STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VERIZON YELLOW PAGES COMPANY F/K/A BELL ATLANTIC YELLOW PAGES COMPANY	:	DETERMINATION DTA NO. 819215
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 September 1, 1998 through February 28, 1999.	:	

Petitioner, Verizon Yellow Pages Company f/k/a/ Bell Atlantic Yellow Pages Company, 1095 Avenue of the Americas, Room 3102, New York, New York 10036, 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 September 1, 1998 through February 28, 1999.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 30, 2003 at 10:30 A.M., and continued to its conclusion at the same location on October 1, 2003 at 10:30 A.M., with all briefs to be submitted by November 1, 2004, which date began the six-month period for the issuance of this determination. Petitioner appeared by Morrison & Foerster, LLP (Craig B. Fields, Esq., and Roberta Moseley Nero, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Cynthia E. McDonough, Esq., of counsel).

ISSUES

I. Whether the delivery by Product Development Corporation and Directory Distributing Associates, Inc. of Verizon's Yellow Pages telephone directories in New York was delivery "by means of a common carrier, United States Postal Service or like delivery service" pursuant to Tax Law § 1115(n)(4).

II. Whether the Division of Taxation's application of Tax Law § 1115(n)(4) to petitioner in this matter violates petitioner's rights under the Due Process and Commerce clauses of the United States Constitution.

FINDINGS OF FACT[1]

1. Verizon Yellow Pages Company f/k/a/ Bell Atlantic Yellow Pages Company ("Verizon") is the purchaser of promotional materials, known as the Yellow Pages Telephone Directories ("Yellow Pages"), that are printed outside New York State. Verizon is in the business of selling advertisements in its Yellow Pages and distributing them to its customers and potential customers. The Yellow Pages are printed and distributed by geographic area. For example, the Manhattan Yellow Pages contain information for the geographic area of Manhattan and are principally distributed in that area.

2. Verizon arranged delivery of its Yellow Pages into New York and contracted with Product Development Corporation ("PDC") and Directory Distributing Associates, Inc. ("DDA") to make such deliveries. PDC and DDA are not affiliated with Verizon.

3. Both PDC and DDA hold themselves out to the public as distribution companies, the majority of whose business is the delivery of telephone directories. Each of the companies' web

[1] A stipulation of facts agreed to by the parties is incorporated into the Findings of Fact.

sites indicated they provided specialized delivery services to telephone book publishers and did not list any published rates. Both companies would deliver telephone books for any company who approached them to do so, and held themselves out to the public as such. Not only do PDC and DDA deliver directories for Verizon's competitors, but Verizon does not prohibit such deliveries. The only conduct prohibited by Verizon is that PDC and DDA are not allowed to deliver Verizon's competitors' directories at the same time and together with the Yellow Pages.

4. There are two cycles within which distribution of the Yellow Pages takes place: Primary Distribution, also called Initial Distribution, and Secondary Distribution, also referred to as Incidental Distribution.

The Yellow Pages are printed at an out-of-state printer who selects a common carrier from a list for delivery of the Yellow Pages to PDC at its warehouses to prepare for the Primary Distribution. In the Primary Distribution cycle, the Yellow Pages are delivered to all businesses and residences in the geographic area to which the directory relates. Primary Distribution occurs once per year for each geographic region for which a directory is published. During the period in issue, the Yellow Pages were delivered during the Primary Distribution cycle by the U.S. Postal Service, FedEx, United Parcel Service ("UPS") and PDC. The Primary Distribution process handled by PDC was guided by two agreements between Verizon and PDC, the "Initial Mail Agreement" and the "Initial Distribution Agreement" which resulted from competitive bidding processes. The two contracts with PDC accounted for approximately 80% of petitioner's directories distributed in New York. Petitioner negotiated the terms of the contracts with PDC and DDA with regard to price, quality control measures, delivery verification and delivery completion dates and other delivery criteria.

5. The deliveries covered by the Initial Mail Agreement are deliveries for those geographic areas where Verizon has been able to predetermine, based upon cost and effectiveness criteria, that deliveries should be either totally or partially by mail. For initial mail deliveries, PDC is provided with names, addresses and the corresponding number of Yellow Pages to be delivered to each customer. This is done by providing either mailing labels or electronic data from which PDC creates labels. PDC then delivers the correct number of Yellow Pages, together with the information required to deliver them, to several different post offices.

6. For deliveries covered by the Initial Distribution Agreement, PDC will determine whether to deliver the Yellow Pages utilizing the U.S. Postal Service, UPS, FedEx or its own carriers. PDC carriers include employees and independent local carriers. Methods of delivery were determined by cost and effectiveness and quality of delivery. The primary consideration in reaching those decisions was generally population. More densely populated areas were hand delivered,[2] which has been done by both the U.S. Postal Service and PDC contracted trucks. The directories were generally mailed to customers in rural areas, with deliveries made by the U.S. Postal Service, UPS or FedEx.

7. For all deliveries covered by the Initial Distribution Agreement, Verizon provided PDC with a list of names, addresses and listed telephone numbers of the recipients. PDC was also provided with the customer's requirements regarding the number of Yellow Pages to be delivered. If PDC determined it would utilize its own carriers, PDC would use the information provided to establish its own delivery routes, since the routes were not supplied by Verizon. Likewise, Verizon did not provide delivery routes to the U.S. Postal Service, UPS or FedEx. Once all the routes were established and printed for the directories that PDC would deliver, and

[2] The term "hand delivery" in this case refers to delivery of the directory to the hinge side of the door.

the Yellow Pages had been received from the printer, PDC provided the routes and directories to its carriers for delivery. In the same manner, when Verizon provided UPS with a list of addresses and the required number of Yellow Pages to be delivered, UPS devised the proper routes and delivered the Yellow Pages.

8. Pursuant to the Initial Distribution Agreement, PDC had a specific time period within which to complete the delivery. Verizon also expected the U.S. Postal Service, UPS and FedEx to deliver the Yellow Pages within certain time periods.

9. Certain specifications regarding delivery were provided to PDC, as well as to the U.S. Postal Service, UPS and FedEx. The Yellow Pages were to be placed in an area free from inclement weather or any dampness and accompanied by a "Verizon bag" which has a toll-free number to provide customers with easy access for any complaints concerning delivery. For individual deliveries, the Yellow Pages were to be delivered to the hinge side of the door. For large deliveries, if the delivery was not able to be made to each individual address, then they were to follow the instructions of the doorman, superintendent or owner of the building as to where to leave the Yellow Pages. Generally, deliveries to businesses were made during business hours when someone would be present to sign for a business delivery, as required.

10. Secondary Distribution is the delivery of the Yellow Pages to persons after Primary Distribution has occurred for the year. For example, it includes delivery to anyone that requests a copy of the Yellow Pages between the annual Primary Distribution dates for the geographic area, as well as "new connects" (people who moved into a jurisdiction after the Primary Distribution has been completed), persons who want an additional copy of a directory, or persons who want a copy of a directory from a jurisdiction in which they are not located. Secondary Distribution of the Yellow Pages during the period in issue was performed by the U.S. Postal

Service, UPS, FedEx and DDA. The Secondary Distribution process by DDA was guided by an agreement between Verizon and DDA, resulting from a competitive bidding process.

Verizon would provide DDA with the required information for the names of persons in this category entered into Verizon's computer system. DDA would print mailing labels from such information and then "pick and pack" or sort through the labels and determine the best method of delivery: the U.S. Postal Service, UPS, FedEx or its own carriers. DDA determined what method of delivery would be used for the Yellow Pages based upon the cost and timeliness of delivery.

11. During the period in issue, PDC's customers included, among others, Ameritech, Qwest, Decks, Specific Telephone, Southwest Telephone and Tellis. During the same time frame, DDA's customers included Bell South, LM Baer Company, Frontier Info Services, Global Directories and a number of smaller independent companies.

12. PDC views as its competitors DDA, the U.S. Postal Service and UPS, among others, and views itself as an alternative delivery service to its competitors. DDA views as its competitors PDC, the U.S. Postal Service and Client Logic, among others. PDC receives contracts after a bidding process. Both PDC's and DDA's rates are relatively uniform among customers; however, any variance is attributable to such factors as volume and unique requirements of particular customers. UPS will also negotiate its rates with shippers and has volume discounts.

13. No evidence was provided which established that PDC or DDA were registered as common carriers with the Interstate Commerce Commission or the United States Department of Transportation.

14. The U.S. Postal Service will provide additional services for additional fees, such as certified mail with return receipt. PDC would also provide the same types of additional services for an additional fee. The U.S. Postal Service, UPS and PDC all had provisions requiring delivery within a specified time frame, and in some cases, penalties for not doing so.

15. On March 11, 1999 and March 18, 1999, Verizon filed timely applications for the refund of sales and use taxes paid to New York State ("applications for refund"). The March 11, 1999 application for refund claimed a refund due of $592,611.99 for the period September 1, 1998 through December 31, 1998 ("first application for refund"). The March 18, 1999 application for refund claimed a refund due of $69,779.43 for the period January 1, 1999 through February 28, 1999 ("second application for refund").

16. The applications for refund claimed refunds of use tax paid by Verizon for the printing and delivery of its yellow pages telephone directories that had been distributed to customers and potential customers in New York on the basis that such directories are exempt from tax pursuant to the exemption for promotional materials found in Tax Law § 1115(n)(4).

17. The Division of Taxation ("Division") denied the applications for refund by issuing two refund denial letters ("the refund denial letters"), both of which are dated April 19, 2000. The refund denial letters assert that the majority of the yellow pages telephone directories were delivered by private or contract carrier and that delivery by such carriers is not exempt under Tax Law § 1115(n)(4).

18. A Request for Conciliation Conference for both refund denial letters was timely filed with the Bureau of Conciliation and Mediation Services of the New York State Department of Taxation and Finance ("BCMS").

19. The BCMS issued a Conciliation Order, dated August 16, 2002, which granted a partial refund for the first application for refund of $15,542.69 for the yellow pages telephone directories that were delivered by the U.S. Postal Service, granted a partial refund for the second application for refund of $1,830.14 for the Yellow Pages telephone directories that were delivered by the U. S. Postal Service, and sustained the remainder of the refund denial letters.

20. At hearing, the Division stipulated that the only issue in this proceeding is whether the delivery by PDC and DDA of Verizon's Yellow Pages in New York was delivery "by means of a common carrier, United States Postal Service or like delivery service" pursuant to Tax Law § 1115(n)(4). The Division concedes that all of the other requirements of Tax Law § 1115(n)(4) are satisfied with respect to Verizon's Yellow Pages that were delivered into New York.

21. If the delivery by PDC and DDA of Verizon's yellow pages telephone directories in New York constitutes an exempt delivery pursuant to Tax Law § 1115(n)(4), then Verizon is entitled to a refund of: (1) $592,611.99, plus applicable interest, for the period September 1, 1998 through December 31, 1998; and (2) $69,779.43, plus applicable interest, for the period January 1, 1999 through February 28, 1999.

If the delivery by PDC and DDA of Verizon's yellow pages telephone directories in New York does not constitute such delivery, then Verizon is entitled to a refund of: (1) $15,542.69, the refund granted in the Conciliation Order, plus applicable interest, for the period September 1, 1998 through December 31, 1998; and (2) $1,830.14, the refund granted in the Conciliation Order, plus applicable interest, for the period January 1, 1999 through February 28, 1999.

22. The term "like delivery service" is not defined by Tax Law § 1115(n)(4) or any New York State statute. Nor has the Division issued any regulation or public pronouncement defining the term.

23. The Division's witness was not an expert in the field of transportation. The Division's witness exhibited uncertainty over what constitutes a common carrier with regard to the confinement of its business to a special type or class of merchandise (such as motor fuel carriers), the presence or absence of regular schedules of operation, the absence of terminals, the existence of a variety of charges imposed based on differing amounts of risk and labor, the requirement that the common carrier serve all of the public, the number of competitors, and what limitations will define its customer base.

24. The legislative bill jacket for chapter 309 of the Laws of 1996 which enacted the Tax Law § 1115(n)(4) exemption in issue does not define "like delivery service." 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.

25. The Division issued a Technical Services Bureau Memorandum, TSB-M-97(6)S, dated August 20, 1997, regarding the changes to the Tax Law at issue in this matter concerning the sales and use tax exemption for promotional materials.

26. Petitioner submitted 86 proposed findings of fact, including the stipulated facts previously referred to. All facts deemed relevant are included above. However, the following have been excluded for these reasons:

a. Proposed Findings of Fact "6," "7," "8," "30," "31," "39 to 45," "46," "47," "52," "59," "73," and "74," in whole or in part, while helpful by way of background information are not essential to the resolution of this matter.

b. Proposed Finding of Fact "20" is modified to more accurately reflect the record.

c. Proposed Finding of Fact "75 through 78"are facts which concerned the conciliation conference in this matter and are not facts which should be considered in this forum.

d. Proposed Findings of Fact "81," "82" and "86" are more accurately reflected within the realm of the summary of the parties' positions and conclusions of law.

SUMMARY OF THE PARTIES' POSITIONS

27. Petitioner maintains that PDC and DDA are common carriers, or at the very least, like delivery services. Further, petitioner argues that the Division's application of the statute to petitioner violates Verizon's rights under the Due Process and Commerce clauses of the United States Constitution.

28. The Division argues that under the rules of statutory construction, exemption statutes like Tax Law § 1115(n)(4) must be interpreted narrowly. Further, the Division asserts that PDC and DDA are not common carriers or like delivery services, and petitioner has failed to demonstrate any due process or equal protection violations.

CONCLUSIONS OF LAW

A. The crux of this case is a use tax exemption enacted as Tax Law § 1115(n)(4), effective March 1, 1997. In determining if the exemption applies in this case, the history of the broader topic of the application of use tax to promotional materials distributed without charge to customers may be helpful to understand how the exemption came about and what it was intended to accomplish.

> When a taxpayer purchases property outside the state and distributes it without charge within the state, the issue arises in a variety of contexts as to whether the taxpayer's in-state distribution of the property constitutes a taxable use. Sometimes this issue is resolved by reference to the question of whether the taxpayer is reselling the property distributed without charge. . . [and] whether the sale-for-resale exemption applies.
>
> A taxpayer's out-of-state purchase of tangible personal property for in-state distribution without charge, however, may raise a second set of issues peculiar to the use tax. Even if the distributed items are not exempt from tax under the resale exemption, the question remains whether the taxpayer's distribution of the items–or the distribution of the items on behalf of the taxpayer–constitutes a taxable "use". . . within the meaning of the statutes (Hellerstein, State Taxation,¶ 16.04[3d ed]).

"Some states have enacted legislation dealing explicitly with use taxation of promotional materials produced outside the state and distributed to prospective customers in the state. New York is one of the states whose courts had interpreted the statutory term 'use' as being inapplicable to such materials" (***id.*** at ¶ 16.04 [3][a][ii]; ***see, Bennett Brothers v. State Tax Commn***., 62 AD2d 614, 402NYS2d 803 [3d Dept 1978][New York could not collect tax on the use within the State of catalogs and other mailings which had been shipped by common carrier or mailed into New York by an out-of-state printer on behalf of a New York vendor]). ***Bennett Brothers*** was contrasted with jurisdictions which viewed the taxable privilege of use as extending to the utilization of property for profit-making purposes (***see, J.C. Penney Co., Inc. v. Olsen***, 796 SW2d 943). In 1989, the Legislature amended the definition of the term "use" to "include the distribution of only tangible personal property, such as promotional materials. . . ." The Legislature adopted the amendment under pressure from the New York printing industry, which contended that New York printers suffered from a competitive disadvantage vis-a-vis out-of-state printers, since the catalogs and other promotional materials produced in New York and delivered to New York customers were subject to sales tax (Hellerstein, ***supra,*** at ¶ 16.04[3][a][ii]). At the same time, the Legislature enacted a provision exempting from tax

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" (Tax Law § 1115[n][1]). The result was that both out-of-state printers and shippers, as well as in-state printers and shippers were liable for use tax for promotional materials sent to New York customers, and both were not liable for sales or use tax for promotional materials shipped to customers outside New York (since the New York vendors now had the section 1115(n)(1) exemption to place them on par with out-of-state vendors in this situation).

In 1996, the Legislature amended Tax Law § 1115(n) and enacted Tax Law § 1115(n)(4), the statute in issue herein (L 1996, ch 309, eff March 1, 1997). In pertinent part, Tax Law § 1115(n) provides as follows:

> (1) 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.
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> (4) 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.

Subsequent to the aforesaid amendments in 1997, the Division's Technical Services Bureau of the Taxpayer Services Division published a memorandum to clarify the overall effect

of these amendments to the Tax Law (TSB-M-97[6]S), which provided the following, in pertinent part:

Expanded Sales and Compensating Use Tax Exemption for Promotional Materials

The Tax Law has been amended to provide an expanded sales and compensating use tax exemption for certain purchases and uses of promotional materials, and of certain services related to promotional materials. These changes are effective on and after March 1, 1997.

Prior to March 1, 1997, promotional materials mailed, shipped, or otherwise distributed from a point within this 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, were exempt from sales and compensating use taxes. [See TSB-M-92(4)S.] On and after March 1, 1997, the exemption also applies to certain printed promotional materials, as well as certain other promotional materials, mailed or shipped by a common carrier, the U.S. Postal Service or a like delivery service within the state.

* * *

Promotional Materials Exempt Under Section 1115(n)(4) of the Tax Law

Printed Promotional Materials

Effective March 1, 1997, printed promotional materials mailed or shipped to destinations in the state are exempt from tax when all the conditions listed below are met.

- The printed promotional materials are ultimately mailed or shipped to customers or prospective customers of the purchaser of the printed promotional materials.
- The printed promotional materials are mailed or shipped by the purchaser of the materials using a common carrier, the U.S. Postal Service or a like delivery service. (*This requirement is also met if the mailing or shipping is arranged by a third party [such as a printer/mailer] on behalf of the purchaser of the promotional materials.*) (Emphasis supplied.)
- There is no charge to the purchaser's customer or prospective customer (ultimate recipient) for the promotional materials, or for mailing or shipping them.

* * *

Other Types of Delivery

Purchases of promotional materials that will be distributed in New York Sate to customers or prospective customers in some manner other than being mailed or

shipped by common carrier, the U.S. Postal Service, or a like delivery service continue to be subject to sales and compensating use taxes.

* * *

Example 9. A multi state vendor with sales offices and retail outlets in New York purchases catalogs from a printer outside the State. The multi state vendor will mail some of the catalogs via the U.S. Postal Service to customers and prospective customers in New York State, without charge to the customers. The vendor will also have catalogs available for distribution to customers at its retail outlets in New York State. The vendor may purchase the catalogs that are to be mailed without charge to customers as exempt promotional materials. However, the vendor will owe sales or compensating use tax on its cost of the catalogs that are given to customers at the retail outlets in New York. These catalogs do not qualify as exempt promotional materials since they are not mailed or shipped to customers or prospective customers.

Example 10. A retailer purchases and takes delivery of catalogs from a printer/mailer. The catalogs are distributed to New York customers and prospective customers door to door by the retailer's sales representatives. Since the retailer's catalogs are not mailed or delivered to customers or prospective customers via a common carrier, the U.S. Postal Service or a like delivery service, the catalogs are not exempt promotional materials. Accordingly, the retailer owes tax on its purchase of the catalogs.

B. The Division aptly noted that the legislative intent of the amended 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. Although the 1989 amendments intended to accomplish the same thing, items distributed to New York customers were still subject to use tax, presumably leaving a New York vendor who has a higher percentage of its customers in New York at a greater disadvantage than a non-New York vendor. Thus, by allowing New York customers like their non-New York counterparts to receive promotional materials from New York vendors without the imposition of use tax, the competitive edge of such vendors who distribute promotional materials, particularly printers, mailers and related vendors, is enhanced. In the case of Verizon's delivery of Yellow Pages, Verizon would presumably be more likely to

hire a New York vendor who can distribute in the same manner as a non-New York vendor if the cost, holding all other things equal, is not increased by taxes. The parity thus established by the 1997 amendments was between the vendor (whether in or out of New York) who ships to customers in New York, with those vendors (in or out of New York) who ship to customers out of New York.

C. The parties agree that the only question in this case is whether the Yellow Pages delivered by PDC and DDA are delivered by "means of a common carrier, United States postal service or like delivery service," inasmuch as all other provisions of the exemption have been met. For purposes of Tax Law § 1115(n)(4), there is no statutory definition of either "common carrier," or of "like delivery service." The question is one of statutory interpretation.

Preliminarily, it is noted that petitioner is seeking an exemption from sales tax. It is well established that exemptions from tax are to be strictly construed, although they should not be interpreted so narrowly as to defeat their purpose (***see, Grace v. State Tax Commn.***, 37 NY2d 193, 197, 371 NYS2d 715, 719, ***lv denied*** 37 NY2d 708, 375 NYS2d 1027). In the case of an exemption, petitioner has the burden of showing that its interpretation of the statute is the only reasonable interpretation or that the Division's interpretation is unreasonable (***Matter of Grace v. New York State Tax Commn***., ***supra***; ***Matter of Blue Spruce Farms v. New York State Tax Commn***., 99 AD2d 867, 472 NYS2d 744, ***affd*** 64 NY2d 682, 485 NYS2d 526).

D. The courts have defined a common carrier, contrasted with a "private carrier" or a "contract carrier," as one who, engaged in a business necessarily involving a public interest, agrees for a specified compensation to transport persons or property from one place to another, offering his services to the public, generally (***Gerhard & Hey v. Cattaraugus Tanning Co.***, 241 NY 413; ***Olive Kent Park v. Moshassuck Transp. Co.***, 189 Misc 864, 71 NYS2d 15, ***affd*** 274

AD 765, 80 NYS2d 729). The test of a common carrier is whether he holds himself out, either expressly or by a course of conduct, to carry persons or property for hire, so long as he has room, for all that may see fit to employ him, indifferently (***Gerhard & Hey v. Cattaraugus Tanning Co., supra***). It is not necessary that a carrier devote himself exclusively to the business of carrying, or that he serve all the public (***Olive Kent Park v. Moshassuck Transp. Co., supra***), in order to be classified as a common carrier (***Jackson Architectural Iron Works v. Hurlbut***, 158 NY 34 [1899]). The court in ***Jackson*** stated:

> Truckmen, wagoners, cartmen and porters who undertake to carry goods for hire as a common employment in a city or from one town to another, are common carriers. It is not necessary that the exclusive business of the parties shall be carrying. Where a person whose principal pursuit is farming solicits goods to be carried to the market town in his wagon on certain occasions, he makes himself a common carrier for those who employ him. The circumstance that the defendants had no regular tariff of charges for their work, but that a special price was fixed by agreement, does not change the relation. The necessity for a different charge in each case arises, of course, out of the difference in labor in handling articles of great bulk. The charge in each case may be proportioned to the risk assumed and commensurate with the carrier's responsibility as such. A common carrier is one who, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him, and every one who undertakes to carry for compensation the goods of all persons indifferently, is, as to liability, to be deemed a common carrier. (***Id.***, at 37-38.)

A carrier may confine his business to a special class or type of merchandise and still be a common carrier (***Olive Kent Park v. Moshassuck Transp. Co., supra***). Moreover, the absence of regular schedules of operation or of a definite terminal does not necessarily take a carrier out of the class of a common carrier (***Olive Kent Park v. Moshassuck Transp. Co., supra***). The fact that a carrier is rather limited in its facilities and is a small organization does not preclude its being a common carrier (***Meridian Knit Finishers, Ltd. v. Rosen Trucking Co., Inc.,*** 61 AD2d 793, 401 NYS2D 857 [the Court determined that a defendant who had been continuously

transporting property for 13 years, operating 8 trucks and maintaining a terminal, was a common carrier as a matter of law, where 95% of its business consisted of transporting goods for plaintiff and one other client, but where defendant regularly serviced 13 additional trucking accounts, even though its practice may have been to refuse single contracts of carriage from ones other than the 15 accounts it serviced]).

The primary factor that distinguishes a common carrier and a private carrier is whether the carrier makes carriage of goods for others a business, where it holds itself out to serve the public for all that see fit to employ such company up to the capacity of the company's facilities. In ***Matter of Motor Haulage Company, Inc., v. Maltbie*** (293 NY 338), the Court, in a concurring opinion by Judge Hiscock, held that the meaning and extent of definitions of a common carrier are emphasized by recognized definitions of a private carrier:

> Private carriers for hire are such as make no public profession that they will carry for all who apply, but who occasionally, or upon the particular occasion undertake for compensation to carry the goods of others upon such terms as may be agreed upon. They are not common carriers because they do not make the carriage of goods for themselves or others a business and they do not hold themselves out to the public as ready and willing to carry indifferently for all persons any particular class of goods or goods of any kind whatever.

The Division insists that the existence of contracts between Verizon and PDC, and Verizon and DDA, is evidence that PDC and DDA operated more like "motor contract carriers," a term specifically defined by the New York State Transportation Law, rather than common carriers. The terms private carrier and contract carrier may be used interchangeably (17 NY Jur 2d, Carriers, § 3), although a distinction is made by statute between contract and private carriers of property by motor vehicles for transporters subject to Transportation Law § 2. Inasmuch as neither party maintains that PDC and DDA are governed by the Transportation Law, it is not

applied herein. The terms common carrier and private or contract carrier are taken from the general principles of New York jurisprudence developed within the context of New York case law, as set forth above, its basis being common law principles. PDC and DDA hold themselves out to serve the public for any company who chooses to hire them for the distribution of telephone directories and other such services as they are equipped to handle. Likewise the arranging of shipping by PDC and DDA is the business of carriage for others. "Carriage" is their business and not an occasional undertaking. Merely because they specialize their services to primarily handle the distribution of telephone directories does not prevent common carrier classification. There is no dispute that the contracts with Verizon cover specialized features of the services DDA and PDC provide. The fact that contracts are negotiated for the services provided is a reflection of a desire for protection from litigation, and does not serve as a determining factor to classify these two companies as contract carriers for Verizon. There is no evidence that PDC and DDA are registered as common carriers for purposes of interstate commerce or other Federal transportation regulations. However, the characteristics of these companies when compared to other common carriers were abundantly similar as displayed in credible testimony and evidence during the hearing in this matter.

The Division further argues that neither petitioner, PDC nor DDA is a part of the targeted beneficiaries of the exemption, since the legislative intent 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. This argument has no merit. First, the only party of concern in this matter as to the exemption is Verizon, not PDC or DDA. Second, Verizon is a related vendor inasmuch as it has the need and ability to hire in-State printers and mailers, the groups targeted to gain industry parity. Third, the exemption is interpreted with regard to transactions which

qualify for the exemption and was not enacted such that other printers, mailers and related vendors (out of New York State) would not also benefit.

Petitioner has carried its burden of proving that in light of the exemption history and legislative intent of the statutory amendment, the Division's interpretation of the scope of the exemption is unreasonable. For purposes of the exemption of Tax Law § 1115(n)(4), PDC and DDA are deemed common carriers, and it would follow that they are also "like delivery services" in the context of the statute. Accordingly, Verizon's distribution of promotional materials, the details of which are set forth in Finding of Fact "1" through "14," should not have been subjected to use tax, and Verizon is entitled to the refund which is the subject of this matter (see, Finding of Fact "21").

E. Assuming *arguendo* that PDC and DDA are not deemed common carriers for purposes of the Tax Law § 1115(n)(4) exemption, the final question is whether the companies qualify as "like delivery services." It has already been established that the legislative intent of 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. The stated intent coupled with the history of the development of use taxation of promotional materials supports the conclusion that the Legislature sought to expand the coverage of the exemption, not limit it. If it were intended to be limited, the type of delivery service would have been defined. What I believe is at issue is the fact that the distribution is being done by another shipper or mailer, like the U.S. Postal Service and various common carriers, and not whether the shipper or mailer is a more exact replica of the U.S. Postal Service or a common carrier. The Division's memorandum supports this interpretation (TSB-M-97[6]S). In the section detailing the conditions which need to be met to qualify for the exemption in issue, the second condition replicates the language of

the statute. There the Division could have detailed the type of service if that was truly in issue. Instead the Division focused on another type of arrangement which would qualify when it stated, "This requirement is also met if the mailing or shipping is arranged by a third party [such as a printer/mailer] on behalf of the purchaser of the promotional materials." PDC and DDA are those third-party providers who arranged for shipping and mailing on behalf of Verizon. Likewise, under the section entitled "Other Types of Delivery," examples 9 and 10 emphasize that the exemption conditions are met when the promotional materials are mailed or shipped, contrasted with being provided to customers at the company's retail outlets or being delivered by the retailer by its own sales representatives door to door. PDC and DDA functioned significantly like the U.S. Postal Service and common carriers in the services they provided to Verizon. The evidence and facts set forth far more similarities than differences. The U.S. Postal Service, common carriers, PDC and DDA accomplished the services for petitioner in a manner that was similar in all material respects. As to the services provided to petitioner and whether the exemption should be granted in this matter, I cannot envision how much more like each other in function they could be. Petitioner has carried its burden that in light of the exemption history and legislative intent of the statutory amendment, the Division's interpretation of the scope of the exemption is unreasonable. Accordingly, PDC and DDA were "like delivery services" under Tax Law § 1115(n)(4), and Verizon is thus entitled to a refund of the taxes paid for which it sought a refund herein.

F. Petitioner briefly makes reference to the statute being unconstitutional as applied to it. However, none of petitioner's evidence or arguments here advance that claim, i.e., there is no evidence or argument that the statute treats petitioner in a manner different from any similarly

situated taxpayer. Further, petitioner has failed to demonstrate in this record how the application of the exemption deprived it of its due process rights.

G. The petition of Verizon Yellow Pages Company f/k/a Bell Atlantic Yellow Pages Company is hereby granted, and its claim for refund as set forth in Finding of Fact "21" is granted.

DATED: Troy, New York
April 7, 2005

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE