

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
UNITED PARCEL SERVICE, INC. : DETERMINATION
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. :

Petitioner, United Parcel Service, Inc., 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, 1999 through May 31, 2002.

A hearing was held before Timothy Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on February 5 and 6, 2009 at 10:30 A.M., with all briefs to be submitted by May 29, 2009, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Richard D. Birns, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Marvis A. Warren, Esq., of counsel).

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

1. Petitioner, United Parcel Service, Inc., 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.

2. During the period at issue, petitioner provided, free of charge, certain supplies to its customers, including packaging materials, labels, business forms and other materials.

3. Petitioner's customers ordered the 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 free supplies were packed and shipped directly to the customer via petitioner's common carrier transportation network.

4. Petitioner paid New York sales tax on all such free customer supplies delivered in New York during the period at issue.

5. 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).

6. 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.

7. The items for which the Division granted the refund claim were rate and service guides, zone charts, rate charts, wall calendars, trade show bags and other similar items.

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

9. At hearing petitioner reduced its refund claim by eliminating certain items from consideration. As so revised, petitioner's refund claim totals \$2,710,051.17.

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

a) *Envelopes* - The envelopes were designed to ship documents by 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.

b) *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.

c) *Boxes* - Various sized corrugated cardboard boxes were designed to ship items by 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.

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

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

ii) 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.

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

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

v) 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.

vi) 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.

e) *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.

f) *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. The CD was transmitted in printed packaging and images were also printed directly on the CD. The CD and the packaging displayed petitioner's name and logo.

g) *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.

h) *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."

11. As noted previously, the Division granted petitioner's refund claim to the extent of \$35,333.80 for 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 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.

12. At hearing petitioner introduced into evidence photographs of the subject supplies that had been reviewed by the Division's auditor in his audit of petitioner's claim and also introduced actual physical examples of the items for which petitioner seeks 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 herein.

13. Petitioner's delivery services involve both ground and air delivery. Petitioner has been engaged in its ground delivery business since 1907. Petitioner began its air delivery operations in the early 1980s. Petitioner's air business includes its Next Day Air and Second Day Air services, as well as all of its international shipping. During the period at issue petitioner shipped about nine times as many packages by ground as by air.

14. The supplies provided by petitioner to its customers that are the subject of the refund claim were designed by petitioner's Brand Management and Communications and Marketing departments. Petitioner intended that the supplies promote awareness of its services and its brand. Petitioner further intended the provision of free supplies as a gesture of goodwill toward a customer which would result in a positive feeling from the customer toward petitioner and greater awareness of petitioner's 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 saw strong promotional value in placing its logo on the supplies. Toward these ends, petitioner's Brand Management and Communications and Marketing departments made decisions as to which supplies to provide to customers, the colors used on the supplies, the wording on the supplies, and any images on the supplies. By its provision of free supplies, petitioner sought to encourage customers and potential customers to continue to use or to consider using petitioner's services.

15. Many of the supplies which are the subject of the refund claim make reference to petitioner's air delivery business. This is because petitioner was not as well known or as well established as an air shipper or an express shipper and sought to promote this aspect of its business.

16. Petitioner did not provide its customers with materials that called attention to its ground business.

17. The audience to whom petitioner sought to promote its brand were its customers, its customers' customers (consignees) and the general public. During the course of providing its shipping services the envelopes, paks and boxes are seen by the general public.

18. 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. Generally, customers do use the air service packaging as intended, i.e., to ship by air.

19. 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 (*see* Finding of Fact 10[e]) 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 which enabled shippers to track the movement of their package 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.

20. Petitioner delivers packages which use its competitor's shipping materials and its competitors do the same with petitioner's shipping materials.

21. With the exception of the heavy package sticker (*see* Finding of Fact 10[g]), petitioner does not require its customers to use any of the supplies in question to use its shipping services.

22. 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.

SUMMARY OF THE PARTIES' POSITIONS

23. Petitioner contends that the supplies which are the subject of the refund claim were promotional materials as that term is defined under Tax Law § 1101(b)(12) and that accordingly,

its purchases of such supplies were exempt from sales and use tax pursuant to Tax Law § 1115(n)(4). Petitioner contends that the supplies, especially the envelopes, paks and boxes, did carry strong advertising messages. Even absent any advertising content, however, petitioner asserts that the supplies were free gifts provided to customers and thus qualified as promotional materials under the statutory definition. Petitioner contends that such free gifts had a promotional purpose and effect. Further, according to petitioner, that the supplies played a role in petitioner's business (i.e., have a purpose other than promotion), does not disqualify them as promotional materials under Tax Law § 1101(b)(12). Petitioner notes that the examples of "other related tangible personal property" listed in the statutory definition are analogous to the materials at issue and thus support the inclusion of the subject supplies within the definition of promotional materials.

24. The Division asserts that the supplies at issue do not qualify for exemption because they were not advertising literature and were not related to advertising literature. The Division asserts that the materials were not advertising because they were transferred to the customer following a communication from the customer to petitioner. The Division contends that advertising, in the ordinary and usual sense, is a one-way communication from a business to the public. The Division further contends that the lack of any limitation on the amount of materials that a customer could order shows that the materials were not advertising because, logically, there would be no promotional function for the materials when the same customer ordered the materials again and again. The Division also asserts that the materials were not advertising because "they do not extol the desirable qualities" of petitioner's shipping services. Rather, the Division asserts, the materials were supplies which facilitate services and displayed service-

related instructions and identifications. The Division contrasts the materials at issue with the Rate and Service Guides which were deemed to be promotional materials by the Division.

25. The Division also contends that the materials at issue were not promotional materials because they were designed for use in petitioner's services and not for advertising and were actually used in the rendition of petitioner's services. In rejecting petitioner's claim to the contrary, the Division takes the position that materials must be exclusively promotional to qualify for exemption.

26. The Division further argues that petitioner's interpretation of the Tax Law § 1101(b)(12) is erroneous because it would lead to absurd results, as everything bearing a logo, including delivery trucks and airplanes, could be considered promotional material.

27. The Division also asserts that the supplies at issue are properly subject to tax as packaging materials used in the provision of a nontaxable service pursuant to 20 NYCRR 528.20(c)(4).

CONCLUSIONS OF LAW

A. The present matter presents the issue of whether petitioner is entitled to an exemption from sales and use tax. 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 [3d Dept 1994], *lv denied* 85 NY2d 806, 627 NYS2d 323 [1995]; *Matter of Lever v. New York State Tax Commn.*, 144 AD2d 751, 535 NYS2d 158 [3d Dept 1988]). "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 [3^d Dept 1987], *lv denied* 69 NY2d 609, 516 NYS2d 1025 [1987]). Indeed, petitioner must show that its

interpretation of the statute is the only reasonable construction (*see F.D.I.C. v. Commr. of Taxation & Finance*, 83 NY2d 44, 607 NYS2d 620 [1993]; *CBS Corp. v. Tax Appeals Tribunal*, 56 AD3d 908, 867 NYS2d 270 [3^d Dept 2008], *lv denied* 12 NY3d 703, 867 NYS2d 704 [2009]).

B. Tax Law § 1115(n)(4) provides an exemption from sales and use tax imposed under Tax Law §§ 1105(a) and 1110 for promotional materials 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.

C. The Division has stipulated that the materials and supplies at issue were provided to petitioner's customers or prospective customers without charge and that such materials and supplies were delivered by common carrier. Additionally, the record is clear that the materials and supplies at issue were printed materials or materials upon which services taxable under Tax Law § 1105(c)(2) have been performed for purposes of the subject exemption. It is noted that at no point in this proceeding (or on audit) did the Division contend that the materials at issue failed the "printed materials" requirement for exemption. Accordingly, in order to determine whether petitioner qualifies for exemption it must be determined whether such supplies were promotional materials for purposes of Tax Law § 1115(n)(4).

D. Tax Law § 1101(b)(12) defines promotional materials for purposes of the sales tax imposed under Tax Law § 1105(a) 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, prospectuses promotional displays and Cheshire labels but does not include invoices, statements and the like.

E. The record in this matter establishes that the supplies in question were provided by petitioner to its customers as an inducement to those customers to make further purchases of petitioner's delivery services and to increase awareness of petitioner's services to potential customers. Accordingly, the subject supplies were promotional materials within the meaning of Tax Law § 1101(b)(12) (*see Matter of Arrow International*, Tax Appeals Tribunal, June 17, 2004).

Specifically, as established through the credible testimony of Sylvie Hamel, a manager in petitioner's Brand Management and Communications Department, by providing the supplies at issue to its customers, petitioner sought to entice the customers or potential customers to continue to use or to consider using petitioner's services. The provision of free supplies was intended as a gesture of good will toward a customer, which would, it was hoped, result in positive feelings toward petitioner and a greater awareness of petitioner's services and, ultimately of course, increased sales. This promotional purpose and intent is demonstrated by the fact that the supplies were designed by petitioner's Brand Management and Communications and Marketing departments. Decisions as to which supplies to provide to customers, the colors, images and wording used on supplies were made with promotional goals in mind. As a result, many of the supplies, especially the envelopes and paks, clearly carried advertising messages. Additionally, petitioner's logo was present, and often prominently displayed, on nearly all of the

supplies. According to Ms. Hamel, petitioner saw strong promotional value in placing its logo on the supplies. Petitioner's promotional intent is also shown by the focus of many of the materials on petitioner's air services, in which it was not as well established, as opposed to its ground services, which was the bulk of petitioner's business (*see* Findings of Fact 13 and 15). Petitioner's promotional intent and the promotional value of the supplies is further demonstrated by the fact that the supplies were seen not only by petitioner's customers, but also by the customer's customers (consignees), who may be potential customers of petitioner. Additionally, the envelopes, paks and boxes were seen by the general public.

F. The statutory language supports the inclusion of the supplies within the meaning of promotional materials under Tax Law § 1101(b)(12). As noted, the statute defines promotional materials as including any advertising literature and "*other related tangible personal property.*" Reference to the nonexclusive list of examples of such "*other related tangible personal property*" contained in Tax Law § 1101(b)(12) shows that the supplies in question fall within the meaning of such "*other related tangible personal property*" and are thus promotional materials under the statutory definition. Specifically, the list includes "free gifts." There is no question that the supplies at issue were free and that the customer could use or not use them at its discretion. Moreover, the record shows that petitioner had a promotional purpose and intent in making the supplies at issue available to its customers. Additionally, the purpose and function of the supplies at issue is similar to that of "applications" and "order forms" which are on the list and thus supports the inclusion of the supplies within the meaning of "*other related tangible personal property*" for purposes of Tax Law § 1101(b)(12) (*see Matter of 415 C.P.W., Inc.*, Tax Appeals Tribunal, March 2, 1989 ["The meaning of words employed in a statute is ascertained by reference to the words with which they are associated . . ."]). That is, applications and order

forms are a means by which customers can purchase or access products or services. Similarly, the supplies at issue facilitate the use of petitioner's services by customers. Indeed, the forms and labels are the means by which customers direct petitioner to provide its shipping services and are thus closely analogous to order forms.

G. The Division's assertion that the materials at issue do not qualify for exemption because they were not advertising literature and were not related to advertising literature is rejected. As noted, the broad statutory definition of promotional material in Tax Law § 1101(b)(12) specifically includes items, such as "applications," "order forms" and "complimentary maps or other items given to travel club members," which are not advertising within that term's ordinary, everyday meaning.¹ Additionally, the Tax Appeals Tribunal has held that free samples of intra-aortic balloon pumps and catheters used in the diagnosis and treatment of coronary disease distributed by the manufacturer to hospitals were promotional materials under Tax Law § 1101(b)(12) (*Matter of Arrow International*, Tax Appeals Tribunal, June 17, 2004). Certainly, such medical equipment is not advertising within that word's ordinary, everyday meaning. Accordingly, although some of the supplies at issue, such as the envelopes and paks, do contain some traditional advertising content (*see* Finding of Fact 10[a], [b]), the fact that others do not expressly extol the desirable qualities of petitioner's services does not disqualify such supplies from exemption as promotional materials.

¹ Where a word in a statute is not defined in the statute or regulations, it is appropriate to use a dictionary definition to ascertain the word's ordinary, everyday meaning (*see Matter of Publishers Clearing House*, Tax Appeals Tribunal, July 22, 1997). To "advertise" means to "to make publicly and generally known; to announce publicly especially by a printed notice or a broadcast; to call public attention to especially by emphasizing desirable qualities so as to arouse a desire to buy or patronize." (Merriam-Webster Online Dictionary [2009].)

H. The Division's contention that the subject materials were not advertising because they were transferred to the customer following a communication from the customer to petitioner and because advertising, in the ordinary and usual sense, is a one-way communication from a business to the public, is refuted, first, by noting, as discussed previously, promotional material under Tax Law § 1101(b)(12) encompasses more than traditional advertising literature. Second, there is no language in the statute restricting the meaning of promotional materials as the Division suggests. Third, the Division itself has taken the position in an advisory opinion that items requested by a customer are promotional materials. Specifically, the Division found that "Triptiks" were promotional materials under Tax Law § 1101(b)(12) (*see Automobile Club of New York*, Advisory Opinion, April 14, 1998, TSB-A-98[28]S). Triptiks were booklets provided free of charge by an automobile club to its members and contained personalized maps, a preplanned driving route, and other travel and member information. As Triptiks contained maps for a specific route and destination, they were necessarily requested by members. Finally, it is noted that, in the instant matter, the supplies were sometimes provided to customers as part of a welcome kit and not in response to a customer request.

I. The Division's contention that the lack of any limitation on the amount of materials that a customer could order shows that the materials were not advertising rests upon the inference that there would be no promotional function for the materials when the same customer ordered the materials again and again. The Division's inference is not compelling, however, for it would appear just as likely that the repeated ordering and use of the supplies would retain a customer or induce a customer to increase its use of petitioner's services. The Division's inference also fails to account for the fact that the supplies are seen by consignees and the general public. Hence, repeated ordering by the same customer notwithstanding, the supplies may be seen by a wider

and wider audience. In any event there is no evidence in the record to support the Division's position that there are diminishing returns with respect to the promotional value of the supplies.

J. The Division's argument that the supplies at issue cannot be considered promotional materials because they were designed for use in petitioner's services, and were, in fact used in the rendition of petitioner's services is refuted by the language of the statute itself, Tax Appeals Tribunal decisions and the Division's own prior interpretation of Tax Law § 1101(b)(12).

There is no question that the supplies serve a utilitarian purpose by providing customers with easy access to petitioner's services and enabling petitioner to more efficiently provide its services to its customers. Contrary to the Division's contention, however, the statutory definition of promotional materials does not restrict the exemption to materials which are exclusively advertising. Indeed, the list of examples of promotional materials in Tax Law § 1101(b)(12) includes items which clearly serve a purpose in addition to advertising or promotion. Specifically, as previously noted, like the supplies herein, "applications" and "order forms" allow customers and potential customers to access services or products, yet both are expressly promotional materials under the statute. Additionally, "complimentary maps or other items given to travel club members" encompasses items that have a use and purpose other than promotional and would appear to be part of the benefits of joining such an organization. Finally the inclusion of "free gifts" as a promotional material contemplates items which have a use or purpose unrelated to promotion or advertising.

Additionally, as previously cited, the Tax Appeals Tribunal has held that certain medical equipment was promotional material under Tax Law § 1101(b)(12) (*Matter of Arrow International*, Tax Appeals Tribunal, June 17, 2004). Obviously, such medical equipment had a purpose beyond promotion.

The Division itself has also taken the position that items with a purpose in addition to promotion are promotional materials under Tax Law § 1101(b)(12). As noted above, the Division has determined that Triptiks were promotional material (*see Automobile Club of New York*, Advisory Opinion, April 14, 1998, TSB-A-98[28]S). Further, in a Technical Services Bureau Memorandum, the Division found that golf balls imprinted with a company's name and phone number and mailed to a company's customers and prospective customer were promotional materials (*see* TSB-M-97[6]S, August 20, 1997). Clearly, golf balls have a purpose in addition to promotion.

Finally, as to the Division's contrast of the subject supplies and the rate and service guides, which the Division has deemed exempt promotional materials, while the guides do contain a few pages of traditional advertising, for the most part they serve a purely utilitarian function, listing shipping rates and various services offered by petitioner (*see* Finding of Fact 11). The rate and service guides thus assist customers in accessing petitioner's services and thereby assist petitioner to more efficiently provide its services to its customers. Accordingly, the function of the rate and service guides is similar to the supplies at issue.

K. The Division's argument that petitioner's interpretation of the Tax Law § 1101(b)(12) would lead to absurd results, such as the inclusion of petitioner's airplanes and trucks (both of which bear petitioner's logo) within the definition of promotional materials, is also rejected. The language of section 1101(b)(12) notwithstanding, in order to qualify for an exemption from tax under Tax Law § 1115(n)(4), as noted previously, the promotional materials must be shipped to customers by common carrier, the postal service or like delivery service and must be *provided to customers free of charge*. It seems clear that these requirements would prevent the absurd results contemplated by the Division.

L. The Division also contends that the subject supplies and materials are properly subject to sales tax as packaging materials used in the provision of nontaxable shipping services. In support of this argument, the Division notes, correctly, that petitioner provides nontaxable shipping services and that regulations promulgated under Tax Law § 1115(a)(19) provide that “[p]ackaging materials used in connection with rendition of exempt services are subject to tax” (20 NYCRR 528.20[c][4]). In further support, the Division cites the examples provided under this paragraph, which indicate that plastic bags purchased and used by a dry cleaner to package clean garments and protective coverings used by carriers or movers are subject to tax (20 NYCRR 528.20[c][4] [Ex. 3 and 4]).

The Division’s contention is rejected. While the language of paragraph 4 of section 528.20(c) is expansive, given the definition of “packaging material” as used in the regulation, it is clear that the materials at issue in the instant matter are not taxable pursuant to that paragraph. Specifically, the regulation defines packaging material as cartons, containers, etc. which are “actually transferred with the product to the purchaser” (20 NYCRR 528.20[b][1]). Here, the materials at issue were not transferred to petitioner’s customers with any product (*see* Tax Law § 1115[a][19]). Nor were they transferred in conjunction with the performance of any service (*see* 20 NYCRR 528.20 [a][2]). Rather, petitioner’s provision of the subject supplies was separate and apart from its rendition of shipping services. As discussed previously, petitioner provided the materials to its customers to encourage the use of its services. The customer was under no obligation to use the materials or to use petitioner’s services. These factors distinguish the instant matter from the cited examples in the regulation and also remove the materials herein from the regulatory definition of packaging material in 20 NYCRR 528.20(b)(1).

M. The petition of United Parcel Service, Inc. is granted. Accordingly, petitioner's claim for refund as revised (*see* Finding of Fact 9) is granted, together with applicable interest.

DATED: Troy, New York
November 19, 2009

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE