N.Y. Tax Law § 1105 Imposition of Sales Tax

Library:	New York Statutes
Edition:	2025
Currency:	Current through 2025 NY Law Chapters 1-49 and 61-121
Citation:	N.Y. Tax Law § 1105
Year:	2025

Id. vLex Fastcase: VLEX-1067268631

Link: https://fastcase.vlex.com/vid/n-tax-law--1067268631

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

(b)

(1) The receipts from every sale, other than sales for resale, of the following: (A) gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature, including the transportation, transmission or distribution of gas or electricity, even if sold separately; (B) telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service and except any telecommunications service the receipts from the sale of which are subject to tax under paragraph two of this subdivision; (C) a telephone answering service; and (D) a prepaid telephone calling service.

(2) The receipts from every sale of mobile telecommunications service provided by a home service provider, other than sales for resale, that are voice services, or any other services that are taxable under subparagraph (B) of paragraph one of this subdivision, sold for a fixed periodic charge (not separately stated), whether or not sold with other services.

(3) The tax imposed pursuant to this subdivision is imposed on receipts from charges for intrastate mobile telecommunications service of whatever nature in any state if the mobile telecommunications customer's place of primary use is in this state.

(2)

(4) (A) For the purpose of subparagraph (B) of paragraph one of this subdivision, receipts from the sale of telephony or telephone service constituting the actual delivery of telephony or telephone service under a prepaid telephone calling service (for instance, when the receipt is represented by a debit to a prepaid account) shall be excluded from the receipts subject to tax under such subparagraph; and (B) for purposes of subparagraph (B) of paragraph one and paragraph two of this subdivision, a particular sale of telephony or telephone service to a vendor that resells such telephony or telephone service as a component of a prepaid telephone calling service shall be deemed a sale for resale of telephony or telegraph service.

(c) The receipts from every sale, except for resale, of the following services:

(1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, and excluding the services of advertising or other agents, or other persons acting in a representative capacity, and information services used by newspapers, electronic news services, radio broadcasters and television broadcasters in the collection and dissemination of news, and excluding meteorological services.

(2) Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which services are performed.

(3)

371 N.Y.S.2d 715

37 N.Y.2d 193, 332 N.E.2d 886

In the Matter of Michael P. GRACE, Respondent, v. NEW YORK STATE TAX COMMISSION, Appellant.

Court of Appeals of New York.

June 12, 1975.

[*716] [194]** Louis J. Lefkowitz, Atty. Gen. (Francis V. Dow, Ruth Kessler Toch and Vincent P. Molineaux, Albany, of counsel), for appellant. Walter J. Rockler, Washington, D.C., for respondent.

BREITEL, Chief Judge.

In an article 78 (CPLR) proceeding, the State Tax Commission appeals from a judgment, denominated an order, of the Appellate Division modifying its determination. The commission had determined that, under article 16 of the Tax Law, Consol.Laws, c. 60 governing personal inco tax, taxpayer was not entitled in reporting his 1955 State taxable income to deduct full amortization of bond premiums paid by him in excess of the face value of corporate bonds purchased by him. The Appellate Division modified, holding that taxpayer was entitled to such a deduction.

The issue is whether, absent authorization by statute or regulation, a taxpayer may claim a deduction from taxable income. **[*717]**

There should be a reversal. Absent authorization by statute or regulation, a taxpayer is not entitled to deductions against taxable income. Section 360 of the Tax Law and applicable regulations, in effect in 1955, did not authorize a deduction for the amortization of bond premiums for individual taxpayers.

Taxpayer purchased for investment purposes Appalachian Electric Power Company 3 1/8% Series 1977 bonds, aggregating $1,050,000, by paying a premium of $105,000 over the face value. Taxpayer amortized the full premium and claimed a **[**195]** deduction in his 1955 State tax return. On December 11, 1958, the State Department of Taxation and Finance notified taxpayer that an additional tax of $7,697.96 was due on his 1955 State income tax, predicated an a net increase on audit in his taxable income of $109,970.88. Taxpayer disputed two of the items which the Department of Taxation and Finance had disallowed, the deduction for the amortization of the bond premiums, and another no longer challenged by taxpayer.

