

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

SUPERMEDIA LLC AND : DETERMINATION
SUPERMEDIA LLC AS SUCCESSOR IN : DTA NO. 826264
INTEREST TO IDEARC MEDIA LLC :

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 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 December 1, 2009 through May 31, 2012.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, in New York, New York, on June 15, 2016 at 10:00 A.M., with all briefs to be submitted by November 30, 2016, which date began the six-month period for the issuance of this determination. 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).

ISSUE

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).

FINDINGS OF FACT

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 that 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. 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.

Petitioner submitted 105 proposed findings of fact. These facts have been substantially incorporated and renumbered, where necessary, except for proposed findings of fact numbered "81" through "87" and the last two sentences of "90" through "96" which are determined to be irrelevant and fact "105" which is more in the nature of argument than a finding of fact.

CONCLUSIONS OF LAW

A. Distribution in New York of promotional material purchased out-of-state is a use of such materials under Tax Law § 1107(b)(7), which is subject to tax under Tax Law § 1110.

An exemption from sales and use taxes is provided for certain promotional materials. Tax Law § 1115(n)(4) provides in pertinent part that:

"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."

It is undisputed that petitioner causes its telephone directories to be mailed or shipped by the USPS, Federal Express, PDC and DDA to its customers and prospective customers without charge to those customers or prospective customers. The only issue in this case is whether PDC and DDA qualify as common carriers or like delivery services such that the subject purchases will be exempt from tax. There is no dispute over the fact that Federal Express is deemed a common carrier within the meaning of the statute.

B. Petitioner asserts that both PDC and DDA were common carriers similar to the USPS and Federal Express. The Tax Law does not define the terms “common carrier” or “like delivery service.” In reviewing case law, a “common carrier” has been described as an entity that:

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

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

Although the Tax Law offers no definition of “common carrier” or “contract carrier,” the Transportation Law defines “common carrier of property by motor vehicle” to mean “any person that transports property by motor vehicle for compensation for the general public” (Transportation Law § 2[8]). The statute defines “contract carrier of property by motor vehicle,” in pertinent part, as follows:

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

C. In reviewing the facts of this case, it is noted that petitioner entered into contracts with both PDC and DDA. PDC’s primary business is the delivery of promotional and advertising materials which included the directories. DDA’s primary business is the door-to-door distribution of telephone directories. Thus, these companies are providing a service for a specific type of customer, i.e., the distribution of promotional and advertising materials such as the telephone directories. These deliveries were a major and ongoing part of petitioner’s business as opposed to an occasional occurrence from time to time as the need arose. Unlike a common carrier, such as USPS or Federal Express, the facts show that these companies’ deliveries were not completed by its own employees, but by independent contractors who used their own vehicles.

The contract with DDA resulted from a request for proposal made 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. Petitioner’s contract with PDC includes the same provisions concerning the detailed list of required services as the contract between petitioner and DDA, including 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. Therefore, upon a review of the record, it is concluded that PDC and DDA were not acting as common carriers in their delivery of the directories, but were acting as contract carriers (*see Matter of Yellow Book of New York, Inc. v. Commissioner of Taxation and Fin.*, 75 AD3d 931 [3d Dep't 2010], *lv denied* 16 NY3d 704 [2011]).

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

The statute does not define "like delivery service." The meaning of this phrase must be determined through principles of statutory construction, the fundamental rule of which is to effectuate the intent of the Legislature (*Matter of 1605 Book Center v. Tax Appeals Trib.*, 83 NY2d 240 [1994], *cert denied* 513 US 811 [1994]). As this matter entails the application of an exemption, petitioner has the burden to show 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.*, 37 NY2d 193 [1975]).

E. Here, "like delivery service" is part of a list with "common carrier" and "United States Postal Service." Accordingly, a "like delivery service" for purposes of Tax Law § 1115(n)(5) must include elements common to these other methods of delivery. As discussed herein,

common carrier services feature service to the general public at set fees. Petitioner's use of the USPS also featured such arrangements. Neither common carrier services nor USPS services feature negotiated contracts, customized services and an ongoing relationship as demonstrated by the relationship between petitioner and both PDC and DDA. Thus, it is concluded that the term "like delivery service" as used in the exempt set forth in the statute does not include contract carriers which provide delivery services under the terms and conditions of these contracts as discussed herein (*see Matter of Yellow Book of New York, Inc. v. Commissioner of Taxation and Fin.*).

F. Petitioner argues that the notice of determination at issue in this case is barred by the doctrine of collateral estoppel. Petitioner claims that the Division cannot re-litigate an identical issue concerning petitioner that was previously adjudicated in the *Matter of Verizon Yellow Pages Co.*, and that was the subject of a determination of an administrative law judge dated April 7, 2005. Petitioner states that the issue in that case involved the exemption under Tax Law § 1115(n)(5) and the administrative law judge determined that both PDC and DDA were deemed common carriers, such that it would necessarily follow that they were also "like delivery services" in the context of the statute.

In order to invoke this doctrine there must be 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 collateral estoppel must meet the burden of showing the identity of the issues in the present litigation and the prior determination (*Kaufman v. Eli Lilly & Co.*, 65 NY2d 449 [1985]).

G. Primarily, it is noted:

“Determinations issued by administrative law judges shall not be cited, shall not be considered as precedent nor be given any force of effect in any other proceedings conducted pursuant to the authority of the division or in any judicial proceedings conducted in this state” (Tax Law § 2010[5]).

Therefore, it is concluded that since a determination rendered by the administrative law judge cannot be considered precedential or even cited, it follows that such a determination does not give rise to collateral estoppel in this current matter.

Moreover, as noted by the Division, a petition filed by *Yellow Book of New York, Inc.*, made its way through the administrative process. This matter involved the statutory exemption for common carriers under Tax Law § 1115(n)(5) and, specifically, involved PDC. In the *Matter of Yellow Book of New York, Inc.* (Tax Appeals Tribunal, December 11, 2008), a different result than that determined in *Verizon Yellow Pages* was reached by the administrative law judge and then upheld by the Tax Appeals Tribunal. The decision by the Tax Appeals Tribunal in *Yellow Book* was later confirmed by the Appellate Division (*Matter of Yellow Book of New York, Inc. v. Commissioner of Taxation and Fin.*).¹ Therefore, this case is the current legal authority on this issue.

H. The petition of SuperMedia LLC and SuperMedia LLC as successor in interest to Idearc Media LLC is denied and the Notice of Determination, dated January 30, 2013, is sustained.

DATED: Albany, New York
May 25, 2017

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE

¹ Petitioner’s representative appeared amicus curiae in this proceeding before the Tax Appeals Tribunal.