STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
YELLOW BOOK OF NEW YORK, INC.	:	DETERMINATION DTA NO. 820527
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 February 1, 1999 through December 31, 2001.	: : :	

Petitioner, Yellow Book of New York, Inc.,[1] 398 EAB Plaza, Uniondale, New York 11556, 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 February 1, 1999 through December 31, 2001.

A hearing was commenced before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 1, 2006 at 10:30 A.M., and continued to conclusion at the same location on February 2, 2006 at 9:15 A.M. All briefs were to be submitted by August 25, 2006, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Scott Brian Clark, Esq., and Hermann Ferre, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (James Della Porta, Esq., of counsel).

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[1] In early 2004, Yellow Book of New York, Inc., pursuant to statutory merger, became part of Yellow Book Sales and Distribution Company, Inc.

ISSUES

I. Whether the Division of Taxation had a proper basis to change its prior position regarding whether petitioner's Yellow Book telephone directories were promotional materials and whether the Division's answer should be stricken in that regard.

II. Whether petitioner's Yellow Book telephone directories are promotional materials for purposes of the exemption under Tax Law § 1115(n)(4).

II. Whether petitioner's Yellow Book telephone directories were distributed to customers or potential customers of petitioner as required for exemption under Tax Law § 1115(n)(4).

IV. Whether petitioner's Yellow Book telephone directories were shipped by means of a common carrier or like delivery service as required for exemption under Tax Law § 1115(n)(4).

V. Whether denying the claimed exemption would violate petitioner's rights to equal protection under the law.

VI. Whether petitioner has established that graphic arts purchased by it and delivered electronically are excluded from tax.

FINDINGS OF FACT

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.[2] 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

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[2] 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.

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.

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 which 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 which 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 which 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 are 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 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 which 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 its contracts with Delivery Companies which 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 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 which 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.[3] 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."

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[3] 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.

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 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.

53. Petitioner submitted proposed findings of fact numbered "1" through "27." Proposed findings of fact "1," "3," "11," "13," "14," "17" through "20," "24," and "26" have been accepted in substance and have been made part of the Findings of Fact herein. Proposed findings of fact "2," "4" through "10," "16," "21," "22," "23" and "25" have been modified to better reflect the record. As modified, such proposed findings of fact are accepted. Portions of proposed findings of fact "4" and "8" are rejected for relevancy. Proposed findings of fact "12," "15" and "27" are conclusions of law and are therefore rejected as facts.

CONCLUSIONS OF LAW

A. Preliminarily, petitioner contends that the Division had no appropriate basis to change its prior determination regarding promotional materials and that its answer should be stricken in that regard. With respect to this contention, the record shows that, at the conclusion of the audit, the basis for the denial of the subject refund claim was the Division's conclusion that the directories were not delivered by means of a "common carrier, United States Postal Service or like delivery service" (***see***, Finding of Fact "45"). The Division raised the issue of whether the

directories were promotional materials as a further basis for denial in its answer dated July 20, 2005 (***see***, Finding of Fact "46"). By raising this issue, however, the Division did not "re-determine" its prior position as petitioner asserts. Rather, the letter dated June 16, 2003 denying petitioner's refund claim was the Division's statutorily required determination with respect to the claim for purposes of Tax Law § 1139(b). By its answer the Division raised an alternative basis for the refund denial. The Tax Appeals Tribunal has permitted the Division to assert additional or alternative theories of liability so long as the petitioner is given adequate notice of such additional or alternative issues (***see***, ***Matter of Clark***, Tax Appeals Tribunal, September 14, 1992). Here, the issue was expressly raised in the Division's answer. Petitioner thus had adequate notice of the promotional materials issue. Accordingly, this issue was properly raised in the Division's answer and is properly considered in this determination.

The cases cited by petitioner on this issue, which involve the recovery of an erroneous sales tax refund by the issuance of a notice of determination (***Turner Construction v. State Tax Commn***., 57 AD2d 201, 394 NYS2d 78), the assessment of additional sales tax following the execution of a consent by the taxpayer (***Adirondack Steel Casting v. New York State Tax Commn***., 121 AD2d 834, 504 NYS2d 265), and the appellate standard of review for administrative determinations (***AT&T v. State Tax Commn.***, 61 NY2d 393, 474 NYS2d 434, ***Alpha Computer Service Corp. v. State Tax Commn.***, 53 AD2d 973, 385 NYS2d 840, ***Bowers v. Aron***, 142 AD2d 32, 534 NYS2d 812), are inapposite.

Petitioner also asserts in its brief that the Division had no basis to issue the October 11, 2005 Notice of Determination seeking recovery of the refund granted for directories delivered by USPS (***see***, Finding of Fact "50"). As the Division correctly notes, however, the question of whether the October 11, 2005 statutory notice should be sustained or cancelled is not relevant to

the present matter. The petition which is the subject of the present matter was filed in response to the June 16, 2003 refund denial (***see***, Finding of Fact "46"). The petition does not protest the October 11, 2005 Notice of Determination. The Division of Tax Appeals thus lacks jurisdiction over the October 11, 2005 notice (***see***, Tax Law § 2008 ["All proceedings in the division of tax appeals shall be commenced by the filing of a petition . . . protesting any written notice issued by the division of taxation which has advised the petitioner of a . . . denial of refund . . . ."]).

B. Turning to the substantive issues at hand, as a general matter, absent a specific statutory exemption, the in-state purchase of promotional material is subject to sales tax as a purchase of tangible personal property pursuant to Tax Law § 1105(a) and the in-state distribution of such material when purchased out of state is a "use" of such material under Tax Law § 1101(b)(7) which is subject to use tax under Tax Law § 1110. Petitioner asserts that the purchases at issue, i.e., the cost of producing its Yellow Book directories, were exempt from tax pursuant to Tax Law § 1115(n)(4).

C. Statutes and regulations authorizing exemptions from taxation are to be strictly and narrowly construed against the taxpayer (***see***, ***Matter of International Bar Assn. v. Tax Appeals Tribunal***, 210 AD2d 819, 620 NYS2d 582, ***lv denied*** 85 NY2d 806, 627 NYS2d 323; ***Matter of Lever v. New York State Tax Commn.***, 144 AD2d 751, 535 NYS2d 158). "Petitioner has the burden of showing clear entitlement under a provision of the law plainly giving the exemption (citations omitted)" (***Matter of Old Nut Co. v. New York State Tax Commn.***, 126 AD2d 869, 871, 511 NYS2d 161, 163, ***lv denied*** 69 NY2d 609, 516 NYS2d 1025).

D. The statute at issue, Tax Law § 1115(n)(4), provides for an exemption from tax under Article 28 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.

The statute thus sets forth five criteria which must be met in order for the cost of the Yellow Book directories to be exempt from sales and use tax. Specifically, the directories must be promotional materials; the directories must be purchased by petitioner; the directories must be mailed or shipped to customers or prospective customers of petitioner; the directories must be shipped free of charge to such customers or prospective customers; and such mailing or shipment must be made by means of a common carrier, USPS or like delivery service.

In this case, the record is clear that the directories were shipped free of charge to recipients and there is no dispute that petitioner purchased the directories.

E. Accordingly, the first question to be addressed is whether the Yellow Books are promotional materials for purposes of the exemption. Tax Law § 1101(b)(12) defines "promotional materials" for purposes of the sales tax imposed under Tax Law § 1105(a)-(d) and the use tax imposed under Tax Law § 1110 as follows:

> *Any advertising literature*, other related tangible personal property (whether or not personalized by the recipient's name or other information uniquely related to such person) and envelopes used exclusively to deliver the same. Such other related tangible personal property includes, but is not limited to, free gifts, complimentary maps or other items given to travel club members, applications, order forms and return envelopes with respect to such advertising literature, annual reports, promotional displays and Cheshire labels but does not include invoices, statements and the like. (Emphasis added.)

The statute does not further define "advertising literature." It is appropriate, therefore, to interpret this phrase in its ordinary, everyday sense (***Matter of Automatique v. Bouchard***, 97

AD2d 183, 470 NYS2d 791). Random House Webster's College Dictionary defines "advertise," in relevant part, as "to give information to the public about"and "literature," in relevant part, as "any kind of printed material" (Random House Webster's College Dictionary 20, 767 [1997]).[4]

F. Petitioner's Yellow Book directories consist of a compilation of advertisements for petitioner's customers and for petitioner, along with telephone listings. There can be little doubt that the ultimate purpose of the directories was to have customers purchase the products and services advertised. Accordingly, as petitioner notes in its brief, a fair reading of this statutory definition establishes that the directories were advertising literature and therefore were promotional materials under Tax Law § 1101(b)(12).

G. The Division did not dispute that the directories fall within the definition of promotional materials under Tax Law § 1101(b)(12). The Division nevertheless argues that the directories do not qualify as promotional materials under Tax Law §1115(n)(4). First, the Division asserts that since the directories promote businesses other than petitioner's, and since petitioner was obligated to its advertising customers to distribute the directory, the directories are not promotional material for purposes of the exemption at issue. The Division also asserts that even promotional materials that promote the purchaser's business are not exempt under Tax Law § 1115(n)(4) if such material also promotes the business of a third party. The Division contends that the promotional material must exclusively promote the purchaser's business in order to qualify for exemption under Tax Law § 1115(n)(4) and suggests that Tax Law § 1115(n)(4) be interpreted in a manner similar to the resale exclusion under Tax Law § 1101(b)(4) (***see***, ***e.g.***, ***Matter of Savemart, Inc. v. State Tax Commn. of State of N.Y.***, 105 AD2d 1001, 482 NYS2d

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[4] This dictionary definition of "advertise" is consistent with the dictionary definition of "advertisements" advanced by the Division and determined to be rational by the court in ***Matter of Scotsmen Press v. Tax Appeals Tribunal*** (165 AD2d 630, 569 NYS2d 991).

150, 152, ***appeal dismissed*** 64 NY2d 1039, 489 NYS2d 1029, ***lv denied*** 65 NY2d 604, 493 NYS2d 1025). The Division also contends, apparently in the alternative, that promotional material which contains both self and third-party advertising should be analyzed to determine its essence or core in order to ascertain whether such material qualifies as promotional material under Tax Law § 1115(n)(4).

These contentions are rejected. As noted above, Tax Law § 1115(n)(4) exempts printed promotional material under certain specific conditions. This provision contains no language modifying the meaning of promotional materials, which as also noted above, is broadly defined for purposes of Tax Law § 1105(a), (b), (c), and (d) and § 1110 as "any advertising literature." Moreover, the statutory requirement that the purchaser of the promotional materials mail or ship the materials to its customers cannot reasonably be read to restrict the meaning of promotional materials to only such materials that promote the purchaser's business. The statutory language thus draws no distinction between self advertising and third-party advertising. Accordingly, the fact that the directories consist largely of third-party advertisements is of no moment. The Division's interpretation would draw a distinction between self advertising and third-party advertising and would thereby create a separate definition of promotional materials for purposes of Tax Law § 1115(n)(4). Such an interpretation is unsupported by the statutory language.

In further support of its position that promotional materials that promote the business of a third party are not exempt under Tax Law § 1115(n)(4), the Division contrasts the language of

the subject exemption with that of Tax Law § 1115(n)(1),[5] which provides for an exemption for promotional materials distributed outside New York. According to the Division, Tax Law § 1115(n)(1) contains no restrictions as to the businesses the exempt promotional material must promote and that all promotional material shipped out of state is exempt under this provision.

While the language of the two exemption provisions differs somewhat, both similarly restrict the class of recipients of exempt promotional materials to "customers or prospective customers." Thus the language of Tax Law § 1115(n)(1) lends little support to the Division's contention.

The Division asserts that in enacting these two exemption provisions (Tax Law § 1115[n][1], [4]), the Legislature was aware of two types of promotional material: self-promoting material and material that promotes a third party's business. There is no language in these two provisions, however, to indicate such legislative awareness. Neither contains language modifying the meaning of promotional materials, which as noted, is defined for sales tax purposes in Tax Law § 1101(b)(12). Further, the legislative bill jacket for chapter 309 of the Laws of 1996 which enacted the Tax Law § 1115(n)(4) exemption makes no reference to such different types of promotional material. The bill jacket does state that the purpose for the exemption was "to enhance the competitive position of New York State's in-state printers, mailers and related vendors compared with their out-of-state competitors" (***see***, July 15, 1996

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[5] Tax Law § 1115(n)(1) provides as follows:

> Except as otherwise provided in this subdivision, promotional materials mailed, shipped or otherwise distributed from a point within the state, by or on behalf of vendors or other persons to their customers or prospective customers located outside this state for use outside this state shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten of this article.

Letter in Support from Commissioner Michael Urbach to Governor Pataki). This expression of legislative intent does not support the Division's contention.

The Division also notes that petitioner did not classify the expenses for the production of the directories as either promotional materials or advertising expenses in its own accounting records (***see***, Finding of Fact "14"). While the manner in which a taxpayer handles an item for accounting purposes may be significant in some circumstances (***see***, ***e.g***., ***Matter of Datascope Corporation***, Tax Appeals Tribunal, August 6, 1992, ***confirmed*** 196 AD2d 35, 608 NYS2d 562), more significant in this case is the item itself. Here, as discussed, the directories are clearly promotional materials as defined in Tax Law § 1101(b)(12). Hence petitioner's internal accounting classification of the directory production costs is of little significance.

H. Turning next to the question of whether the directories were delivered to petitioner's "customers or prospective customers," the record shows that, in its advertising, petitioner seeks to reach businesses or individuals that might advertise in the directories in the future, including small, home-based businesses (***see***, Findings of Fact "6" and "10"). The record further establishes that petitioner's potential customers are broadly dispersed in the general population and that therefore petitioner effectively considers everyone to be a prospect (***see***, Finding of Fact "7"). Furthermore, the distribution of the directories is part of petitioner's marketing and advertising strategy to reach potential customers (***see***, Finding of Fact "9"). It is concluded, therefore, that the directories at issue were distributed to petitioner's prospective customers within the meaning of Tax Law § 1115(n)(4). Moreover, the fact that petitioner also seeks in its advertising to promote its advertisers' businesses does not negate this conclusion.

Additionally, this conclusion is consistent with the dictionary definitions[6] of "prospective" which include "of or in the future" (***see***, Random House Webster's College Dictionary 1046 [1997]). As noted, petitioners' prospective customers were businesses that might advertise in the directories in the future.

I. The Division contends that the word prospective should be interpreted to mean "likely to come about" or "anticipated or expected." According to the Division, petitioner's prospective customers are those persons who are presently in business but who do not advertise with petitioner. This contention is unreasonably narrow and is rejected. Petitioner has established that its potential customers include anyone that might advertise in the directories in the future. This logically includes individuals not presently in business but who may start a business in the future.

The Division's interpretation of "potential customer" calls into question whether any mass mailing of promotional materials would qualify for exemption under Tax Law § 1115(n)(4). Surely, many recipients of mass mailed promotional materials are not "likely or expected" customers of the purchaser of the materials. Such an interpretation could severely limit the application of the exemption under Tax Law § 1115(n)(4) and, contrary to the express legislative intent, would not enhance the competitive position of New York printers, mailers and related vendors.

J. The next issue to be addressed is whether the directories at issue were delivered "by means of a common carrier, United States postal service or like delivery service" as required for exemption.

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[6] As was the case with "advertising literature," Tax Law § 1115(n)(4) does not define "prospective customer." It is appropriate, therefore, to interpret this phrase in its ordinary, everyday sense (***Matter of Automatique v. Bouchard***, ***supra***).

Historically, a “common carrier” has been described as an entity that:

> held itself out to provide shipping services to the general public - usually unsophisticated shippers with little bargaining power - according to a schedule of fixed rates and with no negotiated contract (citations omitted). Common carriage ordinarily involved individual transactions occurring from time to time as need arose rather than as an ongoing course of business between the shipper and carrier. (***M. Fortunoff of Westbury Corp. v. Peerless Ins. Co.***, 432 F3d 127, 131 [2d Cir 2005].)

In contrast to a common carrier, a “contract carrier” has been described as an entity which “provides service for a limited number of customers routinely, either dedicating equipment or providing customized service for its user” (Cunningham, *Transborder-Road Transportation*, 23 St Mary’s LJ 801, 806-807). A contract carrier usually provides shipping services pursuant to bilateral contracts that were individually negotiated with more sophisticated shippers that bargained with the carrier at arm’s length (***M. Fortunoff of Westbury Corp. v. Peerless Ins. Co.***, ***supra***, 432 F3d 127, 131). “It is the ongoing relationship, service commitment, and commercial link between the carrier and its shippers that render contract carriage services inherently different from common carriage service alternatives.” (***C.H. Robinson Co.***, No. 40753, ICC, Sept. 15, 1993 [1993 WL 375845, 4.)

While the Tax Law offers no definition of “common carrier” or “contract carrier,” the Transportation Law defines “common carrier of property by motor vehicle” and “contract carrier of property by motor vehicle” as follows:

> ‘Common carrier of property by motor vehicle’ means any person that transports property by motor vehicle for compensation for the general public. (Transportation Law § 2[8].)
>
> ‘Contract carrier of property by motor vehicle’ means any person that transports property by motor vehicle for compensation under special and individual continuing contracts or arrangements with one person or a limited number of persons for an extended period of time, or that provides services in addition to transportation services that are not normally made available or provided by common carriers of property. (Transportation Law § 2[10].)

K. In light of the foregoing and upon review of the record it is concluded that the Delivery Companies were not acting as common carriers in their delivery of the directories, but were acting as contract carriers. Many facts in the record support this conclusion. The Delivery Companies delivered the directories pursuant to negotiated contracts, not set fees. The Delivery Companies provided customized service to petitioner, agreeing to specific delivery rules and guidelines and placing the directories in plastic bags. The deliveries were a major and ongoing part of petitioner's business and did not occur from time to time as the need arose. At least one of the Delivery Companies, PDC, has had an ongoing commercial relationship with petitioner, having delivered directories since at least 1999. Furthermore, it is clear that PDC provides service for a limited number of customers routinely, as its primary business is the delivery of telephone directories.[7] All of these factors support the conclusion that the Delivery Companies were acting as contract carriers in delivering the directories at issue.

L. Petitioner contends that the historic difference between common and contract carriers has been eroded. Petitioner notes, correctly, the Interstate Commerce Commission Termination Act of 1995 (effective January 1, 1996) abolished the ICC and also merged the separate classifications of common and contract carrier into one classification termed motor carrier (***see***, 49 USC § 13102[12]). Given this elimination of these separate classifications, petitioner asserts that the historic distinction between common and contract carriers is no longer relevant, and that, accordingly, the words "common carrier" should be interpreted to include "contract carrier" for purposes of Tax Law § 1115(n)(4).

[7] There is no evidence in the record as to how long the other Delivery Companies have provided service for petitioner. Nor is there any evidence as to whether, like PDC, such other companies' primary business is the delivery of telephone directories.

This contention is rejected. The Interstate Commerce Commission Termination Act (ICCTA), which eliminated separate classifications for Federal regulatory purposes was enacted in 1995 and became effective January 1, 1996. Tax Law § 1115(n)(4) was enacted in 1996 and became effective March 1, 1997. The ICCTA was thus in place at the time of the passage of the exemption at issue. It would thus appear that the Legislature was aware of such changes at the Federal level and yet chose to use the words "common carrier" in the exemption. Such circumstances indicate that the words "common carrier" as used in the exemption should be respected and interpreted in a manner consistent with their historic meaning.

Moreover, it does not appear that the passage of the ICCTA resulted in the elimination of all distinctions between common and contract carriers even within the Federal regulatory framework. In ***M. Fortunoff of Westbury Corp. v. Peerless Ins. Co. (supra),*** the United States Court of Appeals, Second Circuit, upheld a Department of Transportation regulation requiring cargo liability insurance for common carriage but not for contract carriage. In reaching its decision, the court reasoned:

> Congress' creation of one type of motor carrier did not also create only one type of carriage. Indeed, *common carriage services*, that is, those services offered to the general public at fixed rates without negotiated bilateral contracts, *continue to be different from contract carriage services*, which are those services performed on an ongoing basis for a shipper pursuant to a contract individually negotiated at arm's length. This fundamental distinction remains explicit in the terms of the Termination Act (***M. Fortunoff of Westbury Corp. v. Peerless Ins. Co.***, ***supra***, 432 F3d 127, 139; emphasis added).

Additionally, as noted previously, the New York Transportation Law continues to recognize the distinction between common and contract carriers (***see***, Transportation Law § 2[8], [10]).

It is concluded, therefore, that the term "common carrier" as used in Tax Law § 1115(n)(4) be properly accorded its historic meaning. As discussed (***see***, Conclusion of Law "K"), the

Delivery Companies did not act as common carriers in delivering petitioner's telephone directories.

M. Since the Delivery Companies were not acting as common carriers in delivering petitioner's directories, petitioner must establish that the directories were delivered by means of a "like delivery service" within the meaning of Tax Law § 1115(n)(4) in order to qualify for exemption.

The statute does not define "like delivery service." The meaning of this phrase must therefore be determined through principles of statutory construction, the fundamental rule of which is to effectuate the intent of the Legislature (***Matter of 1605 Book Center, Inc. v. Tax Appeals Tribunal***, 83 NY2d 240, 244, 609 NYS2d 144, 146, ***cert denied*** 513 US 811, 130 L Ed 2d 19). Moreover, as noted previously, inasmuch as Tax Law § 1115(n)(4) is an exemption provision, it is properly construed strictly and narrowly against the taxpayer (***see***, ***Matter of International Bar Assn. v. Tax Appeals Tribunal***, ***supra***).

In order to ascertain the meaning of a word or phrase in a statute it is appropriate to consider the words with which such word or phrase in question is associated (***see***, McKinney's Cons Laws of New York, Book 1, Statues § 239 ["noscitur a sociis"]). This method of statutory construction is particularly applicable where, as here, the word or phrase in question is part of a list (***see***, ***Matter of Delta Sonic Car Wash Systems***, Tax Appeals Tribunal, November 14, 1991).

N. Here, "like delivery service" is part of a list with "common carrier" and "United States Postal Service." Accordingly, a "like delivery service" for purposes of Tax Law § 1115(n)(4) must include elements common to these other methods of delivery. As discussed, common carrier services feature service to the general public at set fees. Petitioner's use of USPS also featured such arrangements. Neither common carrier services nor USPS services feature

negotiated bilateral contracts, customized services, and an ongoing relationship as exemplified by the relationship between petitioner and the Delivery Companies. It is concluded, therefore, that the term “like delivery service” as used in the subject exemption does not include contract carriers which provide delivery services under the terms and conditions herein.

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.

O. Petitioner contends that “like delivery service” must include contract carriers because common and contract carriers are the only types of carriers referenced in the New York Transportation Law and the only types of carriers recognized by New York courts. Otherwise, petitioner asserts, the words “like delivery service” would be superfluous. I disagree with this interpretation. The Legislature chose the words “*like* delivery service,” thereby indicating a

similar delivery service. As discussed, contract carriage is significantly different from common carriage. If the Legislature had intended to include contract carriers within the exemption it would have chosen language (perhaps such as "contract carrier") to reflect that intent.

Petitioner further contends that regardless of how the Delivery Companies' activities are defined - common or contract - the services they provide are the types of services typically provided by a common carrier. Therefore, they should be treated like a common carrier for purposes of the exemption. This contention is rejected. While the Delivery Companies may have been registered as common carriers for certain purposes (***see***, Finding of Fact "36") or may have provided common carrier services from time to time, the record establishes that services provided to petitioner in delivering the directories were contract carrier services. Indeed, historically, many trucking companies have provided both common and contract carriage (***see***, ***M. Fortunoff of Westbury Corp. v. Peerless Ins. Co.***, ***supra***, 432 F3d 127, 132). The Delivery Companies are thus properly treated as contract carriers for purposes of the exemption.

Petitioner also contends that the intent of the statute is simply that the means employed for delivery of the promotional materials be undertaken by a third party and not by the purchaser of the promotional materials. Petitioner cites Example 10 in the Division's Technical Services Bureau Memorandum "Expanded Sales and Compensating Use Tax Exemption for Promotional Materials" (TSB-M-97[6]S, August 20, 1997) in support of this position. This contention, too, is rejected. If the Legislature had intended the exemption to apply to delivery by any third party it would have selected language to reflect that intent and would not have used the words "*like* delivery service." Further, Example 10 in the Technical Services Bureau Memorandum involves the delivery of promotional material by the purchaser's employees and thus does not support petitioner's contention.

Petitioner also contends that it lacked real control over the directories through the completion of the delivery by the delivery companies. Petitioner cites ***Matter of Bennett Bros., Inc. v. State Tax Commn.*** (62 AD2d 614, 405 NYS2d 803), for the proposition that the degree of control was insufficient to justify the imposition of the use tax. As to this contention, subsequent to the ***Bennett Bros***. decision, the definition of "use" in Tax Law 1101(b)(7) ("the exercise of any right or power over tangible personal property by the purchaser thereof") was amended, as previously noted, to include the distribution of promotional materials (***see***, L 1989, ch 61). Thus, by statutory definition, petitioner had "real control," i.e., "right or power," over the directories, thereby justifying the imposition of the use tax. Additionally, considering the rules and guidelines to which the Delivery Companies were subject (***see***, Findings of Fact "29" and "30") and considering that petitioner did not produce any copies of its contract with the Delivery Companies or the written rules and guidelines in effect during the relevant period (***see***, Finding of Fact "32"), it must be concluded that petitioner has not established that it lacked real control over the directories as claimed.

P. Turning next to petitioner's equal protection claim, petitioner notes that if its refund claim is denied, then it will have been treated differently than its competitor, Verizon Yellow Pages (***see***, Finding of Fact "51"). Petitioner notes that, following a Division of Tax Appeals hearing before an administrative law judge, Verizon Yellow Pages was granted a refund for sales and use tax paid on the production costs incurred in the production of its telephone directories which were delivered in a manner similar to the delivery of petitioner's directories (***Matter of Verizon Yellow Pages Company***, Division of Tax Appeals, April 7, 2005). Petitioner asserts that such different outcomes amount to a gross disparity in the treatment of similarly situated taxpayers which violates its right to equal protection of the laws.

Petitioner's constitutional claim is without merit. If this determination is sustained on exception and judicial review (if any), then the different treatment accorded petitioner in this case is entirely justified. Neither the Division of Taxation nor the Division of Tax Appeals is required to repeat its mistakes for the sake of consistency (***see***, ***Matter of Fox v. Board of Regents of the State of New York***, 140 AD2d 771, 527 NYS2d 651). An administrative body, like a court, may correct its erroneous interpretations of the law (***see***, ***Matter of Leap v. Levitt***, 57 AD2d 1021, 395 NYS2d 515, ***lv denied*** 42 NY2d 807, 398 NYS2d 1029). On the other hand, if this determination is incorrectly decided and is reversed on exception or appeal, then there will have been no different treatment between the two cases and thus there could be no equal protection claim.

Q. With respect to the graphic arts issue, petitioner has established that such services were delivered via e-mail from the vendor to the printer (***see***, Finding of Fact "52"). Such services were therefore not subject to tax pursuant to Division stipulation (***id.***; ***see also***, ***Matter of Posmantier***, Advisory Opinion, June 7, 1999 [TSB-A-99(31)S]; 20 NYCRR 527.3[b][5]).

R. The petition of Yellow Book of New York, Inc. is granted to the extent indicated in Conclusion of Law "Q." The petition is in all other respects denied. As modified in accordance with Conclusion of Law "Q," the Division of Taxation's denial of petitioner's refund claim is sustained.

DATED: Troy, New York
February 26, 2007

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE