

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
UNITED PARCEL SERVICE, INC. : DECISION
for Revision of a Determination or for Refund of Sales : DTA NO. 822088
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period September 1, 1999 through May 31, 2002. :
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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on November 19, 2009. Petitioner appeared by Birns & Goff, P.C. (Richard D. Birns, Esq.). The Division of Taxation appeared by Daniel Smirlock, Esq. (Marvis Warren, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. The Division of Taxation filed a reply brief. Oral argument, at the request of the Division of Taxation, was held on July 14, 2010, in Troy, New York.

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

ISSUE

Whether certain supplies provided by petitioner to its customers were exempt from sales and use tax as promotional materials pursuant to Tax Law § 1115(n)(4).

FINDINGS OF FACT

The Administrative Law Judge found 22 findings of fact. We have rearranged and rephrased the following findings of fact to clarify their content and more accurately reflect the record: “2,” “3,” and “4;” “7” and “11;” “10” and “12;” “15” and “16;” as well as “18,” “20,” “21,” and “22.” We have amplified finding of fact “13” to better reflect the record. We have expanded finding of fact “14” into three paragraphs to better reflect the record.

Petitioner, United Parcel Service, Inc. (UPS), is a common carrier engaged in the business of transporting property for hire and offers its common carrier services to the general public. Petitioner has numerous locations throughout New York State.

During the period at issue, petitioner provided its customers with certain shipping supplies free of charge, including packaging materials, labels, business forms and other materials. Petitioner’s customers ordered the shipping supplies either on petitioner’s web site or by a toll-free telephone number. Petitioner also provided such supplies as part of a welcome kit for new customers. All such materials were packed and shipped directly to the customer via petitioner’s common carrier transportation network. Petitioner paid New York sales tax on all such free supplies delivered to customers in New York during the period at issue.

On September 30, 2005, petitioner filed a claim for refund of sales and use tax it had paid during the period September 1, 1999 through May 31, 2002 in connection with its purchase of supplies and other materials it provided free of charge to its customers. The amount of the refund claim was \$3,138,786.93. The basis of the claim was that the subject supplies and materials were printed promotional materials exempt from tax pursuant to Tax Law § 1115(n)(4).

By letter dated July 18, 2006, the Division of Taxation (Division) denied the claim to the extent of \$3,103,453.13 and granted the claim to the extent of \$35,333.80.

The items for which the Division granted \$35,333.80 of the refund claim were rate and service guides, zone charts, rate charts, wall calendars, trade show bags and other similar items. The rate and service guides consist of about 150 pages each and provide rate and zone information, detailed information regarding the various services offered by petitioner, packaging guidelines, a listing of packaging provided by petitioner, international shipping forms, tracking and billing information, and the general terms and conditions of petitioner's shipping services. The rate and service guides also contain a booklet of about eight pages extolling the advantages of shipping with petitioner with messages, such as "When you need speed and reliability, choose UPS" and "The world is yours - guaranteed," prominently displayed. All of the items, including the wall calendars and trade show bags, displayed petitioner's logo.

By Conciliation Order, dated November 2, 2007, the Division's denial of the refund claim was sustained.

At the hearing, petitioner reduced its refund claim to a total of \$2,710,051.17 by eliminating certain items from consideration. Petitioner introduced some photographs and some actual physical examples of the remaining items for which it sought a refund. Some of the photographs and physical examples reflected the materials as they existed during the audit period. Others reflected a redesign of some of the items that occurred after the audit period. Such redesigned items were substantially similar to the items for which petitioner seeks a refund.

The photographs and samples were reviewed by the Division's auditor in the course of considering petitioner's claim.

Petitioner's revised refund claim organizes the supplies in question into eight categories, described as follows:

1. *Envelopes* - The envelopes were designed to ship documents via petitioner's air services. Made of cardboard, there were several varieties, such as standard and legal sizes, and reusable envelopes. The reusable envelope was unique among delivery companies and was therefore considered a competitive advantage. Some envelopes indicated a particular service, such as Next Day Air and Second Day Air. Some reflected petitioner's sponsorship of the Olympics or NASCAR. All envelopes prominently bore petitioner's logo. When used by customers to ship documents, the envelopes were delivered by petitioner in the rendition of its services.

2. *Paks* - Paks were various sorts of packaging designed to ship items via petitioner's air services. These included large, soft plastic envelopes, padded plastic envelopes, hard envelope-sized corrugated cardboard containers, corrugated cardboard tubes, and plastic paks designed for diagnostic specimens. Some paks reflected petitioner's Next Day Air and Second Day Air services. All paks prominently bore petitioner's logo. When used by customers to ship items, the paks were delivered by petitioner in the rendition of its services.

3. *Boxes* - Various sized corrugated cardboard boxes were designed to ship items via petitioner's air services. Some boxes indicated petitioner's Next Day Air and Second Day Air Services. Some were international shipping boxes and indicated maximum weights of 10

kilograms or 25 kilograms. The 25 kilogram boxes were more sturdily constructed with two lines of corrugated walls. All boxes displayed petitioner's logo. When used by customers for shipping, the boxes were delivered by petitioner in the rendition of its services.

4. *Forms* - The refund claim includes various forms designed for use in petitioner's various shipping services, including the following:

a) Various "Shipping Documents" contained address labels, a tracking label and a shipping record and were used for domestic shipping.

b) For international shipping, a Worldwide Services Waybill served a similar function and provided, in addition to the information on the "Shipping Documents," spaces for customs declarations. An International Air Waybill and a Declaration of Contents and Shipper's Letter of Instruction and a UPS Inbound Routing Form were also used in connection with international shipments.

c) Various "Pickup Record" books were used by shippers to record shipments predominantly for billing purposes.

d) Hazardous Materials/Dangerous Goods Shipping Paper was used to identify such materials when shipped.

e) A C.O.D. Tag was attached to packages shipped using petitioner's C.O.D. service. Petitioner would attempt to collect the amount of money shown on the C.O.D. Tag. If collection could not be made, the package would be sent back to the shipper. Alternatively, customers could ship C.O.D. using a UPS automated shipping system, which could generate a label with appropriate information.

f) A Call Tag attached to a package provided for the pickup and return of a package previously delivered by petitioner. Customers could access the same service using a UPS automated shipping system or could simply generate a return label and insert it into the package.

5. *Labels* - Various blank labels were provided by petitioner to its customers to print labels for the shipment of packages. The labels came in many sizes for use in various printers and were configured as rolls or fan-folds. Using these labels with petitioner's software or downloading from petitioner's web site, petitioner's customers could print sender and recipient addresses, along with a tracking number for the item. The self-printed labels were an alternative to the Shipping Documents and the Worldwide Services Waybills in addressing a package for shipping. As noted, the labels were blank, but some had a small logo at the bottom and, for all of the labels, the backing paper displayed reordering information and petitioner's logo.

6. *Software* - Petitioner produced various software packages for use by its customers in creating shipping documents and managing shipments. The software was provided to customers on a compact disc (CD or disc). Each disc was transmitted in printed packaging and images were also printed directly on the CD. Each disc and its accompanying packaging displayed petitioner's name and logo.

Petitioner submitted only photographs of CDs for the periods at issue. Petitioner did provide a CD containing the software for the year 2006. The provided CD contained software entitled "UPS Worldship" and was copyrighted from 1999 through 2004. Utilizing the software required a connection to petitioner's servers.

7. *Stickers* - Stickers were affixed to packages by petitioner's customers to highlight the

service ordered, such as “UPS Next Day Air” or “UPS 2nd Day Air,” or to call attention to the contents of the package, such as “Warning! Plant Material” or “70 lbs.+.” Petitioner required that a heavy package sticker be affixed to any package weighing more than 70 pounds. All stickers displayed petitioner’s logo.

8. *Pouches* - Various plastic pouches were used to securely attach shipping documents to packages. All pouches displayed petitioner’s logo. A pouch captioned “Drop Ship Envelope” contained printed instructions for UPS personnel with respect to such shipment. A pouch for use in international shipping contained a checklist of instructions for customers “to help ensure prompt customs clearance and delivery.”

Petitioner has been engaged in its ground delivery business since 1907. During the initial popularization of air delivery services, petitioner adopted a wait-and-see approach. In the early 1980's, petitioner decided to enter the air delivery market and began offering services, including Next Day Air and Second Day Air services, and international shipping, all offered through the period at issue. Due to its initially cautious approach, petitioner entered the air delivery service market at a disadvantage compared to its peers. During the period at issue, petitioner shipped about nine times as many packages by ground as by air.

Many of the supplies that are the subject of the refund claim make reference to petitioner’s air delivery business. Petitioner did not provide its customers with materials that called attention specifically to its ground business. Petitioner has long been popularly associated with ground delivery services; however, petitioner was not as well-known or as well established as an air shipper or an express shipper. Petitioner sought to use the references to its air and express

services as a means to promote those services and “chip away” at market share.

The audience to whom petitioner sought to promote its brand were its customers, its customers’ customers (consignees), and the general public. Through the rendition of its shipping services, petitioner’s shipping containers and, therefore, its logo, colors, slogans and other branding are seen by the general public. Petitioner adopted a marketing plan intent on maximizing public exposure to its logo and other branding elements.

Petitioner’s Brand Management and Communications and Marketing departments designed the branding, logo, and color scheme on many of the subject supplies. Petitioner sought to use the supplies to promote awareness of its brand and services. It was also petitioner’s intent by the design of the supplies, especially by the inclusion of petitioner’s logo, to remind customers that petitioner had provided the supplies. Petitioner also intended that consignees be aware of who delivered their items. Petitioner saw strong promotional value in placing its logo on the supplies.