A premium may be paid for a bond because of a relatively high nominal interest rate. Bond premium consists of the excess of the price of bonds over their face value, and generally reflects the difference between the nominal interest rate borne by such bonds and the actual or effective rate of return determined by the current market. When a premium has been paid for a bond, the nominal interest perforce exceeds the actual or effective rate of return (see, generally, Hanover Bank v. Commissioner of Internal Revenue, 369 U.S. 672, 677, 82 S.Ct. 1080, 8 L.Ed.2d 187). Hence, the nominal interest paid includes economically a partial return of capital investment. Under State tax procedure in 1955, premium was treated as part of the purchase price of the bond

and would be so treated in calculating gain or loss when the bonds were later sold or redeemed. There was no provision in the Tax Law or the regulations of the Tax Department at that time authorizing full or annual amortization of bond premiums and deduction as an offset against taxable income.

True, the Internal Revenue Code and Federal Regulations since 1942 have authorized as deductible the amortization of bond premiums (see Internal Revenue Code of 1954, § 171; 56 U.S.Stat. 822--823; Treas.Reg., 26 CFR 1.171--1). However, conformity of New York State income tax with Federal income tax law was not in effect until 1960, and thus did not apply to the year 1955 (see N.Y.Const., art. III, § 22; L.1960, ch. 563, § 1). Hence, taxpayer's claim for a deduction must rest upon applicable State tax law in effect for the year when the deduction was claimed.

The burden of proof to overcome tax assessments rests upon the taxpayer (see Matter of Young v. Bragalini, 3 N.Y.2d 602, 605, 170 N.Y.S.2d 805, 807, 148 N.E.2d 143, 145 (opn. per Burke, J.); Matter of **[*718]** Hillman v. State Tax Comm., 30 A.D.2d 362, 364, 292 N.Y.S.2d 233, 235; Matter of Calder v. Graves, 261 App.Div. 90, 94--95, 24 N.Y.S.2d 797, 800, affd.286 N.Y. 643, 36 N.E.2d 688). If there are any facts or reasonable inferences from the facts to sustain it, the court must confirm the Tax Commission's determination. Thus, a determination of the Tax Commission will not be disturbed by **[**196]** the courts unless shown to be erroneous, arbitrary or capricious (see, also, People ex rel. Maloney v. Graves, 289 N.Y. 178, 180, 45 N.E.2d 164, 165; People ex rel. Hull v. Graves, 289 N.Y. 173, 177, 45 N.E.2d 161, 163; People ex rel. Freeborn & Co. v. Graves, 257 App.Div. 587, 590, 14 N.Y.S.2d 4, 7).

It is often said, but sometimes misapplied in oversimplification, that 'A statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax' (People ex rel. Mutual Trust Co. v. Miller, 177 N.Y. 51, 57, 69 N.E. 124, 126; Matter of Voorhees v. Bates, 308 N.Y. 184, 188, 124 N.E.2d 273; see Matter of American Cyanamid & Chem. Corp. v. Joseph, 308 N.Y. 259, 263, 125 N.E.2d 247, 248; American Locker Co. v. City of New York, 308 N.Y. 264, 269, 125 N.E.2d 421, 423; cf. Gould v. Gould, 245 U.S. 151, 153, 38 S.Ct. 53, 62 L.Ed. 211). The principle is, however, applicable only in determining whether property, income, a transaction or event is subject to taxation. Thus, in each of the cases cited above, the issue was whether taxpayer's affairs were subject to the taxing statute at all (see People ex rel. Mutual Trust Co. v. Miller, 177 N.Y. 51, 53, 69 N.E. 124, Supra (corporate franchise tax); Matter of Voorhees v. Bates, 308 N.Y. 184, 187--188, 124 N.E.2d 273, 274, Supra (unincorporated business tax); Matter of American Cyanamid & Chem. Corp. v. Joseph, 308 N.Y. 259, 262, 125 N.E.2d 247, 248, Supra (sales tax); American Locker Co. v. City of New York, 308 N.Y. 264, 267, 125 N.E.2d 421, 422, Supra (sales tax); Gould v. Gould, 245 U.S. 151, 153, 38 S.Ct. 53, 62 L.Ed. 211, Supra (individual income tax)).

When, however, it is undisputed that the taxpayer's income is subject to the taxing statute, but he claims an exemption from taxation, a different rule applies. An exemption from taxation 'must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption' (People ex rel. Savings Bank of New London v. Coleman,135 N.Y. 231, 234, 31 N.E. 1022; see Matter of Young v. Bragalini, 3 N.Y.2d 602, 605--606, 170 N.Y.S.2d 805, 807--808, 148 N.E.2d 143, 145--146, Supra). Indeed, if a statute or regulation authorizing an exemption is found, it will be 'construed against the taxpayer', although the interpretation should not be so narrow and literal as to defeat its settled purpose (see Engle v. Talarico, 33 N.Y.2d 237,

240, 351 N.Y.S.2d 677, 678, 306 N.E.2d 796, 797; People ex rel. Watchtower Bible & Tract Soc. v. Haring,8 [*719] N.Y.2d 350, 358, 207 N.Y.S.2d 673, 677, 170 N.E.2d 677, 680; People ex rel. Mizpah Lodge v. Burke, 228 N.Y. 245, 247--248, 126 N.E. 703, 704). This is because an exemption is not a matter of right, but is allowed only as a matter of legislative grace (cf., e.g., Colgate v. Harvey, 296 U.S. 404, 435, 56 S.Ct. 252, 80 L.Ed. 299).

[197]** A deduction is functionally a particularized species of exemption from taxation. Analytically, the distinction is not unlike that between conditions precedent and conditions subsequent. The same rules apply, however, and, indeed, in language the same at that applied to exemptions. 'Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed. * * * Obviously, therefore, a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms' (New Colonial Co. v. Helvering, 292 U.S. 435, 440, 54 S.Ct. 788, 790, 78 L.Ed. 1348; cf., also, Deputy v. du Pont, 308 U.S. 488, 493, 60 S.Ct. 363, 84 L.Ed. 416; Lenkin v. District of Columbia, 149 U.S.App.D.C. 129, 461 F.2d 1215, 1225; see, generally, 85 C.J.S. Taxation § 1099, at p. 772). The burden is on the taxpayer seeking the deduction to establish his right to it (see Matter of United States Trust Co. v. Gilchrist, 210 App.Div. 527, 532, 206 N.Y.S. 485, 488).

In the instant case, there was no statute or regulation in effect in 1955 authorizi individuals to amortize and deduct bond premiums under the State's personal income tax. True, a deduction was allowed by franchise tax statute for amortization of bond premiums paid by banks and other financial institutions (see Tax Law, § 219--z, subd. 9; § 219--tt, subd. 3--a). A deduction for amortization was also allowed by regulation for fiduciaries (see 20 NYCRR Part 252 (applicable for 1955)). Nowhere, however, was there provision for such a deduction by individual taxpayers. Although it is argued that it is inequitable to allow a deduction to financial institutions and fiduciaries, and not to individuals, 'allowance of deductions from gross income does not turn on general equitable considerations' (Deputy v. du Pont, 308 U.S. 488, 493, 60 S.Ct. 363, 366, 84 L.Ed. 416, Supra).

Moreover, the distinction between financial institutions and fiduciaries on the one hand and individual taxpayers on the other is not without rational basis. Financial institutions and fiduciaries are obliged by substantive law to segregate capital and income in order to meet their legal obligations and maintain the integrity of capital investment and yet not diminish the return to those entitled to income. The individual taxpayer has no such substantive legal obligation. He is free to adjust his capital and income accounts to preserve **[*720]** and distinguish his reserve assets from the profits and avails of those assets chosen by him to be expendable without let.

Absent a provision authorizing a deduction, taxpayer was not entitled to amoritize and deduct the premium paid by him **[**198]** on the purchases of corporate bonds in reporting his 1955 taxable income. Hence, taxpayer has not sustained his burden of proving his right to such a deduction, and the determination of the Tax Commission cannot be said to be erroneous, arbitrary or capricious.

Accordingly, the judgment of the Appellate Division should be reversed, with costs, the determination of the Tax Commission confirmed, and the petition dismissed.

JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE, JJ., concur.

Judgment reversed, etc.

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STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WEGMANS FOOD MARKETS, INC.	:	
for Revision of a Determination or Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2007 through February 28, 2010.	:	DETERMINATION DTA NO. 825347

Petitioner, Wegmans Food Markets 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 June 1, 2007 through February 28, 2010.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, in Albany, New York, on February 14, 2014 at 10:30 A.M., with all briefs due by July 21, 2014, which date began the six-month period for the issuance of this determination. Upon notice to the parties, this period was extended three months pursuant to 20 NYCRR 3000.15(e)(1). Petitioner appeared by Gulotta Law Group, P.C. (Anthony C. Gulotta, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Hall).

ISSUE

Whether petitioner's purchases of pricing information were personal or individual in nature making them eligible for an exclusion from tax on information services provided for in Tax Law § 1105(c)(1).

FINDINGS OF FACT

Petitioner submitted 65 proposed findings of fact, which have been incorporated substantially into the facts below, except proposed findings 29 and 33, which are conclusory in

nature; 54, which has been modified to more accurately reflect the record; and 56 through 64 which are irrelevant.

1. For the period in issue, Wegmans Food Markets, Inc. (Wegmans) was a grocery store chain operating in several states with 50 locations within New York State.

2. From June 1, 2007 through February 28, 2010 (audit period), Wegmans purchased competitive price audits (CPAs) from RetailData Services (RetailData), to reveal how its competitors priced specific items. Such reports accounted for in excess of 99 percent of petitioner's purchases from RetailData during the audit period.

3. The information provided by RetailData in its CPAs was an important step in Wegmans' determination of its own prices in accordance with its pricing strategies.

4. CPAs were either directed or undirected audits. A directed audit gathered prices for specific products as requested by Wegmans or any other RetailData customer. An undirected audit reported on all items in an entire store or in a discrete category selected by Wegmans.

5. Petitioner's pricing team, consisting of pricing managers and several pricing analysts, create specific pricing strategies within different departments and for different items, which are consistent with the company's goals and are used to price items throughout Wegmans' store locations. The pricing team was mindful of the differences between the typical shopping cart in its stores and its competitors, accounted for by location, target markets, store environments, types of inventory and pricing images.

6. Based on petitioner's pricing strategy, the pricing team created schedules of requested audits for entire calendar years, which were provided to RetailData to direct the scope of its CPA requests. Exemplifying this methodology, petitioner's schedule of requested audits for 2009

contained a combined key item list of 552 items representing items it believed were most important to its customer base.

7. The pricing strategy was created by petitioner consistent with its goals and values and refined within its stores and departments. The strategy was unique and confidential and was not shared with the public or its competitors.

8. Petitioner was aware that different grocery stores employ different pricing strategies, and even though confidential, general trends such as high-low pricing and everyday low pricing can be observed. Petitioner's trend was generally trying to maintain a consistent low price image focused around its key item list and groups of items based on the typical shopping lists of its customers, which it believed was substantially dissimilar from those of its competitors.

9. The combined key item list created by petitioner instructed RetailData to complete a directed CPA by specifically identifying items by UPC number, description, brand and size, and excluding all items not listed. Petitioner could customize the manner in which RetailData recorded the prices, having it use various indicators for short-term prices, long-term sales and bonus packs.

10. Up to 40 items on the key item list can change weekly based on customers' buying habits, the marketplace, seasonality, the cost of items, and any additional relevant considerations the pricing team deems important.

