

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of :

IRONDEQUOIT 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 June 1, 1980  
through May 31, 1984.

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Petitioner, Irondequoit Shopper, Inc., 4400 Culver Road, Rochester, New York 14662, 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, 1984 (File No. 57297).

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 10:45 A.M., with all briefs to be submitted by July 21, 1986. Petitioner appeared by Ralph A. Horton, 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 September 10, 1984, following an audit, the Audit Division issued to petitioner, Irondequoit Shopper, Inc., two notices of determination and demands for payment of sales and use taxes due asserting additional tax due for

the period June 1, 1980 through May 31, 1984 in the total amount of \$22,502.65, plus interest.

2. At all times relevant herein, petitioner published "The Irondequoit/ Penfield Shopper", a weekly periodical, commonly referred to as a "shopping paper" or "pennysaver", distributed free of charge **on** a community-wide basis. The publication consisted primarily of paid advertisements. Petitioner derived its revenue from the sale of such advertisements. Also part of the publication were community service notices which petitioner published free-of-charge, as well as articles of general interest.

3. The additional tax asserted due herein consisted of three components. First, the Audit Division found \$155.25 in additional tax due **on** petitioner's purchases of certain capital assets. Second, the Audit Division found \$20,962.36 in additional tax due on petitioner's purchases of printing services during the audit period. Finally, the Audit Division found \$1,385.04 in additional tax **due** on petitioner's purchases of items other than printing services. Petitioner contended that it qualified as a shopping paper as that term is defined in section 1115(1) of the Tax Law and that all such purchases were therefore properly exempt from tax.

4. On audit, the Audit Division first attempted to determine whether petitioner's publication was a shopping paper **as** defined in section 1115(1) of the Tax Law. The Audit Division examined 24 issues **of** the paper published throughout the audit period. Petitioner consented to the use of this sample and agreed that the issues selected were representative of all issues **of** the paper published throughout the audit period. Upon analysis of the 24 issues, the Audit Division determined that petitioner's publication could not be considered a shopping paper during the years 1980, 1981, 1982 and 1983 because

each of the issues published during those years did not have 90 percent or less of its printed area consisting of advertisements. The Audit Division therefore determined that petitioner's publication did not qualify as a shopping paper under the Tax Law. The Audit Division also determined that the publication did qualify as a shopping paper with respect to issues published subsequent to January 1, 1984.

5. To determine the portion of the printed area of each issue devoted to advertising, the Audit Division first determined the area available for printing on each page of the paper. This area amounted to 161.4 square inches. 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 nonadvertising space. These amounts were totalled and the ratio between nonadvertising space and total available space per issue was used to determine whether the printed area of the publication consisted of 90 percent or **less** of advertisements.

6. In its determinations as to which portions of the publication were advertisements and which were nonadvertisements, the Audit Division considered public service announcements, articles of general interest and the publication's masthead as nonadvertisements. Areas between these nonadvertisements and advertisements were determined to be half advertisement and half nonadvertisement. The Audit Division determined all paid advertisements, including classified ads, to be 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 nonadvertisements. Each issue of the publication also contained an announcement of the Irondequoit school menu set forth in an advertisement of a particular business. The Audit Division considered the school menu area of the ad to be an advertisement. Finally, the publication devoted certain pages of each issue to advertisements for similar businesses. These sections, entitled, for example, "Have Dinner Out", "The Bride... Beautiful to Behold", and "Business Service Directory", had banners approximately two inches wide across the top of the page consisting of the title of the section. Some of the specialty sections had black borders between the specific ads. The Audit Division considered the entire printed area of these sections as advertisements.

7. Although it found that each issue of the publication met all requirements for "shopping paper" status commencing with issues published in August 1983, the Audit Division denied the publication "shopping paper" status for all of 1983 because fifty of the publications did not meet the shopping paper requirements for that year.

8. Having made a determination as to which issues of petitioner's publications did not fall within the shopping paper exclusion, the Audit Division examined in detail petitioner's invoices for purchases of printing services for the three years of the audit period during which the Audit Division had determined that the publication did not qualify as a shopping paper. The Audit Division computed additional tax due based upon the amounts listed on petitioner's invoices. Petitioner had not paid tax on its purchases of any printing services throughout the audit period.

9. To determine additional tax due on petitioner's recurring purchases for items other than printing services, the Audit Division conducted a test of

such purchases for the period June 1, 1981 through May 31, 1982. Petitioner consented to the use of the test period. The Audit Division found that petitioner had \$4,808.70 in such purchases during the test period. The Audit Division then determined the ratio of such purchases to petitioner's reported taxable sales for the same period to determine the margin **of** error between reported taxable sales and recurring purchases in this area. This ratio was then applied to petitioner's reported taxable sales throughout the audit period to arrive at the additional tax asserted due in this area of \$1,385.04.

10. The additional tax due on petitioner's purchases **of** capital assets was determined through a detailed audit of petitioner's records with respect to such purchases.

11. Petitioner contended that the methodology used to determine its compliance with the 90 percent advertisement requirement was improper. Petitioner asserted that the Audit Division had improperly focused upon determining that portion **of** space available which consisted of nonadvertisements, rather than determining the amount of space which consisted of specific advertisements. Petitioner contended that the banners referred to in Finding of Fact "6" did not constitute advertisements. Petitioner did not charge any greater fee to its advertisers for placement on such specialty pages. Petitioner also contended that the Audit Division had improperly determined that the space between advertisements and nonadvertisements was half advertisement. Petitioner asserted that this area constituted nonadvertising in its entirety.

#### 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(i), 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(i), 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 each publication [a shopping paper] shall not exceed ninety percent of the printed area **of** each issue." (Tax Law §1115(i)(C).)

B. That the Audit Division's determinations as to which areas of the publication constituted advertising and which areas of the publication constituted nonadvertising were reasonable and within the meaning and intent **of** section 1115(i) of the Tax Law. Petitioner has failed to show wherein such determinations were unreasonable and outside the scope of section 1115(i). Specifically, the Audit Division's determination that the banners denoting a section of related advertisements (Finding of Fact "6") constituted advertisements was reasonable. Such banners clearly called attention to the specific advertisements within the section. Also, the black area between ads in the specialty sections likewise called attention to the specific ads in that section. Thus, notwithstanding the fact that petitioner did not charge its advertisers any additional fee to have their ads placed in the special sections, the enhancements to the specific ads provided in the special sections, such as the banner and area between ads, were part of the specific advertisements themselves. In addition, the Audit Division's determination that one-half of the space between advertising and nonadvertising areas constituted advertising was reasonable. Finally, with respect to the school menu advertisement, inasmuch as it was paid for by its sponsor, the Audit Division properly determined that this area was an advertisement.

D. That petitioner's contention that Tax Law §1115(1)(C), properly interpreted, requires a calculation of the ratio of the area of specific advertisements to the total area available for printing is rejected. This interpretation would exclude banners calling attention to related advertisements, large unused spaces between advertisements, and the entire area between advertising space and nonadvertising space. Such an **interpretation** would allow a publication **to** qualify for the shopping paper exemption merely by increasing the amount **of** unused space in the publication. As a result, a publication containing a minimal amount **of** news or community interest articles could qualify for the exemption.


E. That regarding the portion of the assessment for petitioner's recurring purchases other than of printing services and for purchases **of** capital assets, petitioner failed to present any evidence tending to show wherein this portion of the assessment was improper. It is noted that our determination as to the publication's qualification as a shopping paper is irrelevant **to** this portion of the assessment, for such purchases, even if made by a shopping paper, do not fall within the exemption set forth in section 1115(1) of the Tax Law.

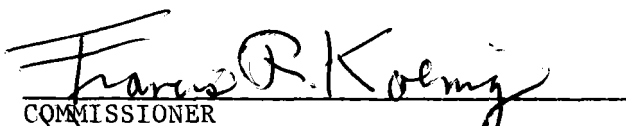
F. That the petition of Irondequoit Shopper, Inc. is in all respects denied and the notices **of** determination and demands for payment of sales and use taxes due dated September 10, 1984 are in all respects sustained.

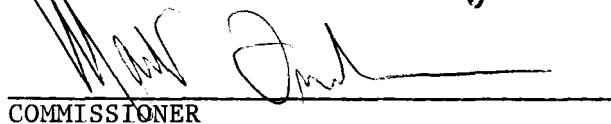
DATED: Albany, New York

STATE TAX COMMISSION

JAN 16 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER