STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SHOPPING BAG - PETER J. STAHLBRODT	:	DETERMINATION DTA NO. 802035
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, 1981 through August 31, 1984.	:	

Petitioner, Shopping Bag - Peter J. Stahlbrodt, 402 West Commercial Street, East Rochester, New York 14445, 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, 1981 through August 31, 1984.

On May 8, 1992 and May 11, 1992, respectively, petitioner and the Division of Taxation consented to have the controversy determined on submission without hearing, with all briefs and documents due by September 24, 1992. The date for the submission of briefs and documents was extended until May 7, 1993. On October 23, 1992, the Division of Taxation, represented by William F. Collins, Esq. (Robert J. Jarvis, Esq. of counsel), submitted documentary evidence. On November 23, 1992, petitioner submitted a memorandum of law. Petitioner submitted further documentary evidence and a supplemental brief on April 23, 1993. The Division did not submit a brief. After due consideration of the record, Marilyn Mann Faulkner, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner is entitled to a tax exemption for purchases of printing services because its publications qualify as a "newspaper" as well as a "shopping paper".

II. Whether petitioner's purchases of printing services constitute sales for resale.

III. Whether the Division of Tax Appeals has the jurisdiction to determine petitioner's claim that the 90% advertising rule for shopping papers is unconstitutional.

FINDINGS OF FACT

Peter J. Stahlbrodt is the owner of a shopping paper, The Shopping Bag, several separate editions of which are distributed to several areas within New York State 52 weeks per year. The publications are distributed to the public without charge. The only sales made are those to advertisers who place ads in the publications.

The Division of Taxation ("Division") conducted an audit of petitioner by analyzing three publications per year for the years 1981 through 1984 to determine if petitioner met the 10% non-advertising rule. Under Tax Law § 1115(i)(A) receipts from the sale of printing services performed in publishing a shopping paper are exempt from tax, however, subdivision (c) of that section provides that "[t]he advertisements in such publication shall not exceed ninety percent of the printed area in each issue".

The Division concluded that of the 12 publications examined, the percentage of non-advertising space ranged from 1.4% to 5.5%. The Division therefore found that petitioner did not qualify for a statutory exemption "as a printer under section 1115(a) of the Tax Law". The auditor found that petitioner owed $44,904.63 in use tax for subcontracted printing costs, $4,201,16 in sales tax for expense purchases other than printing costs, and $3,648.88 in sales tax for capital purchases.

The Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated February 5, 1985, indicating tax due in the amount of

$52,688.93[1] plus $9,303.94 in interest for the period June 1, 1981 through August 31, 1984.

Petitioner filed a petition, dated April 25, 1985, alleging that its publications are "shopping papers" within the meaning of Tax Law § 1115(i) and that the tax imposed by the Division was on disbursements for materials, tools, supplies, equipment and overhead incurred in the operation of "shopping papers". Petitioner claimed that such transactions were explicitly exempt from sales and use tax by statute.

The Division filed an answer, dated March 14, 1986, affirmatively stating, inter alia, that the publications did not qualify as a shopping paper under Tax Law § 1115(i) because more than 90% of the printed material in each issue consisted of advertisements and that because petitioner did not qualify as a shopping paper, its purchases of printing services used in its publications were not exempt from sales and use tax.

As part of its submission, the Division provided a letter dated October 23, 1992 listing the documentary evidence it submitted. Also, the letter contained the following statement:

> "In addition to the above documents, the parties hereto intend to submit a stipulation which sets forth their previous agreements that the audit methodology employed herein, and the tax amount determined due thereby, are not in controversy. Rather, the issue to be decided by the ALJ is whether petitioner's publications qualify for exemption from sales and/or use tax. Along with copies of this letter and the documents being submitted therewith, I am sending petitioner's representative a draft of such a stipulation. The executed version of this stipulation will be submitted when petitioner submits its documents and initial brief."

In its brief, dated November 23, 1992, petitioner stated that the parties stipulated that the audit methodology and calculation of the amount of tax are not in controversy. Petitioner stated that the only issues are (1) whether petitioner's purchases of printing services qualified for an exemption from sales and use tax under the Tax Law, and (2) whether the applicable statutory provisions imposing tax on printing services are unconstitutional per se or unconstitutional as applied. Petitioner further stated that it was not addressing the constitutional issues in the brief because it recognized that the Administrative Law Judge could not rule on the constitutional issues. With respect to its claim that its purchases were tax exempt, petitioner contended that

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[1]Petitioner apparently agreed to, and paid, a small portion of the sales tax thereby reducing the amount determined at audit ($52,754.67).

(1) the publications satisfied all the regulatory requirements for a newspaper, and (2) the purchases of printing services constituted sales for resale.

By letter dated March 23, 1993, petitioner was informed that although petitioner in its brief urged "an examination of the audited shopping papers submitted to the Division of Tax Appeals", the parties did not submit the publications in the record. Moreover, the letter indicated that although the Administrative Law Judge (ALJ) did not have jurisdiction to address petitioner's claim that the statutes imposing tax were unconstitutional on their face, the ALJ had jurisdiction to determine whether the tax law statutes were constitutional as applied. Thus, the letter informed petitioner that it had until April 6, 1993 to address the one constitutional argument and to submit the publications to which it referred in its brief.

Thereafter, petitioner was granted an extension until April 23, 1993 for filing the brief and evidence. By letter dated April 22, 1993, petitioner informed the ALJ that it was unable to locate all the editions that the Division audited and that it was unsure whether petitioner or the Division last had possession of the publications. Petitioner submitted four editions of the Shopping Bag, dated August 7, 1984, alleging that the four publications were representative editions.

In its supplemental brief, petitioner argued that the Division's application of Tax Law §§ 1105(c)(2) and 1115(i)(B)(8) unconstitutionally discriminates against shopping papers based on content.

CONCLUSIONS OF LAW

A. Tax Law § 1105(c)(2) imposes sales tax on receipts from every sale, except for resale, of the services of

> "producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which services are performed." (emphasis added)

Tax Law § 1115(i)(A) exempts from sales tax imposed by section 1105(c)(2) the receipts from the sale of printing services performed in publishing a "shopping paper". Subparagraph (B) defines a "shopping paper" as those community publications known as "pennysavers, shopping

guides . . . and other similar publications distributed to the public, without consideration, for purposes of advertising and public information." That subparagraph also provides that to qualify for a tax exemption as a shopping paper, the publication must meet various criteria including the requirement set forth in subparagraph (C) of the same subdivision. In turn, subparagraph (C) provides that "[t]he advertisements in such publication shall not exceed ninety percent of the printed area of each issue."

Petitioner argues that although the publication may not qualify for a tax exemption as a shopping paper, it may be considered a "newspaper" under Tax Law § 1115(a)(5). Citing to 20 NYCRR 527.4(e), petitioner argues that because retail sales of newspapers are exempt from sales tax under section 1115(a)(5), the purchase of printing services are exempt from sales tax. Petitioner's argument is unpersuasive.

The regulation, to which petitioner refers, concerns section 1105(c)(2), which imposes tax on receipts from printing services unless purchased for resale. There is no specific statutory tax exemption, as there is for shopping papers, for the purchases of printing services for newspapers (see, 20 NYCRR 528.6).[2] Thus, assuming arguendo that the publications in question qualified as a newspaper (which is not subject to the 90% advertising space provision), the purchases of printing services for newspapers are not tax exempt per se unless these services were purchased for resale (Tax Law § 1105[c][2]; 20 NYCRR 527.4).[3]

In any event, the publication in question does not constitute a "newspaper" within the meaning of section 1115(a)(5). The publications do not meet the regulatory definition of a newspaper. One of the regulatory criteria defining a "newspaper" within the meaning of section 1115(a)(5) is that the publication "must contain matters of general interest and reports of

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[2]Tax Law § 1118(5) provides an exemption from use tax with respect to the use of paper in the publication of newspapers (see, 20 NYCRR 528.6[f]), however, no evidence was submitted concerning the nature of the audited printing services to determine whether those services included the purchase of paper.