Petitioner’s Brand Management and Communications and Marketing departments made decisions as to the design on the supplies based, at least in part, on subliminal impressions or the general affect that design elements had on people. As examples, petitioner testified that the shield in its logo represented trust; that red was selected for some envelopes because the color impressed a sense of urgency; that NASCAR was selected as a sponsor because it is associated with speed; that a diagonal line was selected for its air service packages because, petitioner alleges, the diagonal line demonstrated air and lift.

Petitioner testified that it provided customers with shipping supplies free of charge because

it sought to foster goodwill and positive feelings about itself. Through the provision of free supplies, petitioner sought to encourage customers and potential customers to continue to use or to consider using petitioner's services.

In order to ship an item, petitioner requires a properly completed label. Such a label may be in the form of a properly completed shipping document or a self-printed label with information downloaded from petitioner's web site or using software provided by petitioner. A customer may print its own labels using labels provided free of charge by petitioner or it may use labels that the customer acquired on its own or it may print the label on regular paper and affix it to the item. The shipping documents and labels had tracking numbers that enabled shippers to track the movement of their packages and also could be used by petitioner to locate a lost package. In the event of any conflict between information on envelopes, paks, boxes or stickers and the label, the label controlled.

Petitioner requires that items be wrapped or packaged in containers that are able to reasonably withstand the rigors of being convoyed through its shipping system. Petitioner provided supplies that met this requirement. Some supplies also made it easier for petitioner to place the item into its delivery system. Petitioner delivers packages that use its competitors' shipping materials and its competitors do the same with petitioner's shipping materials. While petitioner will provide its ground shipping service for items wrapped or placed in air service packaging, petitioner intends and prefers that customers use air service packaging to ship via its air service. With the exception of the heavy package sticker, petitioner does not explicitly require its customers to use any of the supplies in question to use its shipping services. Many of

the subject supplies facilitated the use of petitioner's services for customers and customers' proper use of the supplies allowed petitioner to provide its services to customers more efficiently. Petitioner credibly testified that when a customer requests the shipping supplies from petitioner, they will likely use it in petitioner's services.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that petitioner was entitled to a refund of sales taxes paid on the distributed shipping supplies. Applying an intent and effect test, the Administrative Law Judge found that supplies were promotional materials under Tax Law § 1101(b)(12) because petitioner intended that the supplies promote its business and the items did, in fact, further induce purchases of its delivery services. The Administrative Law Judge found that the distributed shipping supplies fell under the included category of "related tangible personal property," specifically the "free gift" language. As an additional basis for his decision, the Administrative Law Judge found that the purpose and function of the supplies was similar to "applications" and "order forms," which are specifically included within the definition of promotional materials.

ARGUMENTS ON EXCEPTION

The Division takes exception to the determination of the Administrative Law Judge. The Division contends that the Administrative Law Judge erred in determining that petitioner carried its burden of proving, by clear and convincing evidence, that the subject supplies were promotional materials under Tax Law § 1101(b)(12). The Division argues three points in support of its position: (1) the shipping supplies cannot be found to be promotional materials because of their structural design and subsequent use; (2) the supplies cannot be free gifts due to

the presence of consideration, i.e., that the supplies were offered by petitioner and ordered by its customers; and, (3) the determination should be overturned because it would lead to absurd results.

Petitioner defends the determination by adopting and amplifying the positions expressed by the Administrative Law Judge.

OPINION

Sales tax is imposed on the receipts from every retail sale of tangible personal property (*see*, Tax Law § 1105[a]). Tax Law § 1101(b)(5) defines "sale, selling or purchase" as:

Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

The record clearly establishes that Tax Law § 1105 applies to the distribution of shipping supplies from petitioner to its customers.

Petitioner claimed a refund for these items on the basis that they are exempt promotional materials under Tax Law § 1115(n)(4). This statute states:

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.

Accordingly, to qualify for the exemption granted by Tax Law § 1115(n)(4), petitioner must

prove that the items: (i) were purchased by petitioner; (ii) meet the definition of promotional materials; (iii) were printed materials; (iv) were provided to customers or prospective customers without charge; and (v) are shipped to such customers by means of a common carrier or like delivery service.

Statutes such as Tax Law § 1115(n)(4), which authorize exemptions, must be strictly construed against the taxpayer (*see, Matter of Marriot Family Rests. v. Tax Appeals Trib.*, 174 AD2d 805 [1991], *lv denied* 78 NY2d 863 [1991]); however, the interpretation should “not be so narrow and literal as to defeat its settled purpose” (*Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193, 196 [1975]). The taxpayer bears the burden of demonstrating clear and unambiguous entitlement to the statutory exemption (*see, Matter of Golub Serv. Sta. v. Tax Appeals Trib.*, 181 AD2d 216 [1992]), and showing that their interpretation of the law is not only plausible, but the only reasonable construction (*see, Matter of Federal Deposit Ins. Corp. v. Commissioner of Taxation & Fin.*, 83 NY2d 44 [1993]).

Herein, the Division stipulated that petitioner provided the supplies without charge and delivered them to customers by a common carrier. The Division challenged neither that the recipients were either customers or prospective customers, nor that the provided supplies were “printed materials” as statutorily required. The Division also did not challenge that the items were purchased by petitioner. Therefore, petitioner adduced sufficient evidence to carry its burden of proving these elements. The sole issue to be decided is whether the distributed shipping supplies meet the definition of “promotional materials.”

Tax Law § 1101(b)(12) defines “promotional materials” for purposes of the sales tax, in

relevant part, as:

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, prospectuses, promotional displays and Cheshire labels but does not include invoices, statements and the like.

Accordingly, the dispute here centers on whether the shipping supplies meet the definition of either "advertising literature" or "related tangible personal property," thereby qualifying them as promotional materials under Tax Law § 1115(n)(4).

In matters of statutory interpretation, our primary objective is to "ascertain and give effect to the intent of the Legislature" (*Matter of Yellow Book of New York v. Commissioner of Taxation and Fin.*, 75 AD3d 931 [2010], *citing Riley v. County of Broome*, 95 NY2d 455, 463 [2000]; *see also; Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577 [1998]). "The statutory text is the clearest indicator of legislative intent" (*Matter of Lewis Family Farm v. New York State Adirondack Park Agency*, 64 AD3d 1009, 1013 [2009]). The legislative histories of Tax Law §§ 1101 and 1115 provide little guidance for interpreting either "advertising literature" or "related tangible personal property" in this context. When the law fails to define a given term, as is the case herein, the language "should be given its 'precise and well settled legal meaning in the jurisprudence of the state'" (*Matter of Moran Towing & Transp. Co. v. New York State Tax Commn.*, 72 NY2d 166, 173 [1988], *citing* McKinney's Cons Laws of NY, Book 1, Statutes § 233).

Advertising Literature

Tax Law § 1101(b)(12) specifically includes “advertising literature” within the definition of promotional materials. Petitioner argued that the Division’s concession that the distributed shipping supplies are “printed” is sufficient to qualify them as advertising literature. We disagree.

Interpreting “advertising literature” in its context and in its “ordinary everyday sense” (*Automatique v. Bouchard*, 97 AD2d 183, 186 [1983], *citing Malat v. Riddell*, 383 US 569, 571 [1966]), the Legislature does not refer to advertising that is “writing in prose or verse” (Random House Webster’s College Dictionary 767 [2d Ed 1997] [first definition of “literature”]), but rather advertising that is in the form of “printed materials” such as “circulars, leaflets, or handbills” (*Id.* at 767 [definition 6 of “literature”]) (*see, e.g., People v. Remeny*, 40 NY2d 527 [1976] [distributed handbills naming performances and listing the times, place and price of the concerts are advertising matter]; *see also; Matter of Dubin v. Board of Regents*, 286 App Div 9 [1955] *revd on other grounds* 1 NY2d 58 [1956] [circulars containing solicitations for an optometrist determined to be advertising matters]; *Watchtower Bible & Tract Socy. v. Metropolitan Life Ins.*, 297 NY 339 [1948] [religious leaflets and other distributed materials determined advertising literature]). Therefore, the shipping containers must be in a similar form in order to meet the definition of promotional materials as advertising literature.

The shipping containers, forms, and stickers distributed by petitioner are not materials that fall within the definition of advertising literature. The various shipping containers, including boxes, envelopes, pouches, and paks, are not advertising literature because they do not possess

the requisite form. They are containers. Containers are plainly different from circulars and handbills. Similarly, the distributed forms and stickers bear similar deficiencies because their form is wholly different than brochures, circulars, leaflets, handbills, booklets, and other recognized forms of advertising literature.

It is true that these items contain words either embossed upon their exterior or in their substance (e.g., “Overnight,” “Second Day Air,” and “Hazardous Materials”). However, an item does not meet the statutory definition of advertising literature merely because it contains words. It must be in a form and possess a function similar to leaflets and handbills. Expanding the term “advertising literature” to encompass the distributed materials would diminish all meaning from the language selected by the Legislature. Simply put, the distributed supplies do not fall under the definition of advertising literature because the items are boxes, forms, and stickers.

Petitioner also failed to prove that its software constituted advertising literature for the purposes of Tax Law § 1101(b)(12). Petitioner alleged that the CDs distributed to its customers during the period at issue contained software designed to assist with the purchase of petitioner’s services.

The burden fell upon petitioner to prove the content of the discs and to show that distributing these CDs was similar to distributing advertising literature. Petitioner submitted only photographs of the CDs for the period at issue. However, petitioner did submit a CD containing the distributed software for the year 2006. The photographs of the CD for the years of the audit period, namely 1999 through 2002, wholly fail to substantiate any content that may be located on the CDs at issue. Photographs cannot be read on a disc drive. Therefore, the

photographs are insufficient to prove the contents of the discs. We further hold that the provided CD, containing software for years beyond the audit period, is insufficient to substantiate the contents of the discs for the period at issue.¹ Having failed to produce “clear and convincing” evidence of the content of the distributed discs (*see, e.g., Matter of Bodfish v. Gallman*, 50 AD2d 457 [1976]), petitioner failed to prove that the distributed software was advertising literature.

Accordingly, the distributed materials cannot qualify for the exemption provided by Tax Law § 1115(n)(4) as advertising literature because the items do not meet the “precise and well settled” meaning of advertising literature in New York (*Matter of Moran Towing & Transp. Co. v. New York State Tax Commn.*, *supra* at 173). Accordingly, petitioner is not entitled to a refund on this basis.

We also hold that the “order form” language does not provide an applicable exemption for the distributed shipping supplies. Tax Law § 1101(b)(12) specifically includes “order forms and return envelopes with respect to such advertising literature.” The language connecting the order forms to advertising literature is instructive and cannot be ignored. The Legislature clearly intended to exempt order forms and envelopes typically located within traditional forms of advertising literature, such as brochures and catalogues. The supplied containers cannot qualify as order forms for the same reasons that they cannot qualify as advertising literature. Stretching the statutory language of Tax Law § 1101(b)(12) to apply to petitioner’s shipping supplies would

¹ Although the software on the provided CD is copyrighted through the period at issue, it does not aid petitioner because this is insufficient to prove the contents of the discs distributed from 1999 through 2002.

violate our statutory authority because it would expand the law to apply “to situations not intended to be embraced within the statute” (*Bloomington Bros. v. Chu*, 70 NY2d 218, 223 [1987], *citing Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 NY2d 588, 595 [1982] *citing Matter of Jones v. Berman*, 37 NY2d 42 [1975]). As such, the distributed shipping containers do not meet the definition of promotional materials as order forms.

We further hold that the forms and discs included with the shipping supplies cannot qualify as promotional materials under a theory that they were order forms. An order form constitutes a written agreement to pay for the product or services sold by a vendor. There is simply no way to construe the distributed forms as functionally similar to order forms. The supplies, such as the hazardous materials/dangerous good shipping papers, customs declaration, tracking labels, waybills, C.O.D. tags, etc., function to facilitate and expedite the purchase of petitioner’s services. None of the subject materials function as an agreement.² While we may have been inclined to construe the alleged content of petitioner’s discs as order forms, petitioner failed to carry the burden of proving the contents of the disc. We reiterate that photographs of CDs are insufficient to prove their contents. Petitioner is not entitled to a refund on this theory.

Accordingly, petitioner failed to show clear entitlement to a refund under Tax Law § 1115(n)(4) because it failed to prove that the distributed materials were either advertising literature or order forms with respect to such advertising literature. We also note that the

² Petitioner also testified that its customers were free to use or not use the supplies. While customers generally used the supplies to purchase petitioner’s services and petitioner may have reasonably expected purchase, the provision of supplies alone does not constitute an agreement to terms. This is because petitioner’s testimony established that fulfilling supply orders was “separate and apart from its rendition of shipping services” (Determination, conclusion of law “L”), and that its customers were free to use or not use the supplies.

inclusion of “applications” within the meaning and intent of Tax Law § 1101(b)(12) does not provide entitlement because none of the items constitute an application. Having disposed of the foregoing questions, we now turn to whether petitioner qualifies for a refund under the related tangible personal property language.

Related Tangible Personal Property

Promotional materials also include tangible personal property that is “related” to advertising literature (Tax Law § 1101[b][12]). The statute provides a list of such related property, which includes, “but is not limited to” free gifts, complimentary maps, applications, and orders forms (Tax Law § 1101[b][12]). The statutory language suggests an intent to create an inclusive category that is based not on the form of a distributed item, but rather on its relationship to advertising.

Construed in connection to advertising literature (*see, Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman, supra*; McKinney’s Cons Laws of NY, Book 1, Statutes §§ 94, 239[a]), the plain meaning of the word “related,” with respect to “related tangible personal property,” refers to materials that are distributed for advertising purposes. In New York, it is well-settled that an item is used for an advertising purpose when it is “solicitation for patronage” (*Beverley v. Choices Women’s Med. Ctr.*, 78 NY2d 745, 751 [1991], *citing Flores v. Mosler Safe Co.*, 7 NY2d 276, 279 [1959]; *see, Pagan v. New York Herald Tribune*, 32 AD2d 341 [1969], *affd without opn* 26 NY2d 941 [1970]).³

³ Solicitation is defined as “[t]he act or an instance of requesting or seeking to obtain something; a request or petition” (Black’s Law Dictionary 1520 [9th Ed 2009]).

To show a relationship to advertising literature under Tax Law § 1101(b)(12), a taxpayer must prove that, “taken in its entirety,” its distributions were made for the “solicitation for patronage of a particular product or service” (*Guerrero v. Carva*, 10 AD3d 105, 116 [2004], citing *Beverly v. Choices Women’s Med. Ctr.*, *supra* at 751 [1991] [finding that a calendar was advertising in disguise]). Put alternatively, a taxpayer proves that a distributed item is related to advertising literature when the ultimate objective of the distribution “is to educate the public as to the advantages and virtues of commodities (or services sold) and thereby stimulate demand therefor” (*Selsman v. Universal Photo Books*, 18 AD2d 151, 152 [1963] [a manual extolling the benefits of the camera found to be advertising]). It is the existence of this commercial message that shows the requisite relationship to advertising literature (*see, e.g., Beverly v. Choices Women’s Med. Ctr.*, *supra*; *People v. Remeny*, *supra*). As such, the taxpayer bears the burden of proving, by clear and convincing evidence, that the material was distributed for an advertising purpose, i.e., the solicitation of patronage.

This interpretation of the word “related” gives effect to the legislative intent because it allows the term “related tangible personal property” “to be read in light of the conditions in which they are to be applied” (*Matter of Tommy & Tina v. Department of Consumer Affairs of the City of New York*, 95 AD2d 724 [1983] [internal quotation marks and citations omitted]). While free gifts, samples, and complimentary items given by associations to their members statutorily qualify, requiring a distribution to be a solicitation for patronage does not limit promotional materials to particular classes or categories of materials. This conforms with the definition of advertising in other legal areas, where courts have declined to restrict advertising to

a particular definition, instead electing to define advertising only by what it definitely is not (*see, e.g., Messenger v. Gruner + Jahr Printing & Pub.*, 94 NY2d 436 [2000] [photograph determined to not be advertising because the article was newsworthy]; *Howell v. New York Post Co.*, 81 NY2d 115 [1993] [photograph used to generate sales was not advertising because the topic was newsworthy]). In light of the foregoing, construing “related” to require that a distribution be for the solicitation of patronage gives effect to the intent of the Legislature’s language in Tax Law § 1101(b)(12) (*see, e.g., Matter of Yellow Book of New York v. Commissioner of Taxation and Fin., supra*).

Petitioner raised two distinct arguments for exemption under the “related tangible personal property” provision of Tax Law § 1101(b)(12): (A) the distributed shipping supplies qualify because an advertising or marketing message can be derived from petitioner’s branding; and, (B) even if they are not promotional materials on their face, the distributed materials must qualify as “free gifts,” which are specifically exempted by statute. Petitioner argues that our prior decisions and the positions taken by the Division mandate a ruling in petitioner’s favor. We address each point, and the corresponding counter arguments by the Division, below.

A. Branding on the Supplies

Petitioner argued that it is entitled to the promotional materials exemption under Tax Law § 1115(n)(4) because the distributed supplies allegedly carry strong advertising or marketing messages through their branding. Petitioner submitted testimony and evidence regarding an intent to increase brand awareness through its re-branding campaign that included, among other things, alterations to its logo, new slogans, the color schemes of its packages, and product

placements. One of petitioner's witnesses, an employee with many years of experience in the advertising industry, testified to the effect, stating, in sum, that the logos, color schemes, and slogans conveyed strong messages to all who saw them. Petitioner alleged that the strong messages were conveyed through associations formed by the design elements on its packaging, namely the logos, shapes, colors, and symbols, which has a "subliminal" or "general effect" on people. In essence, petitioner claimed that its distributions of shipping supplies were related to advertising literature because these distributions make petitioner's branding ubiquitous, which reinforced associations in the viewers' minds.

This argument turns on whether branding on an item, i.e., bearing a company logo, slogan, company or service's colors, standing alone, is sufficient to convey a commercial solicitation, thereby establishing a relationship to advertising literature. We conclude that it does not because the act of "branding" cannot constitute a solicitation and because the branding does not produce a discernable commercial message.

Petitioner's branding cannot be considered solicitation because it merely makes the products identifiable. This function is identical to a signature. By placing colors, slogans, and a logo on its products, individuals, petitioner made it easy to discern the provider of the supplies and with which service the supplies were to be used. It is up to the viewer to observe and associate the design elements with petitioner and its services. The effort involved in making an item identifiable or a logo visible is so low that it is passive. Therefore, branding cannot meet the definition of an affirmative act, much less constitute a solicitation for sale of service. Solicitation, not exposure, is the trademark of advertising. Branding an item with an attractive logo or a catchy slogan does not constitute a solicitation.

Accordingly, petitioner failed to adduce clear and convincing evidence that the branding on the distributed shipping supplies bore a relationship to advertising literature as required under Tax Law § 1101(b)(12). The branding argument does not entitle petitioner to a refund under Tax Law § 1115(n)(4). We next turn to the question of whether the distributed shipping supplies qualify as free gifts.

B. Free Gifts

As a rationale for finding in favor of petitioner, the Administrative Law Judge determined that the distributed supplies must constitute free gifts, which are specifically included in the definition of promotional materials (*see*, Tax Law § 1101[b][12]). Petitioner adopted this argument in defending the determination.

On exception, the Division argues that the provided supplies cannot be free gifts because they were valuable consideration. It contends that petitioner provided the supplies free of direct monetary compensation because it was expected that its customers would use them in its shipping services. Petitioner counters by stating that neither the use of the item nor its usefulness disturb its promotional intent behind distributing the shipping supplies.

We hold that, standing alone, neither the independent utility nor the subsequent use of a distributed item is dispositive of whether an item constitutes a gift. As a practical matter, it is impossible to conceive of a wholly useless item that might encourage the purchase of a product or service. To limit free gifts to such useless materials would defeat the statutory purpose of the exemption and exclude items clearly meant to be included, such as free samples (*see, Matter of*

Arrow Intl., Tax Appeals Tribunal, June 17, 2004).⁴ However, while the independent utility and subsequent use may not be the sole determinants, they should be analyzed, in context, with a combination of other factors, to determine whether a gift has occurred.

New York jurisprudence has long held that a gift is “a voluntary transfer of any property or thing to one by another without consideration” (*McKenzie v. Harrison*, 120 NY 260, 265 [1890]; *see also, Gruen v. Gruen*, 68 NY2d 48 [1986], *Wilcox v. Wilcox*, 233 AD2d 565 [1996]). Similarly, Black’s Law Dictionary defines a gift as “the voluntary transfer of property to another without compensation” (Black’s Law Dictionary 757 [9th Ed 2009]); more specifically, a gratuitous or free gift is “a gift made without consideration, as most gifts are” (Black’s Law Dictionary 758 [9th Ed 2009]). The determination of whether an item is a gift “focuses on the subjective intent of the donor at the time of the conveyance” (*Batease v. Batease*, 71 AD3d 1344, 1346 [2010]).

We hold that the distributed supplies are not gifts. There was, in fact, distinct mutual consideration. Customers would sign-up or order shipping supplies from petitioner. This implies a promise that, in return for not paying for supplies, customers would use the supplies to purchase petitioner’s shipping services.⁵ Petitioner agreed to the promise by providing valuable consideration in the form of shipping supplies and reasonably anticipated reciprocation. Such a

⁴ We note that the shipping supplies in question are not free samples in this context. As stated in the facts, petitioner provides shipping services; therefore, a free sample would be free shipping services. Further, if the boxes were free samples of goods produced by petitioner, then it would not be entitled to a refund under Tax Law § 1115(n)(4) because it would not meet the purchaser requirement. Moreover, there is absolutely no evidence that the receipt of free shipping supplies qualified the recipients for free shipping services.

⁵ We note that, by holding the provision of supplies as distinct from the rendition of shipping services, we need not discuss the implications of *Matter of Burger King v. State Tax Commn.* (51 NY2d 614 [1980]) and its line of cases in order to reach our decision.

quid pro quo is the definition of a sale. It would be an unprecedented expansion of the term “gift” to use it in characterizing a distribution that was ordered by a customer and simplified the purchase of the distributor’s services.

The shipping supplies are clearly not gifts because petitioner’s customers ordered the supplies from petitioner in conjunction with the purchase of petitioner’s services. Instead of making its customers purchase their own supplies, petitioner provided the supplies to facilitate the sale of its services. The expectation resulting from such distributions is the very definition of consideration. The presence of mutual consideration nullifies petitioner’s argument that its supplies are gifts. Accordingly, Tax Law § 1101(b)(12) does not apply to petitioner’s supplies.

Despite petitioner’s best efforts to dress the transaction as a gift, it cannot escape the reality that considerations were exchanged. Petitioner submitted testimony below tautologically stating that there was no expectation of reciprocity, except hope that their own customers would use their service. The determination below states:

The provision of free supplies was intended as a gesture of good will towards a customer, which would, it was hoped, result in positive feelings towards petitioner and a greater awareness of petitioner’s services and, ultimately of course, increased sales (Determination, conclusion of law “E”).

It is, at best, disingenuous to characterize petitioner’s anticipation as the “hope” that its customers would use them. Individuals and companies either ordered the supplies or registered as petitioner’s customers. Implicit within these orders and enrollments is the promise of purchasing petitioner’s services. Accompanying each fulfillment of a supply order was a reasonable expectation that its recipients, petitioner’s customers, use them to purchase petitioner’s services. The record shows that mutual consideration flows from customers’ placing the supply orders, to petitioner fulfilling the order, to the ultimate use of the supplies in the

purchase of petitioner's services. Filling these shipping supply orders is not a gift.

To determine "hope" and "goodwill" to be the primary purposes motivating the provision of supplies would require an extraordinary disregard of the facts. We would need to disregard that items need to be packed in order to be shipped and that customers ordered the goods. Moreover, accepting petitioner's position and imputing hope and good will to be its intent behind distributing the supplies would require assuming that petitioner is so unsophisticated that it was unable to make a reasonable inference. The record shows that petitioner is a smart, savvy, profit-maximizing business. The customers ordered shipping supplies that would be used in the rendition of shipping services. Under these circumstances, consideration is both easily and reasonably implied. We are unwilling to overlook these facts and the underlying motivation of a shipping company giving shipping supplies to its customers. Accordingly, petitioner's argument is rejected.

Petitioner relies upon the memorandum on *Expanded Sales and Compensating Use Tax Exemption for Promotional Materials* (TSB-M-97[6]S, August 20, 1997) and the advisory opinion on *Automobile Club of New York*, (TSB-A-98[28]S, April 14, 1998) in support of its position. We note that advisory opinions are non-binding (*Matter of Finance Corp. v. Tax Commn.*, 117 AD2d 103, 109 [1986] [held that advisory opinions are binding only upon parties who requested the opinion]; *Matter of Building Contractors Assoc. v. Tully*, 65 AD2d 199, 204 [1978] [administrative guidelines held non-binding]). However, "an advisory opinion may lend some guidance to a similarly situated taxpayer" (*Matter of DZ Bank*, Tax Appeals Tribunal, May 11, 2009).

The *Promotional Materials* memorandum is not dispositive of the instant matter.

Petitioner claimed that its situation is analogous to the printed golf balls within “Example 7” of the memorandum. This section states:

Example 7. A company located in New York purchases golf balls. The company has the golf balls delivered to a printer/mailer. The printer/mailer will imprint the company’s name and telephone number on the golf balls. The company instructs the printer/mailer to mail the golf balls via the U.S. Postal Service to the company’s customers and prospective customers in New York State for advertising purposes.

The golf balls qualify as exempt promotional materials under section 1115(n)(4) of the Tax Law. The service of imprinting the company’s name and telephone number on the golf balls qualifies for the exemption from tax provided under section 1115(n)(5) of the Tax Law (*Expanded Sales and Compensating Use Tax Exemption for Promotional Materials, supra* at 6).

By analogizing its shipping supplies to the golf balls, petitioner argued that is entitled to the exemption provided by Tax Law § 1115(n)(4).

We strongly disagree because petitioner’s distributions of shipping supplies are wholly different from the golf balls. Petitioner’s customers ordered the supplies. The supplies enabled petitioner’s customers to purchase petitioner’s services. These key respects make petitioner’s distributions different from the golf balls. Additionally, Example 7 determines that the golf balls are promotional materials because it assumes that they are distributed for advertising purposes. As discussed above, petitioner’s shipping supplies lacked advertising purpose both because the items lacked a solicitation and because the transaction evidenced mutual consideration. We need not go further because petitioner is clearly not similarly situated to the taxpayer in Example 7. Accordingly, petitioner’s reliance upon TSB-M-97(6)S is misplaced.

While *Automobile Club* discusses Tax Law § 1101(b)(12), this advisory opinion also does not support petitioner’s position. Therein, the Division addressed the question of whether promotional materials included personalized routing booklets, or “Triptiks,” requested by an

American Automobile Association (AAA) member and provided by the AAA. The Division answered in the affirmative. Petitioner analogizes its filling of its customer's shipping orders to this situation.

We reject this argument because petitioner is not similarly situated to the taxpayer in *Automobile Club*. Therein, the AAA Triptiks distributed by the taxpayer were promotional material because they were literature that contained advertisements for AAA services, as well as other merchants. As discussed above, petitioner's shipping supplies do not and cannot meet the definition of literature in this context. Additionally, petitioner's filling of its customer's supply orders differ somewhat because of the implied promise that they be used in the purchase of petitioner's services. Conversely, the taxpayer in *Automobile Club* could not reasonably expect a return directly emanating from the Triptiks. Therefore, petitioner failed to show its situation to be substantially similar to the taxpayer in *Automobile Club*.

We also disagree that decisions in *Yellow Book* and *Arrow International* require a ruling in petitioner's favor. The *Yellow Book* case addressed the requirement that the promotional materials be shipped by "a common carrier or like delivery service" (Tax Law § 1115[n][4]). In affirming our decision, the Appellate Division held that the taxpayer failed to demonstrate that the private delivery companies used to distribute its materials were "like delivery services" to common carriers. Curiously, petitioner acknowledges that neither the delivery nor the common carrier requirement is at issue, yet still cites this case in support of its position. *Yellow Book* is not dispositive of the current matter because there is no issue regarding the common carrier requirement.

In *Arrow International*, the promotional materials question was whether an out-of-state

taxpayer was eligible for the Tax Law § 1115(n)(4) exemption as a manufacturer, not as a purchaser. We answered in the negative because the statute creates an exemption only for purchasers. As the Division did not challenge the petitioner's status as a purchaser, this case is not dispositive of the promotional materials question. Accordingly, neither of these cases stands for the proposition that ordered shipping supplies constitute promotional materials.

Petitioner failed to carry its burden of proving that the distributed shipping supplies were either advertising literature or related to tangible personal property. Therefore, the items cannot qualify as promotional materials under Tax Law § 1101(b)(12). We need not address the Division's argument regarding absurd results. As petitioner failed to show clear entitlement to the exemption provided by Tax Law § 1115(n)(4), there exists no basis in either law or fact to grant the requested refund.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of United Parcel Service, Inc. is denied; and

4. The Division of Taxation's letter denying the refund claim dated July 18, 2006 is sustained.

DATED:Troy, New York
January 13, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

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

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner