court in *Business Statistics* spoke of original articles, the regulation does not contain the requirement that the articles be original. Therefore, we have four articles, which are either not signed or are signed by what could be a pseudonym.

It is not necessary to decide the issue of whether four articles is a variety of articles (i.e., an indefinite number greater than one). After reviewing the above articles and the testimonial evidence presented in petitioner's behalf, I find that petitioner has not met his burden of proof in proving that the articles were by different authors.

First, the articles standing alone do not prove that they were written by different authors. This is because they are either unsigned, or as admitted by petitioner, could have been signed by a pseudonym. Second, in addition to the four unsigned articles discussed above, petitioner submitted evidence by way of testimony that the staff of The Sheets authored the articles each month. The Division argues that the provision in the regulations allowing for articles prepared by a staff, as opposed to signed articles, concerns newsletters and petitioner has not argued that his publication is a newsletter. If petitioner was able to prove that The Sheets regularly contained unsigned articles prepared by a staff of writers he would be entitled to the presumption in the regulations that these would be articles by different authors. While the Division is literally correct, the Division has in the past blurred this line and allowed a holding of a periodical based on this presumption which speaks to newsletters. For example, in determining that a publication was not a periodical in an advisory opinion, the Division stated:

“Not only do most issues contain only one signed article, there is no evidence of the existence of a staff of writers regularly preparing unsigned articles for each issue.”(*Matter of Pugliese*, Adv.Op. [TSB-H-81(26)(S)].)

In any event petitioner's evidence falls short on this point. There is in the record only one statement from Mr. Friedman that articles were written by staff members, and this was in relation to the articles appearing in the User's Guide. As noted in Finding of Fact "18", Mr. Friedman's testimony did not prove that those articles appeared in The Sheets because the testimony was

contradicted by documentary evidence. Furthermore, petitioner's testimony contradicts the statement that the unsigned articles are prepared by a staff of writers in that he mentions he lets people around the office and *other* people know he will pay for articles. Additionally petitioner testified that these people use pseudonyms, making it impossible to tell who authored even the unsigned articles. The testimony of Mr. Friedman and petitioner on this point clearly indicates that this is not the part of the business they are familiar with. Their testimony is contradictory and lacking in details. Furthermore petitioner testified that a Mr. Weinstein is in charge of the layout of the publication and the outside articles. Perhaps Mr. Weinstein could have provided a clearer picture on this issue, but Mr. Weinstein did not testify. Taken together petitioner has not shown that the articles in The Sheets were written by different authors, or by a staff of writers.

Furthermore, the other difficulty is that this was the only copy of The Sheets introduced into evidence in this matter. While all four of petitioner's witnesses testified that articles appear in every issue of The Sheets, there was no testimony as to each issue containing a variety of articles by different authors. Therefore, I must find that petitioner has failed to meet his burden of proof that The Sheets contained a variety of articles by different authors during the audit period.

The two publications of The Sheets introduced into evidence by petitioner were not within the audit period in this matter. In his brief petitioner states that the taxability of the publication remains at issue. While that may be true and there may be an issue between the Division and petitioner as to whether The Sheets is currently and was a periodical for the time after the audit period, that issue is not before the Division of Tax Appeals in this matter. While those publications were useful for several reasons on the issue of whether the numbers and symbols (i.e., the sheets themselves) were articles, I do not find that they are relevant for the

purpose of determining the nature, amount and authorship of articles appearing in The Sheets during the audit period.¹¹

F. Petitioner's primary contention is that the numeric and symbolic columns of figures appearing on the pre-printed pages that provide the history of each horse, are articles within the meaning of the regulation. I cannot agree.

There is no doubt that petitioner is regarded as an expert in the field of producing speed figures to be used in the handicapping of horse races, particularly at the NYRA tracks. There is also no doubt that petitioner's publication is not a mere listing of statistical information. However, it is simply not possible to construe the columns of numbers and figures appearing in The Sheets as "a generally short nonfictional prose composition usu.[ally] forming an independent portion of a publication" (Webster's Third New International Dictionary 123 [1986 ed]). Furthermore, speed figures are not prose, in that they do not appear as "the ordinary language of men in speaking or writing" (Webster's Third International Dictionary 1820 [1986 ed]).

The difficulty in determining that the speed figures constitute articles was exemplified by the testimony of Mr. Crist set forth in Finding of Fact "30". Mr. Crist recognized the effort and expertise required to produce the speed figures and testified that the figures reflected judgement and opinion about horse racing. However, when asked if the speed figures were articles, he simply

¹¹If anything, petitioner's testimony and the appearance and layout of the articles in the different issues seemed to show that the layout of the publication and the types of articles used may have changed between the audit period and the later publications submitted.

did not even understand the question. This is another indication that speed figures are not articles as that term is commonly understood.¹²

G. While the issue in this case was presented as whether petitioner's publication qualified for an exemption from tax as a periodical, to resolve the expense purchase issues, it is necessary to determine under what provision of the Tax Law petitioner's publication is taxable. It should also be noted that the presentation of petitioner's evidence appears to address the issue of whether his publication is not an information service rather than the issue of whether it was a periodical.

Tax Law § 1105(c)(1) provides that taxable information services include:

“the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons “

I do not agree with the Division that petitioner is an information service. For some but not all of the race tracks petitioner has personal observers at the track clocking the race and making determinations concerning the wind and the position of the horses during the race. For other tracks, some of this information is done by tape (excluding of course the wind determinations), and for still other tracks information is purchased on the basis of the race. For the purpose of ease of entering information into the computer, petitioner purchases certain basic information concerning races, such as the races, names of the horses in each race and the order of finish. The races which are detailed by the observers clearly cannot be considered to produce information that could be considered an information service. The track observers do not collect data, they create data that is not available elsewhere such as the timing of the race and the wind

¹²The testimony of Mr. Crist and Mr. Litfin, the expert witnesses, has been accepted for the purposes of explaining the nature of speed figures and their understanding of the nature of petitioner's publication.

determinations. They include their own personal judgments in these factors. This is the production of a product not an information service. With respect to the races that are done from the video tape the answer is the same because the person viewing the video tape is acting in the same capacity as the observers and making independent judgments that are factored into the final product. Finally, with regard to the races where certain information is purchased, this is also not an information service. This is because with these races, as with all those reviewed by petitioner, the last step in the process, the variant making, is not the collection, compiling or analyzing of data. For example, petitioner utilizes his own formulas and comparison charts in this process. Furthermore, the last step of determining the resiliency of the track is one that is purely judgmental on the part of petitioner and his staff. This again is the production of a product, not the collection, compiling or analyzing of information. Petitioner's expert witnesses testified to the uniqueness of The Sheets, the fact that petitioner is well known and respected in the horse racing community for his speed figures, and the fact that people were willing to pay \$35.00 for The Sheets, far more than for other publications containing speed figures. They testified that the speed figures represented personal opinion and judgment meaning that the numbers as listed on the page are not simply statistical data or listings despite the format presented.

In summary, the evidence presented does not lead to the conclusion that petitioner is providing any service, or an information service in particular, but rather is producing and selling a product.

The Division contends that if petitioner's publication is not an information service, it is tangible personal property. Petitioner has presented no argument that the sale of The Sheets is not tangible personal property taxable pursuant to Tax Law § 1105(a). The same evidence that leads

to the conclusion that petitioner is not an information service leads to the conclusion that petitioner produces the speed figures with are used in The Sheets and as such is producing tangible personal property for sale.

H. With regard to the expense purchase audit, petitioner argues that for all purchases prior to its being issued a Certificate of Authority (enabling petitioner to issue resale certificates) it must be presumed under Tax Law § 1132(c) that tax was paid on the purchases. Tax Law § 1132(c) provides that all receipts are presumed taxable and that the burden is on the vendor or the customer to prove a given transaction is exempt. Tax Law §1132 (b) provides that if a vendor accepts a resale certificate in good faith, the vendor cannot be held liable for tax on sales to the party issuing the resale certificate. Petitioner argues that therefore, the vendors he did business with must have collected the tax since he did not yet possess a valid Certificate of Authority. In this instance, petitioner as the customer pursuant to Tax Law § 1132(c) has the burden of proving that he either paid the tax or the sales were exempt. There is no provision in this section that allows the presumption requested by petitioner. Furthermore, petitioner cannot rely on the legal obligations of his vendors to prove that he paid sales tax on his purchases, specific proof of payment on the purchases in question is required. (*See, Mendon Leasing Corp. v. State Tax Commn.*, 135 AD2d 917, 522 NYS 2d 315 [vendor could not rely on shared duty of customers or the Department of Motor Vehicles to pay the tax].)

I. Petitioner claims its purchases from Bloodstock Research are exempt under Tax Law § 1105(c)(1). As noted by the Division this section states that information services are taxable except for information used by newspapers and broadcasters in the collection and dissemination

of the news. Since petitioner is neither a newspaper nor a broadcaster this section simply does not apply.

J. As noted in Finding of Fact "41", the purchases from Shadow Lithographers have been conceded by the Division and are therefore, no longer at issue.

K. The petition of Leonard Ragozin, is granted to the extent conceded by the Division in Finding of Fact "41" but is in all other respects denied. The Notice of Determination dated December 5, 1994 (DTA #815094), as modified by Findings of Fact "6" and "41", is sustained, and the Notice of Determination dated December 19, 1994 (DTA No. 814840) is sustained.

DATED: Troy, New York
October 30, 1997

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE