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by Michael Penza

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A 'Mixed Bundle'? New York Struggles to Distinguish Between TPP and Services

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Michael Penza

Michael Penza owns Penza Law PLLC, a law firm that advises on New York taxes.

In this article, Penza discusses the analytical framework historically used in New York to differentiate between taxable sales of tangible personal property and nontaxable sales of services, and contends that in recent decisions, the New York State Tax Appeals Tribunal has improperly dismantled this framework.

Anyone reading this article is likely well-versed in sales tax terminology. Have you ever heard of a mixed bundled sale? If not, you're not alone: I hadn't either until I read a handful of recent decisions from the New York State Tax Appeals Tribunal. This odd phrase epitomizes the tribunal's recent struggles to distinguish between taxable sales of tangible personal property (TPP) and nontaxable sales of services.

Generally, sales of TPP are taxable unless exempted and sales of services are nontaxable unless specifically enumerated. But if a seller transfers TPP and provides services in conjunction, is the transaction a taxable sale of TPP, a nontaxable sale of services, or both?

This question should be addressed using an analytical framework that produces consistent results and effectuates legislative intent, and for decades, New York courts and the tribunal applied one. But in a series of recent decisions, the tribunal has all but dismantled it, unjustifiably breaking from precedent and adopting a new approach that will inevitably tax services that the Legislature never intended to tax.

Bundled Versus Mixed Transactions

This article refers to two general types of transactions: bundled transactions and mixed transactions. This terminology is borrowed from the California Court of Appeal's *Dell* decision,[1] which relied heavily on the Hellerstein treatise[2] in setting forth a clear and coherent analytical framework to distinguish between taxable sales of TPP and nontaxable sales of services. This framework provides context for this article's discussion of New York's case law addressing the same issue.

Bundled Transactions

In a bundled transaction, services and TPP are "inextricably intertwined in a single sale."[3] If a person buys a painting from an artist, it is a bundled transaction: The painting is taxable TPP, but it is the product of the painter's nontaxable services. If a person hires a lawyer to draft a will, this is also a bundled transaction: The physical document is taxable TPP, but it is the product of the lawyer's nontaxable services. It seems obvious

[1] *Dell Inc. v. Superior Court*, 159 Cal. App. 4th 911, 917 (2008).

[2] *See* Jerome R. Hellerstein, Walter Hellerstein, and Andrew Appleby, *State Taxation* 12.08 (updated Apr. 2025).

[3] *Dell*, 159 Cal. App. 4th at 924.

— if based only on experience and custom — that the sale of the painting is taxable and the sale of the lawyer's services is not.[4]

Of course, not all bundled transactions lend themselves to easy answers. For example, suppose a person subscribes to a dating service that requires downloading a software application. Is this a taxable sale of software or a nontaxable sale of a dating service?[5] To resolve these questions, a test is used — focusing on either the purchaser's objective (for example, the true object test) or the nature of the seller's business (for example, the common understanding test).[6]

Mixed Transactions

In a mixed transaction, the TPP and services sold together are readily severable.[7] The sale of a door and its installation is an example of a mixed sale: The door and its installation are readily severable because they could theoretically be purchased in two separate transactions from two separate vendors. Put differently, while the door and the installation services may be sold in conjunction, the door is not a product of the installation services, and the installation services are not embodied in the door. If a sale is mixed, each component of the sale is classified as taxable or nontaxable on a stand-alone basis.[8]

Analytical Framework

The foregoing principles establish the following analytical framework: As a threshold issue, it must first be determined whether the transaction is bundled or mixed. If the transaction is bundled, it should be classified as taxable or nontaxable according to a test (for example, the true object test). If the transaction is mixed, the taxability of each component should be analyzed separately.

New York's Case Law

Over the last several years, the tribunal has differentiated between taxable sales of TPP and nontaxable sales of services without a coherent analytical framework — resulting in confusing opinions and dubious taxability determinations. This development is unfortunate, because throughout the last century, New York courts and the tribunal established a workable framework to distinguish between taxable TPP and nontaxable services, which was consistently applied and produced reasonable results.

Establishing a Framework

In *Dun & Bradstreet* (1937),[9] the New York Court of Appeals[10] analyzed whether a company's sales of credit information constituted taxable sales of TPP.[11] The company provided the credit information to its customers in written reports. The court concluded that although the company transferred TPP (the reports), it was selling a nontaxable service. Relying on the principle that doubts must be resolved in the taxpayer's favor, and exercising what may be described as common sense, the court explained:

> The information furnished is of value to the subscribers and for it they pay but not for the paper upon which the information is conveyed or for the reference books which are only guides to assist in the rendition of appellant's service. One does not think of a telephone company as a seller of books to its subscribers. It renders a service. To make that service efficient, it furnishes its subscribers with books containing a list of its subscribers with their call numbers. The paper is a mere incident; the skilled service is that which is required.[12]

[4] *See* Richard D. Pomp, *State & Local Taxation* 6-29 (2011) ("Which transactions are considered to fall on the property end of the continuum and which fall on the service end can be more a matter of custom than of logic. After all, as a matter of logic, a vendor of tangible personal property can be considered as performing the service of selling, rather than selling property.").

[5] This example assumes that software is considered TPP for sales tax purposes.

[6] *See* Hellerstein, Hellerstein, and Appleby, *supra* note 2.

[7] *Dell*, 159 Cal. App. 4th at 925.

[8] *Id.*

[9] *Dun & Bradstreet Inc. v. City of New York*, 11 N.E.2d 728 (N.Y. 1937).

[10] The New York Court of Appeals is the state's highest court.

[11] During the periods at issue in *Dun & Bradstreet*, information services were not subject to New York's sales tax.

[12] *Dun & Bradstreet Inc.*, 11 N.E.2d at 731 (internal quotation marks and citations omitted).

In effect, the court treated the sales as bundled transactions and determined that they were nontaxable based on a common understanding that sales of credit information are sales of services, not TPP.

The Third Department of the Appellate Division of the Supreme Court, which hears appeals of tribunal decisions, adopted this approach in *Laux* (1979)[13] and *Atlas Linen* (1989).[14] In *Laux*, the issue was whether an advertising agency's transfers to its clients of mechanicals (prototypes of printed advertisements) constituted sales of TPP.[15] The Third Department concluded that the mechanicals were for the agency's own use in its advertising business and that the transfers of the mechanicals were incidental to that business.[16] In effect, the court treated the sales as bundled and determined that they were nontaxable, recognizing that the agency's business was advertising and that any transfers of TPP to its customers were incidental to those services.

In *Atlas Linen*, a company supplied hospitals with linens and laundered them. The Third Department held that the rental and laundering of the linens were "inseparably connected" such that they could not be considered as separate transactions for tax purposes,[17] and that the company's provision of linens was "purely incidental to the primary or essential business of laundering."[18] The court effectively treated the transactions as bundled rather than mixed and identified them as nontaxable, recognizing that the company was primarily engaged in a laundering business rather than a rental one.

[13]*Laux Distributing Advertising Inc. v. Tully*, 67 A.D.2d 1066 (N.Y. App. Div. 1979).

[14]*Atlas Linen Supply Co. Inc. v. Chu*, 149 A.D.2d 824 (N.Y. App. Div. 1989).

[15]The advertising agency had been assessed tax on its purchases of the materials to construct the mechanicals. Whether these purchases were taxable turned on whether the mechanicals were resold: If they were resold, the purchases were for resale (nontaxable); if they were not resold, the purchases were at retail (taxable). Several cases discussed in this article arose from circumstances such as these.

[16]*Laux*, 67 A.D.2d at 1067.

[17]*Atlas Linen*, 149 A.D.2d at 826.

[18]*Id.* at 825-826.

The tribunal applied the foregoing principles to a bundled sale of taxable services and nontaxable services in *SSOV* (1995).[19] In that case, a company sold dating services to its members. Each member provided dating-related information to the company, which it disseminated to other members. Because the company distributed information, the state argued that it was selling a taxable information service. The tribunal disagreed, recognizing that the company's "primary function" was to foster dating among its members. The tribunal explained that the provision of information was "merely a component of the overall service," and that to tax the company's dating services "stretches the application of [the sales tax] far beyond that contemplated by the legislature."

Dun & Bradstreet, *Laux*, *Atlas Linen*, and *SSOV* established the following framework: First, it must be established whether the taxable and nontaxable components of the transaction are inextricably intertwined in a single transaction. If so, the transaction is classified as taxable or nontaxable based on the seller's primary or essential business function or purpose. This test is referred to as the primary function test for the remainder of this article, based on the tribunal's use of the term in *SSOV*.[20]

Unintentionally Undermining the Framework

As the foregoing illustrates, during the 20th century the courts and the tribunal established a sensible and straightforward approach to differentiating between taxable sales of TPP (or services) and nontaxable sales of services. But this approach was unintentionally undermined by the New York courts in *Galileo*[21] and *EchoStar*.[22]

[19]*Matter of SSOV '81 Ltd.*, DTA Nos. 810966 and 810967 (N.Y. Tax. App. Trib. Jan. 19, 1995).

[20]The foregoing discussion is by no means exhaustive of the 20th century case law addressing this topic. For example, the Third Department's decisions in *Penfold v. State Tax Commission*, 114 A.D.2d 696 (N.Y. App. Div. 1985) and *Artex Systems Inc. v. Urbach*, 252 A.D.2d 750 (N.Y. App. Div. 1998) were based on the same analytical framework.

[21]*Galileo International Partnership v. Tax Appeals Tribunal*, 31 A.D.3d 1072 (N.Y. App. Div. 2006).

[22]*EchoStar Satellite Corp. v. Tax Appeals Tribunal*, 982 N.E.2d 1248 (N.Y. 2012).

Galileo

In *Galileo* (2006), a business provided travel agents with access to a computer reservation system, through which the travel agents could obtain information about and make reservations for flights, car rentals, and hotels. To enable access to the system, the company provided the travel agents with computer equipment. The business argued that it sold a nontaxable connectivity service, while the state argued that the company leased taxable TPP. Based on the business's pricing model and contractual terms, the tribunal sided with the state. The Third Department affirmed, finding that the tribunal's conclusion was supported by sufficient evidence.

Galileo presented a run-of-the-mill application of the primary function test to a bundled transaction. While reasonable minds may disagree on whether the tribunal got it right, *Galileo* is noteworthy not for its outcome but for its unfortunate dicta. In summarizing the evidence supporting the tribunal's decision, the Third Department said:

> There was adequate evidence to sustain the Tribunal's conclusion that the transfer of equipment was a lease *and that such was a significant part of the transaction, not merely a trivial element of a contract for services*. [Emphasis added.][23]

The emphasized language (the *Galileo* dicta) was gratuitous and reflects a fundamental misunderstanding of bundled transactions. Neither the state nor the business ever argued that the transfers of computer equipment were insignificant or trivial to the transaction; there was no question they were critical. But a bundled transaction is not rendered taxable because its taxable component is significant or even essential. The written reports were critical to the bundled transaction in *Dun & Bradstreet*, the mechanicals were critical to the bundled transaction in *Laux*, and the information services were critical to the bundled transaction in *SSOV*. But in all three cases, the bundled transactions were deemed nontaxable sales of services. The recognition that a bundle's taxable aspect is important does not and cannot establish the bundle's taxability.

EchoStar

Rather than letting the *Galileo* dicta fade into oblivion, the New York Court of Appeals amplified it in *EchoStar* (2012). The taxpayer in *EchoStar* provided satellite television services. To enable reception of the satellite TV signals, the taxpayer provided its customers with satellite dishes. The taxpayer issued to its customers invoices that separately stated charges for the television service and the dishes.

The issue was whether the transfers of the satellite dishes were taxable leases of TPP.[24] The tribunal determined that the transfers were not taxable leases of TPP, and the Third Department agreed, concluding that the transfers were "purely incidental and inseparably connected to [the company's] essential business of providing satellite television programming."[25] In effect, the tribunal and Third Department treated the equipment transfers and television services as bundled, and because the taxpayer's primary function was the provision of TV services, its transfers of the satellite dishes were incidental to nontaxable sales of services.

The court of appeals reversed. According to the court, the rulings of the tribunal and Third Department were "difficult to reconcile" with *Galileo*.[26] Seizing on the *Galileo* dicta, the court said that the transfers of the satellite dishes were as "significant" and as "far from incidental" as the transfers of the computer equipment in *Galileo*. Thus, if the transfers of the computer equipment in *Galileo* were taxable leases of TPP, so were the transfers of the satellite dishes.

But the decisions in *Galileo* and *EchoStar* were easily reconcilable. In both cases, the tribunal and Third Department treated the transactions as bundled, then applied the primary function test to conclude that the bundled transaction was a taxable lease of TPP in *Galileo* and a nontaxable sale of a service in *EchoStar*. While the *Galileo* dicta

[23] *Galileo*, 31 A.D. at 1075.

[24] The company had been assessed tax on its purchases of the satellite dishes. If its transfers of the dishes were taxable leases of TPP, then its purchases of the dishes were nontaxable purchases for resale.

[25] *EchoStar Satellite Corp. v. Tax Appeals Tribunal*, 79 A.D.3d 1307, 1309 (N.Y. App. Div. 2010).

[26] *EchoStar*, 982 N.E.2d at 1251.

was ill-advised, it was not foundational to the tribunal's taxability determination in that case.

The court of appeals' ruling in *EchoStar* can probably be attributed to the procedural posture of the case. The taxpayer had collected and paid tax on its charges for the satellite dishes. The state then assessed tax on the company's purchases of the same satellite dishes but refused to grant a credit for the taxes already paid on the charges for the dishes. The court of appeals acknowledged that if it affirmed the assessment on the purchases, the state would receive a windfall by taxing the purchases and subsequent transfers of the dishes as though they were both at retail. To prevent this result, the court ruled that the taxpayer's transfers to its customers were taxable leases at retail, rendering the purchases nontaxable purchases for resale.[27]

Summary

Critically, neither the Third Department in *Galileo* nor the court of appeals in *EchoStar* expressed any intent to upend New York's analytical framework for distinguishing between taxable sales of TPP and nontaxable sales of services. The Third Department simply used careless language in affirming the tribunal's decision in *Galileo*, and the court of appeals relied on this language to prevent an inequitable result in *EchoStar*. Nevertheless, both have proved damaging in subsequent tribunal rulings.

Dismantling the Framework

The *Galileo* dicta, amplified in *EchoStar*, is now wreaking havoc at the tribunal. The tribunal has been failing to distinguish between bundled and mixed transactions, and rather than applying the primary function test, it is de facto classifying every bundled transaction as taxable.

Lincare

In *Lincare* (2014),[28] the taxpayer provided oxygen systems for in-home use. The issue was whether the taxpayer's transfers to its customers of oxygen cylinders (a part of the oxygen systems) were taxable leases of TPP or transfers incidental to nontaxable sales of oxygen services. The tribunal rightly observed that to resolve the issue, it needed to determine the primary purpose of the taxpayer's business — that is, apply the primary function test — and cited *Laux*. The tribunal concluded that the taxpayer's business was providing oxygen equipment, including the cylinders, and that any service component to the transaction — such as the delivery and retrieval of the equipment — was incidental to the taxpayer's primary function.

While that conclusion was reasonable, it was apparent from the tribunal's analysis that the flawed *Galileo* dicta was becoming entrenched in the analysis of bundled transactions. In concluding that the taxpayer was making taxable leases of TPP, the tribunal observed that the transfers of the oxygen cylinders were a "significant part of the transaction," and not a "trivial element" of the sale of oxygen, citing *Galileo*.

Strata Skin

Although the reasoning in *Lincare* was flawed to the extent that it relied on the *Galileo* dicta, the tribunal at least implicitly recognized that it was analyzing a bundled transaction and applied the primary function test. But in *Strata Skin* (2022), the tribunal truly lost its way.[29]

In *Strata Skin*, the taxpayer provided physicians with laser equipment to treat skin diseases. The taxpayer either sold the laser equipment to the physician for unlimited use or furnished the laser equipment to the physician, who paid the taxpayer on a per-use basis. If the physician paid for the equipment per use, the taxpayer also provided the physician with a suite of services, including equipment training, direct-to-consumer advertising, and referral services.

[27] The court of appeals also overlooked the distinction between bundled and mixed transactions. By analogizing to *Galileo*, the court suggested that the transaction in *EchoStar*, like the one in *Galileo*, was a bundled transaction, taxable as a lease of TPP. But this would mean that the taxpayer's charges for the satellite dishes *and* television services were taxable. Surely this is not what the court meant, and neither the state nor the taxpayer advocated such a position. In effect, the court of appeals unwittingly treated the transactions as mixed sales; this is the only theory under which the taxpayer could simultaneously make taxable leases of TPP and nontaxable sales of television services. This approach, however, was questionable because the transfers of the satellite dishes and the provision of television services seemed intertwined.

[28] *Matter of Lincare Inc.*, DTA No. 823971 (N.Y. Tax. App. Trib. Sept. 11, 2014).

[29] *Matter of Strata Skin Sciences Inc.*, DTA No. 828704 (N.Y. Tax. App. Trib. May 5, 2022).

Regarding the per-use transactions, the issue was whether the taxpayer made taxable leases of TPP or nontaxable sales of services. Accordingly, the tribunal should have first determined whether the transaction was bundled or mixed. If the tribunal determined that the transaction was bundled, then it would need to apply the primary function test; if the tribunal determined that the transaction was mixed, then it would need to analyze the taxability of the laser equipment and the suite of services separately.

The tribunal, however, failed to address the threshold issue of whether the transaction was bundled or mixed. It seemed to assume that the transaction was bundled, despite noting that the taxpayer sold the equipment with and without the suite of services, indicating that the transfer of the equipment and the provision of services were readily severable. Therefore, it seems the transaction should have been treated as mixed, and the taxability of the equipment and the services should have been analyzed separately.[30]

Then, remarkably, the tribunal asserted that the primary function test was inapplicable:

> This Tribunal has not applied the primary function test to bundled sales of tangible personal property and services, but rather only to bundled sales of taxable and nontaxable services [citing *SSOV*, DTA Nos. 810966 and 810967]. Considering that transfers of tangible personal property are presumptively taxable (*see* Tax Law section 1132 [c] [1]), we remain unpersuaded by petitioner's argument that all mixed bundled sales of tangible personal property and services should be analyzed using the primary function test.

That statement is baffling. What on earth is a "mixed bundled sale"? And hadn't the tribunal, just eight years prior in *Lincare*, relied on the primary function test to analyze a bundle of TPP and services? And didn't the tribunal and the courts rely on the primary function test to distinguish between taxable TPP and nontaxable services for the last 80 years, since *Dun & Bradstreet*? And why use the primary function test to distinguish between taxable services and nontaxable services but not between taxable TPP and nontaxable services? The tribunal left all these questions unaddressed in concluding that the transactions at issue were taxable.

On appeal, the Third Department rubber-stamped the tribunal's decision.[31] The court simply observed that "substantial evidence in the record" supported the tribunal's decision not to apply the primary function test.[32] But the court did not explain what specifically in the factual record could resolve the legal question of whether the primary function test applies to bundles of TPP and services.

Beeline.com

In *Beeline.com* (2024),[33] the tribunal applied the same improper analysis that it did in *Strata Skin*. The taxpayer matched businesses with suppliers of temporary labor. To facilitate these matching services, the taxpayer licensed software to its customers. The issue was whether the taxpayer made taxable sales of software (included in the statutory definition of TPP) or nontaxable sales of services. The taxpayer rightly argued that this issue should be resolved through the primary function test. But the tribunal — relying on *Strata Skin* — asserted that the primary function test had no application to "a mixed bundle of tangible personal property and services." The tribunal then relied on the *Galileo* dicta in observing that the software was a "core element" of the taxpayer's business and was "anything but incidental or ancillary." Thus, according to the tribunal, it was clear that the taxpayer sold TPP at retail.

The Third Department affirmed the tribunal.[34] The court repeated the inaccurate statement that the tribunal's "historical use of the primary

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[30] It is not entirely clear whether New York has a separate-statement rule, which would treat the total receipts from a mixed sale as taxable unless the charges for the nontaxable components of the sale are separately stated. Nevertheless, if this is the basis for taxability, it should be stated expressly, to clarify that taxability is not based on the taxability classification of a bundled transaction.

[31] *Strata Skin Sciences Inc. v. New York State Tax Appeals Tribunal*, 225 A.D.3d 953 (N.Y. App. Div. 2024).

[32] *Id.* at 956.

[33] *Matter of Beeline.com*, DTA No. 829516 (N.Y. Tax. App. Trib. May 2, 2024).

[34] *Beeline.com Inc. v. Tax Appeals Tribunal*, No. CV-24-1494 (N.Y. App. Div. Jan. 15, 2026).

function test arises in cases that involve the classification, and taxable nature, of certain types of services (*see* Tax Law section 1105[c][1]), rather than the 'mixed bundle' that is present here."[35] The court also repeated the tribunal's use of the term "mixed bundle," lending credibility to this meaningless and confusing phrase.

Nevertheless, to the court's credit, it at least recognized that some test must be applied to classify a bundled transaction as taxable or nontaxable, and pointed out that the tribunal performed a "functional equivalent" to the primary function test.[36] But the court found that the tribunal's decision was rational because the software was central — rather than incidental — to the transaction, and because the software had "market value distinct from the services rendered."[37] This echoes the fallacy of the *Galileo* dicta: Even if the taxable component of a bundled transaction is important or valuable, these facts alone cannot render the bundle taxable, as the nontaxable component of the same transaction may be equally or more important or valuable.[38]

Summary

As this discussion illustrates, when TPP is transferred and services are provided in conjunction, the tribunal is improperly glossing over the distinction between mixed and bundled transactions. Further, the tribunal — rather than applying the primary function test — is treating any transaction involving TPP and services as taxable so long as the TPP is important to the transaction. As explained above, this development is unsupported by logic or precedent.

Conclusion

Recall the following language from *Dun & Bradstreet*:

> One does not think of a telephone company as a seller of books to its subscribers. It renders a service. To make that service efficient, it furnishes its subscribers with books containing a list of its subscribers with their call numbers. The paper is a mere incident; the skilled service is that which is required.

This principle is no less valid today than it was in 1937. When a service provider furnishes its customers with TPP (including software) to make more efficient use of the service, the sale of the nontaxable service does not transform into a taxable sale of TPP.

But this is the inevitable consequence of the tribunal's recent decisions. Whenever a service provider transfers TPP to its customer, that transfer will likely be important or essential to the service — why else would the service provider make the transfer? Thus, under the tribunal's new approach, virtually every service that involves the transfer of TPP will be subject to sales tax, which expands the sales tax to services that the Legislature never intended to tax.

This is obviously improper. The tribunal should course-correct at the next opportunity and restore analytical clarity to this critical area of sales tax law. ■

[35] *Id.* at *3.

[36] *Id.*

[37] *Id.*

[38] Recently, in *FacilitySource*, the tribunal determined that the sales of a facility-management service company were taxable because the company licensed to its customers software to facilitate its services. In reaching this conclusion, the tribunal relied on the same improper analysis used in *Beeline.com*. *Matter of FacilitySource LLC*, DTA Nos. 829500, 829501 (N.Y. Tax. App. Trib. Sept. 18, 2025).