

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

MOUNT MORRIS SHOPPER, 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 March 1, 1981
through May 31, 1984.

Petitioner, Mount Morris Shopper, Inc., 24 Chapel Street, Mt. Morris, New York 14510, 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 March 1, 1981 through May 31, 1984 (File No. 55926).

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 June 4, 1986 at 9:15 A.M. Petitioner appeared by Louis H. Richards, C.P.A. 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(d) of the Tax Law, thereby exempting certain purchases made by petitioner from the imposition of sales tax.

FINDINGS OF FACT

1. On August 28, 1984, following an audit, the Audit Division issued to petitioner, Mount Morris Shopper, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due asserting \$11,025.75 in additional sales

tax due for the period March 1, 1981 through May 31, 1984 together with interest thereon of \$1,920.68 for a total of \$12,946.43.

2. At all times relevant herein, petitioner published the "Mount Morris Shopper", a weekly periodical, commonly referred to as a "pennysaver" or "shopping paper", distributed free of charge on a community-wide basis. The publication consisted primarily of paid advertisements. Petitioner derived its revenue from the sale of advertising space. Also part of the publication were community service notices and news articles which petitioner published free of charge.

3. The additional tax asserted due herein consisted of three components. First, the Audit Division found \$1,086.06 in additional tax on petitioner's purchases of certain capital assets. Second, the Audit Division found \$9,669.40 in additional tax due on petitioner's purchases of printing services during the audit period. Finally, the Audit Division found \$270.29 in additional tax due on petitioner's purchases of items other than printing services.

4. 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 for the audit period.

5. On audit, the Audit Division first examined seven issues of petitioner's publication to determine whether the publication was a shopping paper within the meaning of section 1115(1) of the Tax Law. The Audit Division determined that the printed area of each of the seven issues examined contained more than 90 percent advertisements and therefore concluded that the publication was not a shopping paper during the audit period.

6. To determine the portion of the printed area of each issue devoted to advertisements, the Audit Division first determined the area available for

printing on each page of the paper. The borders along each page were not included in this calculation. The area available for printing on each page was then multiplied by the total number of pages in each issue to determine the total area available for printing for each 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 available space per issue was used to determine whether the publication consisted of 90 percent or less of advertisements. Of the seven issues examined, the amount of non-advertising space in each issue ranged from 1.56 percent to 5.79 percent.

7. In its determination as to which portions of the publication were advertisements and which were non-advertisements, the Audit Division considered public service announcements, articles of general interest and the publication's masthead as non-advertisements. Areas between these non-advertisements and advertisements were determined to be half advertisement and half non-advertisement. The Audit Division determined all paid advertisements, including classified ads, as advertisements. Sections of the publication which promoted the publication's own services were also considered advertisements, except that any portion of such sections which included an area for use by a reader to write down his or her own ad and submit it to the publication to be published were considered non-advertisements.

8. Petitioner did not dispute the methodology used by the Audit Division to determine the amount of advertisements in the publication. At hearing, petitioner conceded that each issue of the publication contained in excess of 90 percent advertisements throughout the audit period. Petitioner also did not

dispute the Audit Division's methodology in calculating the additional tax found due with respect to each of the three components of the audit.

9, Petitioner contended that it was unaware of the 90 percent advertisement requirement for qualification as a shopping paper and further contended that said requirement was vague and ambiguous.

CONCLUSIONS OF LAW

A. That Tax Law §1115(1) provides for an exemption from the imposition of sales tax imposed pursuant to section 1105(c)(2) upon the receipts from the sale of printing services performed in publishing a shopping paper. For purposes of Tax Law §1115(1), subparagraph (B) of said section 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 (B), 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 in view of Findings of Fact "6", "7" and "8", the advertisements contained in petitioner's publication exceeded 90 percent of the printed area of each issue throughout the audit period. Accordingly, the Audit Division properly determined that petitioner's publication was not a shopping paper within the meaning of section 1115(1) of the Tax Law during the relevant period.

C. That in view of Finding of Fact "4", the Audit Division properly calculated the additional tax asserted due herein. Petitioner failed to present any evidence to show wherein such calculations were inaccurate.

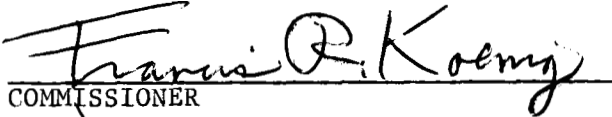
D. That the petition of Mount Morris Shopper, Inc. is in all respects denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated August 28, 1984 is in all respects sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 16 1987


PRESIDENT


COMMISSIONER


COMMISSIONER