

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**YELLOW BOOK OF NEW YORK, INC.** : DECISION  
for Revision of a Determination or for Refund of : DTA NO. 820527  
Sales and Use Taxes under Articles 28 and 29 of the :  
Tax Law for the Period February 1, 1999 through :  
December 31, 2001. :  
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Petitioner, Yellow Book of New York, Inc., and the Division of Taxation each filed exceptions to the determination of the Administrative Law Judge issued on February 26, 2007. Petitioner appeared by Sonnenschein Nath & Rosenthal, LLP (Scott Brian Clark, Esq., and Hermann Ferré, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (James Della Porta, Esq., of counsel).

Petitioner and the Division of Taxation filed briefs in support of their exceptions, briefs in opposition and reply briefs. A brief *amicus curiae* in support of petitioner was filed on behalf of Idearc Media Corp. by Morrison & Foerster LLP (Craig B. Fields, Esq., and Roberta Moseley Nero, Esq., of counsel). Oral argument, at the request of both parties, was heard on June 11, 2008 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

## ***ISSUES***

I. Whether the distribution of petitioner's Yellow Book telephone directories qualified as mailing or shipping "to its customers or potential customers" within the meaning of Tax Law § 1115(n)(4).

II. Whether petitioner's Yellow Book telephone directories were mailed or shipped "by means of a common carrier, United States postal service, or like delivery service" within the meaning of Tax Law § 1115(n)(4).

## ***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. Petitioner, Yellow Book of New York, Inc., is the largest independent publisher of Yellow Pages in the United States. It provides print advertising in its Yellow Books and on-line advertising through its website, yellowbook.com. Petitioner competes with telephone company directory publishers as well as other independent directory publishers. The telephone company directory publishers with whom petitioner competes, while affiliated with telephone companies, are separate corporate entities operating their business much like petitioner's business, i.e., they provide advertising in telephone directories and distribute their directories to customers and prospective customers.

2. Like its competitors, petitioner distributes its Yellow Books free of charge to all businesses and residences in a geographic area. Petitioner also distributes free of charge a Business to Business Yellow Book, which is distributed solely to commercial businesses.

3. Petitioner is obligated to its customers, the businesses that paid for advertising in the Yellow Book, to distribute the directories in this manner.

4. The “yellow pages” section of the Yellow Book and the Business to Business Yellow Book contain advertisements and listings of businesses. Both books also contain a white pages directory of business listings.

5. Petitioner uses different means to promote its brand and its advertising services. Petitioner spends over \$20 million annually for marketing, media advertising, and generally toward the creation of a national brand in the marketplace with a recognizable name and logo.

6. Petitioner advertises through different media. During the period at issue, petitioner spent about \$10 million annually on paid advertising. Specifically, petitioner advertised in newspapers, magazines, event programs (e.g., sporting event programs), and on television, radio and billboards. Petitioner’s objective in its advertising is to reach individuals and businesses that might advertise with petitioner in the future. Petitioner also seeks through its advertising to promote the use of the directories among consumers, i.e., its advertisers’ customers.

7. Petitioner uses mass media in its advertising in order to build brand awareness and trust. In addition, because petitioner has a broad market focus and can provide advertising to all types of businesses large and small, petitioner believes that mass media advertising is an effective way for it to reach prospective customers. Petitioner thus uses mass media advertising because its potential customers are broadly dispersed in the general population. Petitioner therefore effectively considers everyone to be a prospect.

8. Petitioner has been the largest advertiser in its own Yellow Books. Petitioner’s own ads in the Yellow Book, which promote Yellow Book generally, Yellow Book’s ability to provide targeted advertising for its customers, petitioner’s 1-800 number, and also the use of yellowbook.com, are intermixed with the ads of petitioner’s customers and are found throughout the yellow pages section of the directory. Petitioner’s 2000 Manhattan Yellow Book and its 2001

Business to Business Yellow Book for Brooklyn, Queens, Nassau and Suffolk each contain about 175 such advertisements.<sup>1</sup> Additionally, petitioner's name, logo and website appear prominently on the directory's cover and spine as a means not only to identify the directory but also to promote the Yellow Book brand and the yellowbook.com website.

9. The Yellow Book directory itself is a marketing tool for petitioner because it is delivered door-to-door. As noted, the directory contains petitioner's advertising, promotes petitioner's 1-800 number and its website. Recipients of the directory are thus made aware of Yellow Book.

10. Petitioner makes an effort through its marketing to get small businesses to purchase advertisements in its directory. While some of these businesses are home-based, petitioner was unable to provide an estimate of the number of such home-based businesses. Unlike telephone company directories, petitioner does not require that a business have a business telephone in order to have a listing in the yellow pages.

11. Petitioner's mass media advertising is one strategy employed by petitioner to reach potential customers. Petitioner also employs 5,000 sales representatives, the largest on-premises sales force in the country, to solicit potential customers. Petitioner's sales reps attempt to "swing every door," i.e., visit every business, in the market for customers. Such businesses or potential customers are identified to the sales reps by a "lead pool," a list of businesses developed from information contained in competitors' directories, listings of businesses in a given marketplace, and call-ins to petitioner's 1-800 number. The sales force does not "knock on the door" of a residence unless such residence has been identified as a business and is listed in the lead pool.

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<sup>1</sup> The 2000 Manhattan Yellow Book and the 2001 Business to Business Yellow Book were introduced into the record as representative samples of petitioner's directories during the relevant period.

12. Petitioner also employs a telephone sales force that solicits sales by telephone. The telephone sales force uses the same lead pool as the sales reps who make contact at the premises of potential customers.

13. Petitioner retains approximately 70 percent of its customers from year to year. Petitioner seeks to replace the 30 percent of customers who do not continue to advertise with petitioner and also seeks to grow each year by adding an additional 10 percent of new customers. During the period at issue petitioner successfully added such new customers and thus grew significantly.

14. Petitioner's chart of accounts has accounts for promotional material and advertising expense. None of the expenditures related to the refund claim, i.e., the production of the Yellow Books (*see*, Finding of Fact "43"), were recorded in either of these accounts. The expenditures in question were recorded in a production cost account.

15. To print and bind its Yellow Books, petitioner engages third-party printers located both in and outside of New York State. Petitioner purchases and provides the paper, and the printer provides all other necessary supplies or services, such as printing plates, ink and printing. Once the Yellow Books are printed, petitioner arranges to have the books delivered from the printers' facilities to the warehouses of the different companies that have been hired by petitioner to perform the door-to-door delivery service ("the Delivery Companies").

16. The first step in this process, getting the Yellow Books from the printer to the Delivery Companies, may occur in one of three ways. First, petitioner may direct a Delivery Company to arrange to pick up the directories at the printer's location. Second, petitioner may direct the printer to ship the directories to a public warehouse or the Delivery Company's warehouse and direct the Delivery Company to arrange for delivery from there. In either such case, once the

directories are in possession of the Delivery Company, the Delivery Company will deliver the directories to businesses and residences in the designated geographic area. Third, petitioner may direct the printer or Delivery Company to deliver the directories to the United States Postal Service (“USPS”) and then have the USPS deliver the directories to businesses and residences in the geographic area.

17. After the entire geographic region has been served with delivery of the Yellow Books for that region, any surplus books, i.e., those left over after that delivery, are shipped to petitioner’s warehouse in Pennsylvania. Petitioner pays for the shipping of these surplus books.

18. The Yellow Book is delivered to businesses and residences in the geographic area to which the directory relates. The distribution occurs at least once a year for each geographic region covered by petitioner. Once petitioner has contracted with a Delivery Company, the Delivery Company coordinates with petitioner’s printer to arrange for delivery for the door-to-door distribution.

19. During the relevant years, petitioner contracted with several Delivery Companies, including common carriers, USPS, and like delivery services. None of the Delivery Companies were affiliated with petitioner and none of the Delivery Companies shared employees with petitioner. Petitioner gave the Delivery Companies specific time periods within which to complete their deliveries. Petitioner had the same expectations with the USPS to deliver the Yellow Books within certain time periods.

20. All of the Delivery Companies hold themselves out as delivery companies. For example, the web site of one of the Delivery Companies, Product Development Corporation (“PDC”), indicates that PDC will provide specialized delivery services for any company that

contracts with them to do so. PDC's primary business is the door-to-door delivery of telephone directories. PDC has been delivering directories for petitioner since at least 1998 or 1999.

21. The Delivery Companies deliver telephone directories for petitioner's competitors, including Verizon Yellow Pages, Sprint Yellow Pages, Valley Yellow Pages, Qwest, Decks, Specific Telephone, Southwest Telephone and Tellis. Petitioner does not prohibit any Delivery Company it contracts with from contracting with its competitors.

22. Petitioner selects Delivery Companies through a bid process conducted by geographic area. The criteria for selection are price, timeliness and quality. Timeliness takes into account whether a delivery company has the resources available to deliver within a certain time period, and quality takes into account past experience and the company's quality control or ability to verify delivery.

23. When petitioner and a Delivery Company agreed to terms, they executed a letter agreement that set forth the agreed-to rates, time period for distribution and quality of distribution.

24. During the relevant period, petitioner contracted with USPS, PDC, JBK Moving and Trucking, VIP Relocations, Inc., Next Day, Inc., Central Pennsylvania Transportation, Inc., Kinard Trucking, Inc., Advance Moving Company, Inc., Logistics Systems, Inc., and Specialty Directory Distribution Services.

25. The Delivery Companies were permitted to subcontract delivery services. One of the delivery companies, PDC, subcontracted out about 80 percent of its Yellow Book delivery work. PDC's requirements for subcontractors is that they have a social security number, a driver's license and motor vehicle insurance. PDC's subcontractors do not need shipping or trucking licenses or permits.

26. The Delivery Companies determined whether the books were delivered by their own employees or were subcontracted (in some instances with the USPS).

27. Petitioner does not furnish the Delivery Companies with address or mailing labels for the directories. Petitioner assigns a Delivery Company a geographic area within which the directories are to be distributed. Petitioner provides the Delivery Company with information consisting of the “occupant” file obtained from the USPS, which is merged with a business list, and petitioner’s own contract data, so that the Delivery Company has an accurate listing of all residences, businesses, and advertisers in the directory in the geographic area. From that information, the Delivery Company produces a manifest or route sheet, a delivery list with addresses. At the end of the delivery, the Delivery Company provides the route sheet to petitioner.

28. Problems with delivery, i.e., books that have not been delivered, are the responsibility of the Delivery Company.

29. Petitioner requires that Delivery Companies put the directories in plastic bags and place the directories on the hinge side of the door. Sometimes the Delivery Companies are required to purchase the plastic bags. At other times, Yellow Book has supplied the plastic bags.

30. Petitioner provided the Delivery Companies with a list of general rules and guidelines to be followed in distributing the directories. Among such guidelines was the general directive that the books were to be delivered door to door from dawn to dusk. If a recipient requested an additional book, the Delivery Company was directed to provide such additional book and to note it on the delivery manifest. The carrier usually has a few extra books because sometimes a particular residence or building may not want a book, i.e., refuse delivery. The Delivery

Companies were required to provide petitioner with a daily report that noted the percentage of the delivery that was complete.

31. During the course of the audit (*see*, Finding of Fact “44”), petitioner provided to the Division of Taxation (“Division”) a standard contract to be entered into by petitioner and a Delivery Company. A list of “Distribution Rules and Guidelines” detailing general procedures to be followed by the Delivery Company in delivering directories for petitioner was part of this standard contract. It does not appear that this particular standard contract was used by petitioner and the Delivery Companies during the relevant period. As noted above, however, petitioner did provide the Delivery Companies with written rules and guidelines to be followed in fulfilling the contracts in effect during the relevant period.

32. Petitioner did not produce any of the contracts with Delivery Companies that were in effect during the relevant period. Petitioner also did not produce any copies of any written rules or guidelines to be followed by the Delivery Companies in distributing the directories during the relevant period.

33. Following the completion of a delivery, any surplus copies of the directory are stored temporarily at the Delivery Company’s facility and are then shipped within a week or two to a facility designated by petitioner. Petitioner pays the cost of such shipping.

34. Petitioner has recalled directories from the Delivery Company because of mistakes in the directory, which were then corrected and the directories redistributed to the Delivery Company.

35. Secondary delivery of copies of the directory is made to individuals who contact petitioner through the 1-800 telephone number to request a copy.

36. Authority to operate as a carrier of property, except household goods by motor vehicle, may be issued by the New York State Department of Transportation (“NYDOT”) to a carrier after notice and with or without a hearing if the Commissioner of NYDOT determines that the holder is fit, willing and able to hold authority, and that there are no valid safety protests against the carrier. During the relevant period, JBK Moving & Trucking and VIP Relocations, Inc. had authority and were registered with NYDOT to act as carriers of property, although JBK’s certificate of authority was revoked for part of the relevant period on March 4, 2001. The certificates from NYDOT specifically refer to these carriers as “common carriers.”

37. Similarly, the United States Department of Transportation (“USDOT”) is responsible for the registration of interstate carriers. PDC, Next Day, Inc., Central Pennsylvania Transportation, Inc., Kinard Trucking, Inc., Advance Moving Company, Inc., Logistics Systems, Inc., and Specialty Directory Distribution Services are all registered with USDOT as interstate carriers as follows:

- PDC is registered to carry cargo including paper products;
- Next Day, Inc. is registered to carry cargo including paper products and U.S. Mail;
- Central Pennsylvania Transportation, Inc. is registered to carry cargo including paper products and U.S. Mail;
- Kinard Trucking, Inc. is registered to carry cargo including paper products;
- Advance Moving Company, Inc. is registered to carry cargo including general freight;
- Logistics Systems, Inc. is registered to carry cargo including general freight;
- Specialty Directory Distribution Services is registered to carry cargo including paper products.

38. As a point of comparison, United Parcel Service, Inc., is registered with USDOT to carry cargo including general freight and paper products.

39. During the relevant period, petitioner’s experience with the delivery of the Manhattan Yellow Book by USPS was unsatisfactory. Even though the Parcel Post Unit of USPS dedicated

specific trucks to the delivery of the Yellow Books, USPS did not meet the time frame it had promised for delivery and was ill-prepared for the magnitude of the delivery required.

40. USPS delivered directories in a manner similar to the Delivery Companies. Like the Delivery Companies, USPS made door-to-door delivery of the books. For a dwelling with multiple residences, USPS left the books where it was told, e.g., lobby, basement, mail room. Directories delivered by USPS were not labeled with individual addresses. USPS dedicated trucks to the delivery of Yellow Books. USPS had to rent additional trucks and hire additional personnel to complete the deliveries. In addition, USPS was given extra directories in case they were needed, and petitioner was responsible to retrieve those extra directories from USPS.

41. Petitioner and USPS did not enter into an agreement like that of petitioner and the Delivery Companies. USPS had a fixed schedule of rates that determined the cost of the delivery to petitioner.

42. The Delivery Companies considered USPS to be a competitor.

43. On March 12, 2002, petitioner timely filed a claim for refund of sales and use tax in the amount of \$1,910,167.50 based on, among other provisions, Tax Law § 1115(n)(4). The total claim amount included a \$10,693.23 refund claim for exempt internet transactions, a \$671,903.50 refund claim for sales tax paid on printing, and a \$1,227,570.77 refund claim for use tax paid on the cost of ink, paper, printing and other services used in making and distributing Yellow Book telephone directories.

44. Petitioner's refund claim triggered an audit by the Division. On June 16, 2003, following the completion of the audit, the Division issued a letter granting in part and denying in part petitioner's refund claim. The amount approved included the \$10,693.23 in tax paid on internet sales and \$125,903.77 in use tax paid for producing telephone directories delivered by

the United States Postal Service.<sup>2</sup> The balance of petitioner's refund claim, in the amount of \$1,773,569.74 was denied.

45. The Division's June 16, 2003 letter explained the denial as follows:

The portion of the claim which is denied relates to directories which were not shipped via a common carrier, the United States Postal Service, or a like delivery service. The exemption for printed promotional materials requires shipping or mailing by one of these methods.

46. On September 4, 2003, petitioner timely filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services, setting forth its position with respect to the Division's denial due to the carrier issue. After much correspondence and without resolution of the matter, petitioner filed a Request for Discontinuance of the Conciliation Conference on February 24, 2005. Petitioner then timely filed a petition with the Division of Tax Appeals on May 11, 2005. The Division subsequently filed its answer to the petition dated July 20, 2005. The Division's answer raised, for the first time in connection with petitioner's refund claim, the issue of whether petitioner's directories were "promotional materials" as required for exemption under Tax Law § 1115(n)(4). Specifically, the answer affirmatively stated "that the directories distributed by petitioner do not constitute promotional materials as such directories do not promote petitioner's business."

47. During the course of the audit, the Division considered the issue of whether the directories were promotional materials as required for exemption under the relevant statute. The Division's field audit report stated, among other things, that:

A review of the refund claim was performed and the results were as follows: . . .  
(3) A review of the supporting schedule for period Sept. 00-Nov. 00 showed that other items not related to the production costs of producing *printed promotional*

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<sup>2</sup> The approved refund of \$136,597.76 was reduced by \$59,695.00 for tax owed on various unrelated taxable purchases, for which sales tax had not previously been paid. The resulting net refund paid was \$76,902.76.

*material* were erroneously included in the supporting schedule. Since these costs did not fall in the definition of printed promotional materials, use tax was correctly paid and not subject to any refund . . . . (4) Vendor's telephone directories are delivered by USPS and several other contract carriers . . . . Except USPS, all other delivery providers do not fall in the definition of common carriers or like delivery services within the meaning of Section 1115(n)(4). (Emphasis added.)

The reference to printed promotional material in the audit report as noted above refers to the production costs of petitioner's Yellow Books.

48. In granting the portion of the refund claim related to books delivered by USPS, the Division necessarily concluded that the directories were promotional materials distributed to customers or prospective customers of petitioner for purposes of the exemption under Tax Law § 1115(n)(4).

49. The change in the Division's position on the question of whether the directories were promotional materials was not based on any facts overlooked during the audit or on any newly discovered facts.

50. On October 11, 2005, the Division issued a Notice of Determination to petitioner seeking recovery of the refund granted for the cost of the directories delivered by USPS. This notice is not the subject of the petition at issue in this matter.

51. In New York State, petitioner competes principally with Verizon Yellow Pages Company ("Verizon Yellow Pages") for advertising revenue. Although Verizon Yellow Pages is a subsidiary of Verizon Communications, Inc., the telephone company, it is a company wholly separate and apart from Verizon Communications and is separately incorporated in Delaware. Indeed, while Verizon Communications is a New York-based telephone company, Verizon Yellow Pages is a Texas-based company, which also controls and operates SuperPages.com, a local Texas search portal.

52. During the period at issue, petitioner purchased graphic arts services from a vendor named Pindar, which is located outside New York. Pindar delivered the graphic arts services so purchased to printers designated by petitioner via e-mail. Tax paid on such services amounted to \$37,648.73. By stipulation, the Division conceded that where delivery of such services is accomplished electronically, the purchase of such services is not subject to tax.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge determined that the statutory exemption for promotional materials in section 1115(n)(4), which requires that the “purchaser of such promotional materials mails or ships such promotional materials, or causes such promotional materials to be mailed or shipped, to its customers or prospective customers (underscoring added),” cannot reasonably be read to restrict the exemption to promotional materials that promote the business of the “purchaser” to the exclusion of materials that promote the business of the purchaser’s customers. Stated another way, the statute’s use of the word “its” should not be read to limit the exemption to materials mailed to the purchaser’s own customers but instead may apply to materials mailed to “customers or prospective customers” of the purchaser’s customers. The Administrative Law Judge rejected the Division’s argument that the more general language in section 1115(n)(1) reflects a considered decision by the Legislature to narrow the scope of the exemption in section 1115(n)(4) to self-promotional materials. In addition, the Administrative Law Judge found that the directories were mailed to the purchaser’s “prospective customers” because the recipients of the directories might advertise in the directories in the future.

The Administrative Law Judge next addressed the statutory requirement of section 1115(n)(4) that the materials be mailed or shipped “by means of a common carrier, United States postal service or like delivery service.” The determination reviews provisions of the New York

Transportation Law and the Federal Interstate Commerce Commission Termination Act of 1995, which use the term “common carrier,” and concludes that the “negotiated bilateral contracts, customized services, and an ongoing relationship between petitioner and the Delivery Companies” are sufficiently different from the business of a common carrier to prevent the Delivery Companies from qualifying as a “like delivery service” within the meaning of section 1115(n)(4). The Administrative Law Judge also rejected petitioner’s argument that the intent of the statute is simply to require that the materials be delivered by a third party and not the purchaser. The determination also states the following with respect to the legislative intent of section 1115(n)(4):

This statutory interpretation is consistent with the legislative intent of the exemption of enhancing the competitive position of New York State’s in-state printers, mailers and related vendors compared with their out-of-state competitors. Prior to the passage of Tax Law § 1115(n)(4) the distribution of all promotional material in New York was subject to either sales or use tax with one notable exception: The out-of-state purchase and distribution of such material by or on behalf of a purchaser who lacked nexus with New York. Absent nexus such a purchaser is not subject to use tax (*see, Quill Corp. v. North Dakota*, 504 US 298, 119 L Ed 2d 91). Shipment of promotional materials into New York by or on behalf of such a purchaser via common carrier or USPS avoids nexus and thus avoids use tax liability (*id.*). Passage of Tax Law § 1115(n)(4) enabled New York purchasers of promotional materials to purchase and distribute such materials in New York without sales or use tax liability as long as they used a similar means of delivery. New York printers, mailers and related vendors were thus placed in the same competitive position as their non-New York counterparts with respect to the New York distribution of printed promotional materials by purchasers who lacked a New York nexus.

#### ***ARGUMENTS ON EXCEPTION***

On exception, the Division challenges the Administrative Law Judge’s first conclusion—*viz.* that the directories in the present case satisfy the requirement of section 1115(n)(4) that “the purchaser of such promotional materials mails or ships such promotional materials, or causes such promotional materials to be mailed or shipped, to its customers or prospective customers.” The Division argues that while section 1115(n)(1) is broadly worded to

cover promotional materials distributed on behalf of others, as would be the case where an advertising agency purchases such materials and distributes them for its clients, section 1115(n)(4) is more narrowly worded with the intention of excluding such materials from exemption.

The Division also asserts that the delivery services obtained by petitioner did not qualify as distribution “by means of a common carrier, United States postal service or like delivery service” because the arrangements in this case lack the quality present in the services of the postal service and common carriers—*viz.* the customer’s lack of control over its property while it is in transit. Here, petitioner’s degree of control over the delivery of its directories pursuant to its contracts with the Delivery Companies negates a resemblance to the postal service and common carriers that would permit these arrangements to qualify as a “like delivery service.”

Petitioner argues on exception that since common carriers and contract carriers are the only types of carriers referred to in the New York Transportation Law, the words “like delivery service” in section 1115(n)(4) must include at least some contract carriers. Otherwise, the statutory words would be meaningless. Moreover, the delivery companies that petitioner engaged were for the most part common carriers and all of them provided services like those provided by common carriers and the United States Postal Service. In petitioner’s view, all that the statute requires is delivery by an independent delivery company as distinguished from distribution by the purchaser directly.

Petitioner also rejects the Division’s argument that the materials are disqualified because they are directed to customers or prospective customers of persons other than petitioner. First, petitioner asserts that it is the largest advertiser in its directories and thus it is promoting its own

business. Second, it states that since the persons who receive the directories may become customers of petitioner in the future, they should be viewed as “its prospective customers.”

### ***OPINION***

Tax Law § 1115(n)(4) provides an exemption from sales and use tax as follows:

Notwithstanding any contrary provisions of paragraph one of this subdivision, promotional materials which are printed materials and promotional materials upon which services described in paragraph two of subdivision (c) of section eleven hundred five have been directly performed shall be exempt from tax under this article where the purchaser of such promotional materials mails or ships such promotional materials, or causes such promotional materials to be mailed or shipped, to its customers or prospective customers, without charge to such customers or prospective customers, by means of a common carrier, United States postal service or like delivery service (underscoring added).

The issues in this case are two. First, did petitioner cause its directories to be mailed or shipped “to its customers or prospective customers?” Second, were the directories mailed or shipped “by means of a common carrier, United States postal service or like delivery service?”

With respect to the first issue, we read the statutory description of the ultimate recipients of the promotional materials as imposing a substantive limitation on the application of the exemption. While the sparse legislative history of the provision indicates that the Legislature intended to provide a tax incentive to New York printers and mailers, there is no reason to think that it intended the benefit to be unlimited. As with most such provisions, the issue here is just how broad a benefit did the Legislature intend to confer. We think the words in question must be read as an intentional tailoring of the exemption to a particular factual setting. If the Legislature meant simply “mailed or shipped . . . without charge to . . . [the recipient],” it would presumably have said so. Nevertheless, the meaning of the words and their application to the present facts is not free from doubt. We understand the words “customers or prospective customers” to mean that the materials must be sent to present or possible future purchasers of goods or services and

thus would exclude other kinds of printed materials such as annual reports, college yearbooks and political pamphlets. In the present case, it seems clear that the directories are sent to persons who are or may become customers of the advertisers as a group.

The word “its” refers to the “purchaser.” Under the narrowest reading of this provision, the purchaser’s customers are the persons who have paid for listings or display advertising space in the directories. Since the directories are distributed to the entire populations of the communities involved, some portion of the persons receiving directories will inevitably be the advertisers in the directories. Many of the directories will, however, be distributed to persons who are not customers or prospective customers of particular advertisers. Directories advertising liquor stores will be delivered to the homes of teetotalers; the advertising of barbershops will be delivered to the bald. It seems likely that many advertisers will be appealing to only a small percentage of the general population. This is no doubt a common feature of mass marketing and it seems reasonable to conclude that even if only a small number of “customers or prospective customers” are counted among the recipients, the statute will nevertheless be satisfied. For example, if it could be estimated that only one percent of the general population would fall within the class of customers or prospective customers of taxidermists, the statute should not be read to exempt only one percent of printed fliers included in a mass mailing by a taxidermist. There is no reason to believe that the class of persons who have listings or advertisements in classified telephone directories represented a less significant portion of the population.

The Division advances a theory that the use of the word “its” was specifically intended by the Legislature to exclude from the exemption promotional materials purchased by advertising agencies and other advertising intermediaries, including petitioner. While this explanation has the appeal of simplicity and clarity, the Division has presented no evidence that it was in fact

contemplated by the Legislature. Moreover, since the legislative purpose was to relieve New York printers and mailers from a tax disadvantage in providing promotional materials in competition with out-of-state vendors, it is hard to find logical support for limiting the relief to materials sold directly to the sellers of goods and services and denying it to similar materials sold to intermediaries representing those sellers. We accordingly conclude that requirement of delivery to the purchaser's customers is satisfied.

The second issue in this case is whether the methods employed by petitioner to distribute its directories falls within the statutory phrase "by means of a common carrier, United States postal service or like delivery service." It seems clear that the words "like delivery service" mean a delivery service bearing a resemblance to a common carrier or the United States Postal Service, but the nature of the required resemblance is unstated. Like the Administrative Law Judge, we infer from the legislative history that the purpose of section 1115(n)(4) was to avoid a competitive disadvantage for New York printers and mailers in comparison to out-of-state printers and mailers where an out-of-state purchaser engaged such a company to print and distribute promotional materials in New York. In this light, it appears that the words are intended to mean a method of distribution in New York that could be used by a hypothetical out-of-state competitor without creating a sufficient presence in New York to permit the Division to require the payment of sales or use tax on the promotional materials. Accordingly, the question presented is whether the substantial nexus requirement of the Commerce Clause would be met if a hypothetical out-of-state purchaser engaged an out-of-state printer and mailer to produce promotional materials and to distribute them in New York using the methods actually employed by petitioner. If the answer is yes, the out-of-state competitor enjoys no tax advantage over the

in-state vendor and the exemption provided in section 1115(n)(4) is not needed to produce competitive neutrality.

The requirement of substantial nexus can be satisfied by the activities of independent contractors and does not require the presence of a taxpayer's own employees or property (*Scripto, Inc. v. Carson*, 362 US 207 [1960]). Moreover, the activities of independent contractors may be sufficient to constitute a physical presence within the state for purposes of imposing a requirement to collect sales and use taxes (*see, Quill Corp. v. North Dakota*, 504 US 298 [1992], at 306, citing *Scripto* as involving "some sort of physical presence within the State"). Substantial nexus is not present, however, where a vendor's only contact with customers in the taxing state is by common carrier or the United States mail (*Id.*, at 315). What other forms of contact may avoid creating Constitutional nexus is less certain. The parties have not cited any authorities that directly bear on this question. Cases cited by the Division and petitioner, including *Matter of Bennett Bros. v. State Tax Commn.*, 62 AD2d 614 (3d Dept 1978), and *Chesapeake and Potomac Telephone Co. v. Comptroller*, 317 Md 3, 561 A2d 1034 (1989), involve situations in which the purchaser was engaged in business within the taxing state and the nexus requirement was clearly met apart from the delivery methods employed (*see, D.H. Holmes v. McNamara*, 486 US 24 [1988]; *Commissioner of Rev. v. J. C. Penney Co.*, 431 Mass 684, 730 NE2d 266, at n5 [2000]; *Sharper Image Corp. v. Miller*, 240 Conn 531, 692 A2d 774, at n5 [1997]). Nevertheless, we think that the extensive control that petitioner exercised over the delivery of its directories as set forth in the findings of fact would support a finding of substantial nexus if employed by an out-of-state competitor and, accordingly, petitioner would not need to enjoy an exemption from tax under section 1115(n)(4) in order to avoid being disadvantaged. We also find support for this conclusion in a decision of the Maryland Circuit Court holding that

the activities of an independent delivery company established substantial nexus under the Commerce Clause for an out-of-state furniture manufacturer (*see, Comptroller v. Furnitureland South, Inc.*, Maryland Circuit Court [August 13, 1999], *rev'd on procedural grounds*, 364 Md 126, 771 A2d 1061 [2000]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Yellow Book of New York, Inc. is denied;
2. The exception of the Division of Taxation is denied;
3. The determination of the Administrative Law Judge is affirmed;
4. The petition of Yellow Book of New York, Inc. is denied;
5. The denial by the Division of Taxation of the claim for refund dated March 12, 2002 is sustained.

DATED: Troy, New York  
December 11, 2008

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
President

/s/ Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner

/s/ Robert J. McDermott  
Robert J. McDermott  
Commissioner