

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
NANCY HENIGSON	:	DETERMINATION
AND	:	DTA NOS. 821293
FORECLOSURE UPDATE, INC.	:	AND 821294
for Revision of Determinations or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period December 1, 1996 through	:	
November 30, 2002.	:	

Petitioners, Nancy Henigson and Foreclosure Update, Inc., filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1996 through November 30, 2002.

A consolidated hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 25, 2007 at 10:30 A.M., with all briefs submitted by July 27, 2007, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by James H. Tully, Jr., Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Marvis A. Warren, Esq., of counsel).

ISSUE

Whether a publication was exempt from sales tax as a periodical pursuant to Tax Law § 1115(a)(5).

FINDINGS OF FACT

1. Petitioner Foreclosure Update, Inc. (“Foreclosure”) is a New York corporation that issues a weekly publication entitled Foreclosure Update, 50 weeks per year. According to its website, each issue of the publication contains “comprehensive information on upcoming real estate and co-operative apartment foreclosure auctions in the five counties (boroughs) of New York City (Manhattan, Brooklyn, Queens, Staten Island and the Bronx), Westchester County, Nassau County and Suffolk County.” Each issue of the publication also contains advertisements and two short articles related generally to real estate matters.

2. Foreclosure Update is sold on a subscription basis to the general public. During the audit period, subscription rates for Foreclosure Update were as follows: \$299.00 per year (50 weeks), \$179.00 for 6 months (25 weeks), and \$105.00 for 12 weeks.

3. Foreclosure Update describes itself on its masthead as a “weekly abstract of real estate foreclosure notices published in the five counties of New York City.”

4. Foreclosure collects legal notifications of upcoming foreclosure auctions from newspapers, lawyers, and county clerk offices.

5. After Foreclosure collects the foreclosure data, it reviews the data for accuracy and indexes it so its readers get the foreclosure auction facts they need to make informed investment decisions.

6. Foreclosure adds information to that contained in the legal notifications. Such information is obtained from a company hired by Foreclosure to provide it with real estate data and is also obtained through certain real estate websites. Such additional information includes the block and lot numbers of the properties, the dimensions of the properties and also a brief description of each property.

7. Copies of Foreclosure Update dated November 18, 2002, November 25, 2002 and December 2, 2002 were received in evidence at the hearing. These copies were representative of the content of Foreclosure Update throughout the audit period.

8. Foreclosure Update, Volume XIII, Number 45, dated November 18, 2002, consists of 35 pages. The first page contains date boxes with public notices of real estate auctions to be held between November 18 and December 6, 2002. Pages 2 through 29 contain real estate foreclosure notices. Page 30 contains a list of lis pendens. Page 31 contains a half-page article written by Robert Jeffries, entitled "Structural Inspection Contingency: Tread Carefully." Page 32 contains two advertisements. Page 33 contains a half-page article written by petitioner Nancy Henigson (under her maiden name, Nancy Peress) entitled "Renovation Projects: New Data for Some Favorite Home Makeovers." Page 34 is blank and page 35 contains eight advertisements.

9. Foreclosure Update, Volume XIII, Number 46, dated November 25, 2002, consists of 35 pages. The first page contains date boxes with public notices of real estate auctions to be held between November 25 and December 13, 2002. Pages 2 through 31 contain real estate foreclosure notices. Page 32 contains a half-page article written by Robert Jeffries, entitled "Real Estate Strategies: Lease With Option." Page 33 contains eight advertisements. Page 34 contains a half-page article written by Robert Jeffries entitled "Negotiation: Put Yourself in the Other's Shoes." Page 35 contains two advertisements.

10. Foreclosure Update, Volume XIII, Number 47, dated December 2, 2002, consists of 40 pages. The first page contains date boxes with public notices of real estate auctions to be held between December 2 and December 20, 2002. Pages 2 through 36 contain real estate foreclosure notices. Page 36 also contains a list of lis pendens. Page 37 contains a full-page article written by Nancy Henigson, entitled "What are Closing Costs and Who Pays for Them?" Page 38

contains an unsigned half-page article entitled “If You Move Yourself.” Page 39 contains two advertisements. Page 40 contains eight advertisements.

11. The information on each foreclosure auction contained in Foreclosure Update is arranged in uniform blocks of space. Each such block of information contains block and lot numbers, index number, address, description of property, lot and building sizes, plaintiff’s name, plaintiff’s attorney (with phone number and address), defendant, referee, sales date and time, and the approximate lien amount.

12. The subjects of the articles in Foreclosure Update were selected by the authors. Foreclosure’s president, Nancy Henigson, wrote some articles. Other writers were independent contractors, sometimes paid in cash or with a free subscription. As noted, one writer was Robert Jeffries, a real estate broker. Nancy Henigson’s former husband, David Henigson, also occasionally wrote articles.

13. Once Foreclosure has gathered all the information on the foreclosure auctions and the articles, that information is inserted in a newsletter format and sent to a printing service. The printing service reviews the format and prints the copies.

14. Issues of Foreclosure Update are mailed to subscribers via U.S. Postal service second class mail.

15. Although the publication is available to the general public, Foreclosure’s customers were mostly real estate professionals (e.g., attorneys, agents, brokers). Foreclosure had about 600 to 700 subscribers during the audit period.

16. The Division of Taxation (“Division”) performed a sales tax field audit of Foreclosure for the period December 1, 1996 through November 30, 2002. On audit, the Division determined

that Foreclosure Update was a compilation of information subject to sales tax and was not a periodical exempt from sales tax.

17. During the audit period, Foreclosure was not registered as a vendor for sales tax purposes and did not collect any sales tax or file any sales tax returns.

18. During the audit, although requested to do so, Foreclosure did not provide the Division with any copies of issues of Foreclosure Update that were published during the audit period.

19. Foreclosure was operated out of petitioner Nancy Henigson's home and did not keep old issues because of a lack of space.

20. On August 1, 2005, the Division issued to Foreclosure a Notice of Determination which asserted \$96,306.98 in additional tax due, plus interest, for the period December 1, 1996 through November 30, 2002.

21. Also on August 1, 2005, the Division issued to petitioner Nancy Henigson, as a person responsible to collect tax on behalf of Foreclosure, a Notice of Determination which asserted \$96,306.98 in additional tax due, plus interest, for the period December 1, 1996 through November 30, 2002.

22. The Division determined additional tax due in the subject notices of determination based on a detailed review of Foreclosure's sales during the audit period, as indicated by Foreclosure's records. All such sales were determined to be subject to tax. The Division gave credit for sales tax paid by Foreclosure on its purchase of printing services. The computation of additional tax due is not at issue herein.

23. Nancy Henigson is and was at all time relevant the president, sole officer and sole shareholder of Foreclosure. She does not contest the Division's assertion that she was a responsible officer of Foreclosure during the audit period.

24. The Division submitted proposed findings of fact numbered “1” through “25.” Such proposed findings are generally accepted and have been incorporated herein.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1115(a)(5), the receipts from sales of periodicals and newspapers are exempt from sales tax. Petitioners contend that Foreclosure Update is a periodical under Tax Law § 1115(a)(5) and therefore exempt from tax.

B. As petitioners seek an exemption from sales tax, it must be noted, preliminarily, that statutes and regulations authorizing exemptions from taxation are to be strictly and narrowly construed (*see, Matter of International Bar Assn. v. Tax Appeals Tribunal*, 210 AD2d 819, 620 NYS2d 582, *lv denied* 85 NY2d 806, 627 NYS2d 323; *Matter of Lever v. New York State Tax Commn.*, 144 AD2d 751, 535 NYS2d 158). In order to qualify for the exemption, petitioners bear the burden of clearly proving entitlement to the exemption sought (*see, Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193, 371 NYS2d 715, *lv denied* 37 NY2d 708, 375 NYS2d 1027).

C. The Division’s regulations define “periodical” for purposes of the exemption under Tax Law § 1115(a)(5), in relevant part, 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.*

(2) A publication which may be known as or considered to be a newsletter may qualify as a periodical if it conforms to the above standards. Where a newsletter has no signed articles, but has a staff of writers who originally prepare articles, such publication will be considered to have articles by different authors. If a publication has been classified by the United States Postal Service as one which is entitled to second class mailing privileges, that fact will be considered in determining whether or not the publication is a periodical.

(3) Nothing in this section shall be construed to exempt as a periodical the following:

* * *

(ii) listings and compilations which constitute information services. (20 NYCRR 528.6[c]; emphasis added.)

There is no dispute that Foreclosure Update meets requirements “i” through “iv” of section 528.6(c)(1) of the regulations as noted above.

D. Tax Law § 1105(c)(1) imposes sales tax on information services, defined in relevant part, as follows:

The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons

E. A review of the record, particularly the three representative issues of Foreclosure Update contained therein, compels the conclusion that, its second class mailing privileges notwithstanding, the subject publication is not a periodical exempt from tax pursuant to Tax Law § 1115(a)(5), but is rather an information service subject to tax under Tax Law § 1105(c)(1).

As the issues in evidence reveal, Foreclosure Update consists almost entirely of listings of data regarding real estate foreclosure auctions. This collection and compilation of data which is sold to Foreclosure’s subscribers via Foreclosure Update constitutes the taxable sale of an

information service (*see*, Tax Law § 1105[c][1]; 20 NYCRR 527.3[a]). The articles in the publication comprise only a small part of its content. Indeed, the three issues in the record contain, in the aggregate, 97 pages of such listings and 6 pages of articles. In other words, about 94 percent of the nonadvertising content of each issue of Foreclosure Update consists of data. While the regulations do not require that articles comprise any specific percentage or amount of the publication's total content, it is certainly appropriate to examine the publication in its totality to determine whether the publication is properly categorized as a listing or compilation of information or as a periodical as defined in the regulations. Here, such an examination supports a finding that Foreclosure Update was an information service as it was comprised almost entirely of foreclosure data.

The record also reveals that Foreclosure itself did not consider the articles to be a significant part of the publication. The descriptions of Foreclosure Update on both the website and the masthead reference only the foreclosure data and make no reference to the articles. Foreclosure thus marketed itself as a provider of foreclosure information, i.e., an information service. Further, while the articles in Foreclosure Update covered general real estate topics, there is no evidence that Foreclosure ever published any articles specifically dealing with real estate foreclosure issues or specifically relating to the 30 or so pages of data in each issue. In sum, the insertion of the articles in Foreclosure Update appears to be more of an effort to qualify for a sales tax exemption and to avoid classification as an information service than an effort to publish a bona fide periodical.

Additionally, petitioners failed to meet the regulatory requirement that each issue of the publication contain "a variety of articles by different authors" (*see*, 20 NYCRR 528.6[c][1][v]). While the placement of two short articles in each issue may minimally satisfy the "variety"

requirement, petitioners have failed to show that the publication generally conformed to the requirement that each issue contain articles by different authors. Specifically, the November 25, 2002 issue features two articles by a single author, Robert Jeffries. Also, the December 2, 2002 issue contains an article by Nancy Henigson and an unsigned article. Since petitioners offered no evidence as to the author of the unsigned article, and considering that Foreclosure Update was, for the most part, a one-person, home-based operation, it cannot be concluded that this issue contains articles by different authors. The record thus shows that only one of the three representative samples of the publication contains articles by different authors. It must be concluded, therefore, that Foreclosure Update failed to meet this regulatory requirement.

F. Petitioners cite three Division advisory opinions in support of their position herein (*PriceWaterhouseCoopers, LLC*, Advisory Opinion, March 16, 2007, TSB-A-07[6]S; *Value Line Publishing, Inc.*, Advisory Opinion, April 11, 1997, TSB-A-97[24]S; *Freetime Magazine, Inc.*, Advisory Opinion, February 7, 1995, TSB-A-95[21]S). Although such opinions are not precedential and are not in any way binding herein (*see*, Tax Law § 171; 20 NYCRR 2376.4), the publications described in each of those advisory opinions present a much stronger case for exemption as a periodical than does Foreclosure Update. Specifically, in contrast to Foreclosure Update, there was no question that the subject publications in all three of these advisory opinions each contain a variety of articles by different authors. The publication in *PriceWaterhouseCoopers, LLC*, “Publication C,” provided “news, analyses, political forecasts and recommendations on a variety of topics in the broad subject area of financial investment.” The articles were written by the company’s staff of writers. The publication in *Value Line Publishing, Inc.*, was produced by a staff of 120 persons and contained 10 pages of current articles and investment ideas on subjects meriting special attention and approximately 8 one-page

articles on particular industries and approximately 130 reports on specific companies within those industries. The publication in *Freetime Magazine, Inc.*, featured news and information gathered from various sources, with particular emphasis on current events in arts and entertainment. This publication contained previews, reviews and comments by columnists. It was written and edited by a staff, as well as several regular columnists and various free lance contributors.

The publications which are the subject of the advisory opinions noted above thus unquestionably met the regulations' requirement of "a variety of articles by different authors." In contrast, as noted, Foreclosure Update contains only two articles per issue, not necessarily written by different authors. Additionally, as noted previously, in contrast to the publications discussed in the *PriceWaterhouseCoopers* and *Valueline Publishing* advisory opinions, there is no evidence that any of the articles published in Foreclosure Update support, relate to or complement the data therein.

G. The petitions of Nancy Henigson and Foreclosure Update, Inc. are denied, and the notices of determination dated August 1, 2005 are sustained.

DATED: Troy, New York
October 25, 2007

/s/ Timothy J. Alston

ADMINISTRATIVE LAW JUDGE