[3]See Conclusion of Law "B" rejecting petitioner's argument that the purchases of printing services were sales for resale.

current events" (20 NYCRR 528.6[b][iv]). Although petitioner is correct in noting that the regulatory definition does not require that any particular quantum of space in the publication be devoted to news material, the non-advertising portion of the publication in question does not, in any event, meet the regulatory requirement that it contain reports of current events. Of the 20 pages in the August 7, 1984 edition, the only articles of general interest are an opinion survey which take up less than a quarter of one page, a question and answer column on car care (the Datsun 280Z) which takes up less than one half a page, and an article concerning certain computer purchases which also takes up less space than one half of a page. Similarly, the August 21 and August 28 editions contain 20 pages and the August 14 edition contains 24 pages with a combined total of approximately one page or less in each edition devoted to an opinion survey, questions and answers on car care and a short article discussing some aspect of computer purchases.[4]

Prior to the effective date of the regulations (March 29, 1982) that defined a newspaper under section 1115(a)(5), the courts used a test of "common understanding" to define a newspaper under the statute (Matter of G & B Publishing Co., Inc. v. Dept. of Taxation and Finance, 57 AD2d 18, 392 NYS2d 938-940, lv denied 42 NY2d 807, 398 NYS2d 1029). In applying this test, the court in G & B Publishing Co. found that a weekly commercial advertising publication was not a newspaper. The court held that

> "it is significant that the instant publication seldom contains intelligence of current events or happenings of general interest (see, 66 C.J.S. Newspapers, § 1), does not regularly supply information on a variety of subjects, except for the availability of merchandise and services, would not qualify as a proper medium for the publication of legal notices (General Construction Law, § 60, subd. [a]), and, so far as we can tell, never presents internally generated thoughts or expressions of editorial opinion" (id., 392 NYS2d at 940).

The definition of a newspaper contained in the regulations, which were promulgated subsequent to the court's decision, mirrors the test of common understanding to the extent this test underscores that a newspaper contain articles concerning "current events or happenings of

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[4]The August 21 edition contains only an opinion survey and an article consisting of a series of questions and answers on car care.

general interest". In Matter of Scotsmen Press v. State of NY Tax Appeals Tribunal (165 AD2d 630, 569 NYS2d 991), the court held that publications and pennysavers that do not contain news articles or expressions of opinion are generally not newspapers within the meaning of the Tax Law (id., 569 NYS2d at 993 [and cases cited therein]). The Scotsmen Press court found significant the testimony by the general manager of the pennysaver in question that the "general interest articles in the paper were only fill and were placed in the pennysaver after the layout of the advertisements" (id.).[5] A review of the four issues of the Shopping Bag submitted by petitioner into the record leads to a similar conclusion. Thus, based on the regulations and case law, the publication in question does not fit the definition of a newspaper under section 1115(a)(5).

B. Petitioner argues that the purchases of printing services are sales for resale and, therefore, are tax exempt under Tax Law § 1105(c). Relying on section 1101(b)(5) which defines a "sale" as "[a]ny transfer of title or possession or both, . . . for a consideration", petitioner contends that a resale took place when advertisers provided consideration to the Shopping Bag to place their ads in the publication. According to petitioner's theory, the advertisers' consideration subsidized readers of the Shopping Bag "to the extent of the price per copy that [p]etitioner would otherwise charge the consumer" (Pet Brf at 7).

This argument has no merit. Petitioner has not established that there was a transfer of title or possession between the advertisers and petitioner for a consideration. From this record, the only transfer of title or possession that took place was between petitioner and the consumer, from whom no consideration was received. (See, Matter of Chanry Communications, Ltd., Tax Appeals Tribunal, March 7, 1991, confirmed sub nom, Matter of Henry v. Wetzler, 183 AD2d 57, 588 NYS2d 924). Furthermore, petitioner's theory that advertisers subsidize the readers of

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[5]Petitioner argues that the Scotsmen Press case is distinguishable because the court did not rule on whether the pennysavers met the regulatory criteria defining a newspaper. Although the court did not discuss the regulatory criteria, petitioner's distinction is inapposite because the court nevertheless relied on the test of common understanding outlined in G & B Publishing Co., which, as noted above, employs a definition that was subsequently adopted by the regulations, e.g., that the publication contain "matters of general interest and reports of current events".

the Shopping Bag to the extent that petitioner otherwise would charge the readers does not reflect the economic realities of publishing a shopping paper.

In sum, the purchases of printing services did not constitute sales for resale. (See, Matter of Henry v. Wetzler, 183 AD2d 57, 588 NYS2d 924, 926, supra.) In enacting Tax Law § 1115(i)(A), the Legislature specifically addressed when the purchases of printing services in publishing a shopping paper are exempt from the tax imposed by Tax Law 1105(c)(2). Thus, the only escape from tax is under section 1115(i)(A) and petitioner has not demonstrated its entitlement to this exemption. As noted by the Tribunal in Chanry Communications, if the transaction between the publisher and advertiser was a sale of a shopping paper, it would have been unnecessary for the Legislature to create a specific exemption under Tax Law § 1115(i)(A) because such transaction would already have been excluded from tax as a purchase for resale pursuant to Tax Law § 1105(c)(2).

C. Finally, petitioner argues in its supplemental brief that the Division's application of Tax Law §§ 1105(c)(2) and 1115(i)(B)(8) unconstitutionally discriminates against shopping papers because Tax Law § 1115(i)(B)(8) imposes a 90% advertising rule on shopping papers whereas no such content criteria is imposed on newspapers. Petitioner also contends that it is arbitrary to confer a tax exemption on a shopping paper when 90% of its content consists of advertising while denying the exemption to a shopping paper when 91% or 95% of its content consists of advertising. Petitioner asserts that the denial of a tax exemption deters free speech in violation of the First Amendment.

The Division of Tax Appeals does not have the jurisdiction to address petitioner's constitutional claims. At the administrative level, it is presumed that statutes are constitutional (Matter of Bucherer, Inc., Tax Appeals Tribunal, June 28, 1990). Although the Division of Tax Appeals may determine whether tax law statutes are constitutional as applied (see, Matter of David Hazan, Inc., Tax Appeals Tribunal, April 21, 1988, confirmed, 152 AD2d 765, 543 NYS2d 545, affd 75 NY2d 989, 557 NYS2d 306), its scope of review does not extend to determining the facial constitutionality of the statutes (Matter of J.C. Penney Co., Inc., Tax

Appeals Tribunal, April 27, 1989; Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988).

Here, petitioner frames his argument in terms of the Division's unconstitutional application of the statute; however, the crux of its claim focuses solely on a facial attack of the statute -- the constitutionality of the 90% advertising rule itself. Thus, the Division of Tax Appeals has no jurisdiction to address petitioner's constitutional claims that the 90% advertising rule discriminates between newspapers and shopping papers and among shopping papers themselves. (See, Matter of Chanry Communications, Ltd., supra; Matter of Scotsmen Press Inc., Tax Appeals Tribunal, September 14, 1989, confirmed sub nom Matter of Scotsmen Press v. State of NY Tax Appeals Tribunal, supra; Matter of Geneva Pennysaver, Inc., Tax Appeals Tribunal, September 11, 1989).

D. The petition of Shopping Bag - Peter J. Stahlbrodt is denied and the Notice of Determination, dated February 5, 1985, is sustained.

DATED: Troy, New York
October 14, 1993

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE