

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

SUPERMEDIA LLC AND :
SUPERMEDIA LLC AS SUCCESSOR IN :
INTEREST TO IDEARC MEDIA LLC :

DECISION
DTA NO. 826264

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 December 1, 2009 through May 31, 2012. :

Petitioner, SuperMedia LLC and SuperMedia LLC as successor in interest to Idearc Media LLC, filed an exception to the determination of the Administrative Law Judge issued on May 25, 2017. Petitioner appeared by Morrison & Foerster, LLP (Craig B. Fields, Esq. and Nicole L. Johnson, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in New York, New York on March 29, 2018, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. President Roberta Moseley Nero took no part in the consideration of this matter.

ISSUES

I. Whether the delivery of petitioner's telephone directories by Product Development Corporation and Directory Distributing Associates, Inc., constituted such directories being

mailed or shipped by means of a common carrier or like delivery service within the meaning and intent of Tax Law § 1115 (n) (4).

II. Whether the Division of Taxation is collaterally estopped from asserting that Product Development Corporation and Directory Distributing Associates, Inc., are not common carriers or like delivery services within the meaning of Tax Law § 1115 (n) (4).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except finding of fact 18, which we have modified for clarity. These findings of facts, so modified, are set forth below.

1. Petitioner, SuperMedia LLC and SuperMedia LLC as successor in interest to Idearc Media LLC (SuperMedia), is the purchaser of printed materials, known as the yellow pages telephone directories, that are printed outside of New York State. The telephone directories provide information and advertising to assist consumers seeking products and/or services. The directories primarily contain telephone numbers and advertising.

2. The directories contain petitioner's advertisements, as well as advertisements for unrelated businesses. The advertising contained within the directories promotes the advertising company's business to its customers and potential customers.

3. Petitioner's directories contain information for a selected geographic region (e.g., Queens or Albany) and are distributed throughout the United States, including in New York.

4. There is no charge to the recipients for the directories.

5. As relevant to this proceeding, petitioner arranged delivery of its yellow pages telephone directories into New York and contracted with the United States Postal Service (USPS), Product Development Corporation (PDC) and Directory Distributing Associates, Inc.

(DDA) to deliver its telephone directories.

6. Petitioner determined which vendor to deliver the directories based strictly on cost.

7. The Division of Taxation (Division) audited petitioner's sales and use tax liabilities for the period December 1, 2009 through May 31, 2012 (audit period).

8. The Division determined that petitioner's expenses incurred in printing the directories that were distributed in New York by PDC and DDA were subject to tax, since it concluded that neither PDC or DDA were common carriers.

9. At the conclusion of the audit, the Division issued a notice of determination to petitioner, assessment No. L-039035459, dated January 30, 2013, that asserted additional tax and interest due as follows:

Tax Period Ended	Tax Amount Assessed	Interest Amount Assessed	Current Balance Due
02-28-10	\$ 436,245.32	\$ 109,530.53	\$ 545,775.85
05-31-10	133,286.72	30,136.63	163,423.35
08-31-10	414,347.88	83,545.12	497,893.00
11-30-10	371,458.09	66,083.74	437,541.83
02-28-11	238,758.66	37,281.84	276,040.50
05-31-11	213,933.35	28,504.98	242,438.33
08-31-11	261,273.56	28,902.73	290,176.29
11-30-11	316,630.28	28,465.44	345,095.72
02-29-12	188,757.14	13,200.30	201,957.44
05-31-12	186,252.02	9,293.72	195,545.74
Totals	\$2,760,943.02	\$ 434,945.03	\$ 3,195,888.05

10. Petitioner timely filed a request for a conciliation conference with the Bureau of

Conciliation and Mediation Services (BCMS). A conciliation order was issued March 28, 2014, which sustained the notice of determination. Subsequently, petitioner timely filed its petition with the Division of Tax Appeals.

11. At the formal hearing, petitioner presented testimony from employees who worked for it during the audit period. These witnesses discussed the delivery of the directories and explained why a certain deliverer was chosen over another.

12. Susan Kochem testified regarding her employment duties during the audit period. Ms. Kochem was involved with media planning, graphic design and administration that supported four to five of petitioner's sales representatives.

13. Ms. Kochem testified that the purpose of the telephone directory was to provide information and advertising for consumers to use when they are looking for products and services and phone numbers for government agencies. The directory provided a way for advertisers to promote their products and services to consumers. There was no charge to the recipients for the directories.

14. Petitioner arranged for delivery of the directories into New York using third parties.

15. There were two types of distribution: (1) Initial (or Primary) Distribution; and (2) Secondary Distribution. Initial Distribution is the delivery of a directory to every business and residence within a set geographic area. Secondary Distribution occurs after Initial Distribution and is the delivery of directories to people who have moved or who request a directory.

16. Petitioner has used the USPS, PDC and DDA to deliver its directories for over 33 years.

17. During the audit period, petitioner used the USPS, PDC and DDA for Initial

Distribution and the USPS and Federal Express for Secondary Distribution.

18. For deliveries to be made by the USPS, after the directories were printed, they were shipped to petitioner's warehouse in Martinsburg, West Virginia. At the warehouse, petitioner bundled the directories by carrier route in zip code order onto pallets. The carrier routes were developed by the USPS.

19. Prior to delivery, petitioner alerted the various post offices about the pending delivery and the number of directories to be delivered. The pallets were then shipped to the appropriate regional post office.

20. Petitioner did not label each directory. Instead, cards with address, in carrier route order, were delivered with each pallet of directories.

21. Petitioner provided the USPS with a scheduled time frame for delivery. Petitioner did not instruct the USPS as to the order in which to deliver the directories.

22. Petitioner expected all deliveries made by USPS to occur during daylight hours. For residences, petitioner expected that the directories would be delivered by USPS to the mailbox if the directory fit. Otherwise, the USPS would leave the directory near the mailbox. For businesses, petitioner expected the USPS to deliver the directories inside the business.

23. The delivery process was managed by USPS and not petitioner. Petitioner did not have any involvement with the delivery by the carriers.

24. The USPS assigned a national representative to petitioner. Petitioner was in regular contact with the representative regarding the delivery of the directories.

25. Petitioner conducted quality checks to ensure that the directories were delivered. Petitioner would call certain residences and businesses to ensure receipt of the directory. If

petitioner was alerted to a problem with delivery, it contacted its USPS national representative.

26. If the USPS received extra directories, it would contact petitioner who either had the USPS recycle them or ship them back to petitioner's warehouse in West Virginia.

27. If the USPS needed additional directories, it would contact petitioner.

28. The rates charged by the USPS to petitioner were on a per book basis. Petitioner did not have a written contract with the USPS.

29. USPS carriers did not have any of petitioner's logos on their clothes or uniforms.

30. The USPS and petitioner did not have any officers or employees in common.

31. With respect to deliveries made by Federal Express, petitioner did have a written contract which included provisions for sending petitioner's directories by Smartpost beginning in September 2010. Under Smartpost, petitioner sent the directories to Federal Express' facility in Martinsburg, West Virginia. The directories were intermingled with the other packages shipped by Federal Express and sent to the USPS facility near the final destination for final delivery to the recipients.

32. Smartpost was a contract-only service offered by Federal Express. With Smartpost, petitioner was able to track the status of shipments.

33. The rates charged by Federal Express were on a per shipment basis.

34. There is no dispute that Federal Express was a common carrier.

35. Petitioner presented the testimony of Ken Kramer who is a Senior Vice-President, Initial Distribution for PDC. He has been employed by PDC since 2008. He is responsible for PDC's initial distribution operations east of the Mississippi, including New York. He testified regarding the services that PDC provided to its customers, including petitioner.

36. PDC's primary business is the delivery of promotional and advertising materials. PDC delivered product samples, catalogs, door hangers and other materials, including directories.

37. Petitioner had a written contract with PDC regarding delivery of petitioner's directories which included a detailed list of required services such as petitioner's right to specify further services (work orders), petitioner's right to submit change orders, procedures for handling complaints, protection of confidential and proprietary information and certain insurance requirements. This contract also sets forth the required manner and method of delivery, the authority to provide additional copies of directories, the maintenance of detailed delivery records, provision for address corrections, verification of deliveries and for quality checks.

38. Petitioner contacted PDC and alerted it that a shipment of directories would be arriving and the number of directories in the shipment. Petitioner would then have the directories bundled on pallets and shipped to PDC's warehouse.

39. PDC would provide an extra directory at a customer's request. It would also make insertions or affixation of additional written material to the directories if petitioner made such a request and it would place the directories in plastic bags supplied by petitioner.

40. Petitioner electronically transmitted data to PDC containing the names and addresses of the recipients.

41. Petitioner would outline a geographic boundary and PDC would deliver a directory to everyone within that boundary.

42. Based on the information provided by petitioner, PDC created routes using the postal routing system. Petitioner did not instruct PDC as to the order of deliveries.

43. After PDC created the routes, the independent contractors hired by PDC would select

whichever routes they wanted to deliver in, and they would go out and deliver. The independent contractors used their own vehicles to complete the deliveries.

44. Petitioner provided PDC with a time frame within which to deliver the directories.

45. It was petitioner's expectation that the directories would be delivered on the hinge side of the door or by the postal boxes for residents and inside the building for businesses.

Petitioner also expected the directories to be delivered during daylight hours.

46. Beginning in 2010, the carriers used GPS data loggers to track each completed delivery. The GPS data loggers were owned by PDC, not petitioner. PDC also verified that delivery was completed by automated phone calls. The GPS data and results of the telephone verification were only provided to petitioner upon request.

47. After the carriers completed the routes, petitioner conducted spot checking by telephone to ensure that the delivery was completed.

48. If PDC had extra directories after a delivery was completed, it would contact petitioner regarding what to do with these directories. Petitioner either had PDC recycle the directories or ship the directories to petitioner's warehouse in Martinsburg, West Virginia.

49. If PDC did not have sufficient directories to complete the deliveries, it would contact petitioner regarding next steps.

50. PDC's method of delivery has remained constant over the years.

51. The delivery process was managed by PDC, not petitioner. PDC's carriers did not have any of petitioner's logos on their clothing. Petitioner did not provide any training to PDC or its carriers. PDC did not have any employees or officers in common with petitioner.

52. PDC charged petitioner on a per directory basis for delivery.

53. Petitioner presented the testimony of Michael Shelton who was the Vice President, Treasurer and Director of Information Management Services for DDA. He has been employed by DDA for 45 years and retired in 2015. His testimony addressed the services that DDA provided to its customers, including petitioner.

54. DDA's primary line of business was the door-to-door distribution of telephone directories. Petitioner had a written contract with DDA regarding the delivery of petitioner's directories that resulted from a request for proposal by petitioner. The contract sets forth the specific services to be performed, including standards for delivery times, packaging and reporting requirements and, further, allows for such other services as the parties agree upon.

55. Petitioner contacted DDA and alerted it that a shipment of directories would be arriving and to the number of directories in the shipment. Petitioner would then have the directories bundled on pallets and shipped to DDA's warehouse.

56. Petitioner electronically transmitted data to DDA containing the names and addresses of the recipients.

57. DDA used independent contractors (i.e. carriers) to complete the deliveries. The independent contractors used their own vehicles to complete deliveries.

58. DDA determined how many carriers would deliver each route. Petitioner did not instruct DDA as to the delivery order.

59. Petitioner did not have any contact with the carriers.

60. It was petitioner's expectation that the directories would be delivered on the hinge side of the door or by the postal boxes for residents and inside the building for businesses. Petitioner also expected the directories to be delivered during daylight hours.

61. DDA used two methods to deliver petitioner's directories: (1) carriers delivered the directories to recipients; and (2) DDA sent the directories to the USPS for delivery to the recipients. It was DDA's decision as to how to deliver the directories.

62. Beginning in May 2010, DDA's carriers used GPS data loggers to track each completed delivery. The GPS data loggers were owned by DDA, not petitioner. Prior to that time, DDA used computer generated calling to verify that delivery was completed.

63. DDA did not provide the data gathered by the GPS data loggers or the results of the computer generated calling to petitioner unless requested.

64. After the carriers completed the routes, petitioner conducted spot checking by telephone to ensure that the delivery was completed.

65. If DDA had extra directories after delivery was completed, it would contact petitioner regarding what to do with these directories. Petitioner either had DDA recycle the directories or ship the directories to petitioner's warehouse in Martinsburg, West Virginia.

66. If DDA did not have sufficient directories to complete the deliveries, it would contact petitioner regarding next steps.

67. Between 1998 and the periods at issue, DDA's delivery of directories only changed in two ways: (1) how the carriers were paid by DDA; and (2) the use of the GPS data loggers.

68. DDA's carriers did not have any of petitioner's logos on their clothing. Petitioner did not provide any training to DDA or its carriers. DDA did not have any employees or officers in common with petitioner.

69. DDA charged petitioner on a per directory basis for delivery.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination by noting that the distribution in New York of promotional material purchased out-of-state is a use of such materials under the Tax Law. The Administrative Law Judge explained that these promotional materials are exempt from tax where they are shipped without charge by the purchaser to its customers and potential customers by means of a common carrier, United States Postal Service (USPS) or like delivery service.

Next, the Administrative Law Judge found that petitioner caused telephone directories to be shipped to its customers and prospective customers via USPS, Federal Express, PDC, and DDA without charge, thus leaving as the only issue in this case whether PDC and DDA qualified as common carriers or like delivery services for purposes of the Tax Law.

As the Tax Law does not define the terms “common carrier” or “like delivery service,” the Administrative Law Judge turned to definitions provided in case law and secondary sources. The Administrative Law Judge found that common carriers have been described as holding themselves out to the general public as providing shipping services according to a schedule of fixed rates without a negotiated contract, usually consisting of individual transactions rather than an ongoing course of business between the customer and carrier. The Administrative Law Judge contrasted this with a definition of “contract carrier” that described contract carriers as providing service for a limited number of customers routinely, either dedicating equipment or providing customized service for the customer. The Administrative Law Judge described the relationship between a contract carrier and its customers as typically pursuant to a ongoing relationship, service commitment, and commercial link between the carrier and its customers. Although the

Tax Law does not define these terms, the Administrative Law Judge noted that the Transportation Law distinguishes between common carriers and contract carriers, where the former are described as providing services to the general public and the latter as providing specialized services pursuant to special or individual contracts and offering specialized services not normally provided by common carriers.

Next, the Administrative Law Judge found that PDC and DDA both entered into contracts with petitioner. The Administrative Law Judge found that PDC's primary business is the delivery of promotional and advertising materials, while DDA specialized in delivering telephone directories. Both companies provide services for a specific type of customer, had ongoing business relationships with petitioner, and used independent contractors rather than its own employees to fulfill their obligations under the contracts, according to the Administrative Law Judge. These facts, combined with the fact that both companies provided a number of specialized services pursuant to individually negotiated contracts, led the Administrative Law Judge to conclude that PDC and DDA were acting as contract carriers rather than common carriers for petitioner within the meaning of the Tax Law.

Turning next to the question of whether the delivery services provided by PDC and DDA to petitioner qualified as "like delivery services" for purposes of the Tax Law, the Administrative Law Judge found that the Tax Law likewise did not define that term. The Administrative Law Judge applied principles of statutory construction to that term to determine that a like delivery service must have elements in common with the other delivery services exempted from tax under the statute. However, the Administrative Law Judge found that the facts did not show commonalities between PDC or DDA and common carriers or the USPS so much as the commonalities demonstrated between PDC and DDA and contract carriers. The Administrative

Law Judge thus concluded that neither PDC nor DDA qualified as like delivery services under the statute.

Lastly, the Administrative Law Judge addressed petitioner's argument that collateral estoppel barred the Division from asserting that neither PDC nor DDA qualified as common carriers, as the issue was decided in a 2005 Division of Tax Appeals determination. However, the Administrative Law Judge reasoned that collateral estoppel would not be applicable to this matter as the Tax Law prohibits determinations by administrative law judges from being precedential or given any force or effect in any other proceedings conducted in New York. Notwithstanding the foregoing, the Administrative Law Judge concluded that a subsequent Appellate Division case involving PDC decided what qualifies as a common carrier or like delivery service for purposes of the tax exemption and remains the current legal authority on this issue.

The Administrative Law Judge denied petitioner's protest and sustained the notice of determination.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner argues that the Administrative Law Judge erred in concluding that PDC and DDA did not qualify for the exemption from tax under Tax Law § 1115 (n) (4) and that the record indicates that PDC and DDA in fact qualified as common carriers, or in the alternative, like delivery services. Petitioner also argues that collateral estoppel bars the Division from asserting that PDC and DDA are not common carriers or like delivery services, as this was an issue finally resolved in petitioner's favor following a prior protest in the Division of Tax Appeals.

The Division counters that the Administrative Law Judge correctly concluded that PDC

and DDA did not qualify as common carriers or like delivery services. The Division also argues that collateral estoppel is not applicable where there was no evidence showing that the same issue was conclusively decided in the prior matter or where there was no evidence of privity between the parties involved in the prior and instant matters.

OPINION

We begin with Tax Law § 1115 (n) (4), which provides an exemption from the use tax imposed by Tax Law § 1107 (7) (b), and sets forth, in relevant part:

“promotional materials . . . 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.”

As petitioner claims an exemption from sales tax, it bears the burden of showing that its interpretation of the exemption statute is the only reasonable interpretation or that the Division’s interpretation is unreasonable (*Matter of Charter Dev. Co., L.L.C. v City of Buffalo*, 6 NY3d 578 [2006]; *Matter of Federal Deposit Ins. Corp. v Commissioner of Taxation & Fin.*, 83 NY2d 44, [1993] *Matter of Grace v New York State Tax Commn.*, 37 NY2d 193 [1975]), *rearg denied* 37 NY2d 816 [1975], *lv denied* 338 NE2d 330 [1975].

Where, as here, terms referred to in a statute are undefined, we must turn to definitions of those terms from case law (*see Matter of Yellow Book of New York, Inc. v Commissioner of Taxation & Fin.*, 75 AD3d 931 [3d Dept 2010], *lv denied* 16 NY3d 704 [2011], *citing Matter of Moran Towing & Transp. Co. v New York State Tax Commn.*, 72 NY2d 166 [1988]). In *Matter of Yellow Book of New York, Inc.*, a common carrier was described as an entity that holds itself out as providing shipping services to the general public for a specified compensation.

A relatively recent federal case describes a common carrier as providing services without a negotiated contract and typically involving individual transactions rather than an ongoing course of business (*see M. Fortunoff of Westbury Corp. v Peerless Ins. Co.*, 432 F3d 127 [2d Cir 2005]). This contrasts with a contract carrier, which usually provides shipping services pursuant to bilateral contracts that are individually negotiated with more sophisticated shippers at arm's length (*id.*) We are also informed by the description of the term “[c]ontract carrier of property by motor vehicle” under Transportation Law § 2 (10) (“any person that transports property by motor vehicle for compensation under special and individual continuing contracts . . .”; *cf.* Transportation Law § 2 [8] [common carrier of property by motor vehicle serves the general public]).

We affirm the Administrative Law Judge’s conclusion that the record demonstrates that PDC and DDA were acting as contract carriers rather than common carriers in their business relationships with petitioner. The record shows that petitioner entered into negotiated contracts with both PDC and DDA, that PDC’s and DDA’s respective business models are specialized delivery services of promotional and advertising materials and telephone directories, that both companies had long-standing business relationships with petitioner and that both companies followed special requirements petitioner had regarding delivery of its telephone directories. In short, the specialized nature of PDC’s and DDA’s business models and the services they actually provided to petitioner demonstrated that they acted as contract carriers in performing their contractual obligations for petitioner.

Tax Law § 1115 (n) (4) provides an exemption from the use tax for promotional materials delivered by common carriers, the USPS or “like delivery service.” Again, the Tax Law does not provide a definition of a like delivery service, but we find the Appellate Division’s description of

like delivery services as services that are the same or substantially similar to the services provided by either common carriers or the USPS as controlling in this matter (*see Matter of Yellow Book of New York, Inc.*). As discussed herein, the record demonstrates that the delivery services provided by PDC and DDA were substantially similar to those provided by contract carriers rather than those provided by common carriers. Petitioner has not borne its burden of showing that its interpretation of the statute, namely, that the services provided by PDC and DDA qualified as like delivery services, was the only reasonable interpretation of the statute or that the Division's interpretation was unreasonable. Thus, we affirm the Administrative Law Judge's conclusion that neither PDC nor DDA qualified as like delivery services for the purposes of Tax Law § 1115 (n) (4).

Lastly, we turn to petitioner's argument that collateral estoppel bars the Division from asserting that PDC and DDA are not like delivery services for purposes of Tax Law § 1115 (n) (4), as both companies had been deemed to be common carriers in a prior proceeding before the Division of Tax Appeals (*see Matter of Verizon Yellow Pages Co.*, Division of Tax Appeals, April 7, 2005). Petitioner maintains that the Division cannot relitigate an issue that was previously adjudicated and thus PDC and DDA are like delivery services within the context of the statute.

To invoke the doctrine of collateral estoppel, its proponent must show an identity of issue which has necessarily been decided in the prior action and is decisive of the present action and there must have been a full and fair opportunity to contest the prior decision (*see Staatsburg Water Co. v Staatsburg Fire Dist.* 72 NY2d 147 [1988]; *Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65 [1969]). The party seeking the benefit of the doctrine bears the burden of

showing the identity of issues in the present litigation and the prior determination (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449 [1985]).

However, as noted by the Administrative Law Judge, Tax Law § 2010 (5) precludes application of collateral estoppel to an issue decided in a determination by a Division of Tax Appeals administrative law judge:

“Determinations issued by administrative law judges shall not be cited, shall not be considered as precedent nor be given any force or effect in any other proceedings conducted pursuant to the authority of the division or in any judicial proceedings conducted in this state.”

As the statute precludes any force or effect of the outcome of the prior determination of an administrative law judge in any judicial proceedings conducted in New York, we agree with the Administrative Law Judge’s conclusion that the prior determination cannot give rise to collateral estoppel in the instant matter. Furthermore, a subsequent Tax Appeals Tribunal case decided on December 11, 2008 and involving the same issue and one of the parties to this matter, came to a different conclusion, which was later confirmed by the Appellate Division (*Matter of Yellow Book of New York, Inc.*). We thus affirm the conclusion of the Administrative Law Judge that *Matter of Yellow Book of New York, Inc.* is the current legal authority on this issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Supermedia LLC and Supermedia LLC as successor in interest to Idearc Media LLC is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Supermedia LLC and Supermedia LLC as successor in interest to Idearc Media LLC is denied; and
4. The notice of determination dated January 30, 2013 is sustained.

DATED: Albany, New York
September 20, 2018

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner