

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

GENESEE VALLEY PENNY SAVER, INC.

DECISION

for Revision of a Determination or for Refund  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period June 1, 1980  
through May 31, 1983.

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Petitioner, Genesee Valley Penny Saver, Inc., Avon Plaza, Avon, New York 14414, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1980 through May 31, 1983 (File No. 49210).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on February 27, 1986 at 10:45 A.M., with all briefs and additional evidence to be submitted by December 24, 1986. Petitioner appeared by Roger G. Streb, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUE

Whether a certain publication produced by petitioner should properly have been classified as a shopping paper within the meaning and intent of section 1115(1) of the Tax Law, thereby exempting certain purchases made by petitioner from the imposition of sales tax.

#### FINDINGS OF FACT

1. On December 1, 1983, following an audit, the Audit Division issued to petitioner, Genesee Valley Penny Saver, Inc., a Notice of Determination and

Demand for Payment of Sales and Use Taxes Due asserting additional tax due for the period June 1, 1980 through May 31, 1983 in the total amount of \$56,129.51, plus minimum interest.

2. On September 7, 1983, petitioner, by its president, Margaret J. Harrison, executed a consent extending the period of limitation for assessment of sales and use taxes due for the period June 1, 1980 through August 31, 1980, to December 20, 1983.

3. Subsequent to the issuance of the notice of determination herein, the amount of tax asserted due by the Audit Division was adjusted to \$54,829.47, plus minimum interest.

4. At all times relevant herein, petitioner published the "Genesee Valley Penny Saver", a weekly periodical consisting primarily of paid advertisements and distributed free of charge on a community-wide basis. Petitioner derived revenue from the sale of such advertisements. Petitioner published four regional editions of its paper each week (North, South, East and West). All four editions were substantially similar in content.

5. The additional tax asserted due herein consisted of three components. First, the Audit Division found \$822.37 in additional tax due on certain "job work" performed by petitioner for certain other periodicals. Petitioner presented no evidence to refute this portion of the audit. Second, the Audit Division found \$20,276.34 in additional tax due on certain expense purchases made by petitioner. This determination was premised upon the Audit Division's contention that expense purchases used in the production of the publication were subject to tax. Expense purchases used in both producing the publication and in "job work" were apportioned between such uses. Expense purchases used in "job work" were not held subject to tax. Petitioner contended that it was a

"shopping paper" as that term **is** defined in section 1115(1) of the Tax Law, and therefore its expense purchases were properly exempt from tax. Finally, the Audit Division found \$33,730.76 in additional tax due **on** certain capital acquisitions and leasehold improvements during the audit period. Of this amount, \$32,865.75 represented tax due **on** petitioner's capital purchases during the audit period, consisting primarily of printing-related equipment. Petitioner did not dispute such purchases, but rather contended that, as a "shopping paper" such purchases were exempt from tax. The remaining \$865.01 of this component of the tax asserted due represented tax on certain leasehold improvements.

6. The Audit Division's calculations, resulting in the additional tax asserted due with respect to all three components of the audit, were based upon a detailed audit of all of petitioner's purchase invoices and books and records for the audit period.

7. **On** audit, the Audit Division first determined that petitioner's publication could not properly be classified as a "shopping paper" within the meaning of section 1115(1) of the Tax Law. Specifically, the Audit Division determined that each of the issues of the publication published during the audit period did not have ninety percent or less of its printed area consisting of advertisements. This determination was premised upon a review of virtually all of the publication's issues published during the relevant period. The Audit Division did not actually calculate the amount of advertisements and non-advertisements in each of those issues, but rather observed said issues and estimated that the so-called "ninety percent rule" was not met.

8. Subsequent to the issuance of the notice of determination herein, the Audit Division calculated the area consisting of non-advertisements with

respect to four issues of the publication published during the audit period.

The results of these calculations are set forth below:

<u>ISSUE</u>	<u>TOTAL AREA UTILIZED FOR PRINTING</u>	<u>TOTAL AREA OF NON-ADVERTISEMENTS</u>	<u>% OF NON-ADVERTISEMENTS</u>
6/10/81	7,560 sq. in.	24 sq. in.	0.3%
5/10/83	8,640 sq. in.	68 sq. in.	0.8%
5/24/83	8,280 sq. in.	109 sq. in.	1.3%
5/31/83	6,840 sq. in.	117.13 sq. in.	1.7%

9. In its calculations, the Audit Division first determined the area generally utilized for printing on each page of the paper. The borders along all four sides of each page were not included in this calculation. The area per page was then multiplied by the total number of pages in each issue to determine the total area available for printing for that issue. The Audit Division next determined the area on each page consisting of non-advertising space. These amounts were totalled and the ratio between non-advertising space and total utilized space per issue was used to determine whether the printed area of the publication consisted of ninety percent or less of advertisements.

10. In its determinations as to which portions of each publication were advertisements and which were non-advertisements, the Audit Division considered the publication's masthead and certain community service areas, notably a listing of local school menus, to be non-advertisements. Also considered to be non-advertisements was an area in each issue for use by a reader to write down his or her own ad and submit it to the publication to be published.

11. The four issues measured by the Audit Division were representative samples of all issues published during the audit period.

12. Petitioner contended that the publication had been in compliance with the ninety percent advertisement requirement throughout the audit period. Petitioner presented calculations with respect to each issue published throughout

the audit period in support of its contention. Petitioner's calculations centered upon its calculation of "non-paid space" in each issue. Such "non-paid space" consisted of the non-advertisements as determined by the Audit Division and also certain advertisements for which petitioner did not charge a fee, notably advertisements for the local cooperative extension. Also considered to be non-advertisements were certain "classified-type" ads which were actually "fillers" ("Congratulations Graduates", for example). The advertisements which were published gratis and the "filler" ads constituted a very small part of the amount of "non-paid space" in petitioner's calculations. The key distinction between petitioner's and the Audit Division's calculations was petitioner's inclusion of so-called "gutter space" as "non-paid space". The "gutter space" consisted of the border along the inside of each page. This space was available to petitioner for printing, but was only utilized in the centerfold of each issue. Another distinction between petitioner's and the Audit Division's calculations was petitioner's inclusion of all four of its editions in calculating the total number of pages in each edition and the total amount of non-paid space in each issue.

#### CONCLUSIONS OF LAW

A. That Tax Law §1115(a)(20) provides for an exemption from the imposition of sales tax imposed pursuant to section 1105(a) and compensating use tax imposed pursuant to section 1110 upon "[p]aper, ink and any other tangible personal property purchased for use in the publication of a shopping paper...which is to become a physical component part of such paper." For purposes of Tax Law § 1115(a)(20), section 1115(1)(B) sets forth eight requirements to be met by a publication in order to be defined as a shopping paper within the meaning of section 1115(1), thereby gaining benefit of the exemption. Of the eight

requirements set forth in subparagraph (8), the following requirement is at issue herein:

"The advertisements in such publication [a shopping paper] shall not exceed ninety percent of the printed area of each issue." (Tax Law § 1115[1][C].)

B. That the Audit Division's determination that petitioner's publication did not meet the requirement set forth in Tax Law § 1115(1)(C) in order to be properly classified as a shopping paper during the audit period was reasonable and within the meaning and intent of section 1115(1). Petitioner's argument that a proper interpretation of section 1115(1)(C) requires a calculation of the ratio of "unpaid space" to the total area available for printing **is** rejected. This interpretation would "allow a publication to qualify for the shopping paper exemption merely by increasing the amount of unused space in the publication", and would thereby emasculate the statutory criteria for qualification for shopping paper status (~~see~~ Matter of Irondequoit Shopper, Inc., State Tax Commission, January 16, 1987). It is noted that while the Audit Division's calculations may have failed to include certain non-advertising space, notably the "filler", the free ads and the centerfold "gutter" space, such space was small **in** area and even if determined to be non-advertisement, would not result in petitioner's meeting the "ninety percent rule".

C. That the Audit Division's assertion of tax due **on** petitioner's purchases of capital assets was in all respects proper. Petitioner's qualification or lack thereof as a shopping paper **is** irrelevant to this portion of the assessment (see Matter of Irondequoit Shopper, Inc., supra). The relevant sales tax exemption with respect to this portion of the assessment **is** Tax Law § 1115(a)(12), which provides for an exemption for purchases of machinery and equipment for use or consumption directly and predominantly in the production of tangible personal

property for sale. Petitioner has failed to show wherein the machinery and equipment at issue was used in the production of tangible personal property for sale. The exemption offered by Tax Law § 1115(a)(12) is therefore unavailable to petitioner.


D. That with respect to that portion of the assessment relating to "job work" and leasehold improvements, petitioner failed to present any evidence tending to show wherein this portion of the assessment was improper.

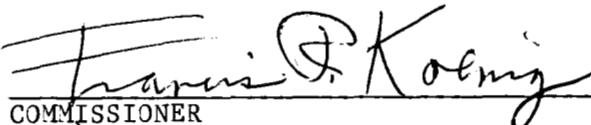
E. That the petition of Genesee Valley Penny Saver, Inc. is in all respects denied, and the Notice of Determination and Demand for Payment of Sales and **Use** Taxes Due, dated December 1, **1983**, as adjusted (Finding of Fact "3"), is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

**JUN 09 1987**

  
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PRESIDENT

  
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COMMISSIONER

  
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COMMISSIONER