11. Undirected CPAs were requested according to the schedule of requested audits under the category headings, which include week numbers, price check start dates, price check complete dates, transmit by dates, department headings, groupings of items, competitor locations, specialty categories and lists, club store rotations by month, and locations and codes.

12. During the audit period, the week numbers on the schedule represented the frequency with which petitioner purchased CPAs from RetailData. For the year 2009, 52 weeks were listed on the schedule, representing each week of the calendar year.

13. On the schedule, the row entitled "RDS Price Checks Start On" represented the date RetailData was to begin the CPA, the row entitled "RDS Price Checks Complete By" represented the date RetailData was to finish the CPA, and the row entitled "RDS Transmit By" represented the date by which RetailData must have the CPA report delivered to petitioner in the proper format.

14. Generally, RetailData had six days to conduct the CPA and two days to transmit the pricing information to petitioner. Pricing information that was delivered to petitioner even a day or two late was considered stale, thereby losing its value to petitioner, and such an audit would be canceled.

15. Groups of items under the category headings indicated to RetailData the items for which it needed to gather pricing information. Because groups of items indicated undirected CPAs, RetailData collected pricing information about every item within petitioner's specified groups.

16. Based on the pricing team's pricing strategies, audits on different groups of items were requested in different frequencies, for different time periods and for different stores.

17. Under the heading "Where to Check," RetailData conducted audits based on the store locations petitioner specified under the different weeks. If a competitor's code was listed under the week, RetailData was required to conduct an audit of that store on that week.

18. Petitioner's request schedule also included special categories and lists, including cosmetics, bakery, nature's top items, health and beauty care, beer, wine and spirits and club category rotations.

19. The request schedule was created, formatted and customized entirely by petitioner's pricing team according to its pricing strategy. Each date, week number, item, item grouping, product category and store location was specifically chosen by petitioner to acquire information to enforce its pricing strategy.

20. Petitioner was able to add, delete or modify anything on its schedule of requested audits at any time before RetailData began a CPA.

21. Confidentiality was important to both petitioner and RetailData and it was specifically provided for in the contract between them. In a representative contract, dated May 24, 1995, the parties agreed as follows:

> Confidentiality. RDS recognizes and acknowledges the competitive value and proprietary nature of any confidential information supplied to RDS by Wegman's. RDS will therefore handle all such information in a professional manner and agrees that any confidential information will be used solely to carry out its obligation hereunder and shall not be disclosed to any third party without Wegman's prior written consent. Following the termination of this Agreement, RDS will promptly return to Wegman's, upon request, all copies of such confidential information, in whatever form, including all copies maintained electronically or on magnetic disc or CD-Rom.
>
> Wegman's recognizes and acknowledges the proprietary nature to RDS of the data it receives from RDS and Wegman's agrees not to sell, exchange, convey or release in any manner the content of received services to any other person (except in comparative advertisements in general circulation newspapers).

22. Petitioner's order schedules and key item lists were confidential to prevent competitors from discovering what products it was monitoring. If petitioner's order schedule or key item list was made public, it would have revealed specific information concerning petitioner's pricing strategies and resulted in a loss of competitive advantage in the market.

23. Although there was a remote possibility that information collected during CPAs could have overlapped, one customer's pricing information was never incorporated into another's CPA report, i.e., CPA reports were not provided to two distinct customers. It would have been highly unlikely for two of RetailData's customers to select the same parameters for an entire CPA because combinations of item selections, time requirements, collection methodology, indicators, and formatting requirements made the permutations infinite. Further, the same factors made it impracticable from a business standpoint for RetailData to reuse data collected in two separate CPAs created for different customers.

24. In reality, if petitioner and another of RetailData's customers requested the same item, for the same location, on the same date, according to the same specifications, RetailData would still gather the information in two separate work orders. The data would have been collected in two independent observations and recorded the information at two separate intervals.

25. RetailData offered a service called snag-a-price, which allowed petitioner to either purchase historical data maintained by RetailData or retrieve its own old data without charge if accessed from an area within snag-a-price called "my data only." Since the data within snag-a-price is not current, does not specify location of the price point and cannot be customized according to petitioner's needs, it is without appreciable value to petitioner. A company like Tops, which is a high-low marketer, may place more value on an historical database since current prices are not its primary concern, and use of the broader historical database maintained by RetailData in its snag-a-price service, may provide older information collected on CPAs conducted for other companies.

26. In 2008, petitioner spent 1.5 million dollars in purchases of services from RetailData, whereas it only spent $3.61 on purchases of snag-a-price services. Brian Colling, the current

pricing manager at Wegmans, explained that it was unlikely that Wegmans would have requested a snag-a-price other than petitioner's own historical data because it would have an interest only in products it carries, which would be available in the "my data only" database free of charge. Therefore, he believed the snag-a-price expense of $3.61 was most likely a bookkeeping error or a mistaken attempt to retrieve information.

27. Out of the total number of jobs RetailData conducts, snag-a-price represented one tenth of one percent of its business. The primary value in RetailData's business model was the CPAs it conducts for its customers, accounting for more than 99 percent of its business.

28. When RetailData received an audit request from a customer, it packaged it into a "work component." Each customer's CPA request was packaged into one or more work components, which were conducted separately and independently for each client.

29. RetailData collected pricing information for petitioner by employing data collectors who downloaded a version of petitioner's request schedule to a portable device and physically traveled to a location specified by petitioner to conduct a CPA. In each of RetailData's collection methods the price of an item, the pack, and the indicator was manually input by a data collector after physically observing the item.

30. RetailData gathered pricing information in two ways: in an open environment (with permission of store management) using Motorola scanners and manually inputting relevant pricing information; and in closed environments (without store management permission) using smart phones to discretely input pricing information.

31. RetailData only gathered information for petitioner after petitioner made a request for it and said request was not limited by information in a database. The only limitation placed on petitioner's request was the scope of observable information at a competitor's store.

32. Petitioner maintained pricing databases within its stores, which contain private and confidential pricing information, to which no one outside of Wegmans had access. Conversely, Wegmans did not have access to its competitor's pricing databases.

33. RetailData did not have access to petitioner's pricing database or any database maintained by any of petitioner's competitors. All of its pricing information was collected during CPAs.

34. Once RetailData collected the pricing information as requested by petitioner, RetailData ran the information through a verification process, which utilized its own proprietary software program, developed using a statistical model that used 15 weeks of historical pricing information. RetailData established acceptable pricing variances based on discussions with its individual customers.

35. Prices that fell outside of a customer's specified variance tolerance were reviewed manually by the RetailData client service manager. A verification determination was made based on factors such as RetailData's historical database, similar store or chain information or item cost fluctuations.

36. RetailData's statistical model also notified data collectors in the field if a price entered fell outside of the variance so that they could attempt to validate the pricing information while still on site.

37. Price points accepted as accurate were placed into petitioner's reports. Prices that were not accepted were generally deleted and never transmitted to petitioner.

38. Once RetailData validated the pricing information, it placed the information into reports according to petitioner's specifications, allowing petitioner to view the data in petitioner's competitive online pricing system for pricing analysts (COPSPA).

39. COPSPA was a proprietary computer software program crated by petitioner to examine pricing information in a way that allowed its pricing team to analyze the data and set store pricing according to its pricing strategy. Through COPSPA, pricing analysts were able to compare competitors' prices, sales and packaging to petitioner's own pricing and cost information.

40. The pricing reports prepared by RetailData and delivered to petitioner contained only information specifically requested in petitioner's schedule of requested audits. The reports did not contain information collected as part of CPAs performed for other clients of RetailData.

41. Once the report was delivered by RetailData into petitioner's COPSPA system, the information was analyzed by a pricing analyst. After comparing the information with its own, petitioner determined its prices in accordance with its pricing strategy.

42. The Division of Taxation (Division) conducted a field audit of petitioner's sales and use tax liability for the audit period and reviewed expense purchase records, capital purchase records and sales records. Based on the audit, the Division determined that additional sales and use tax was due and issued a Statement of Proposed Audit Change, dated August 4, 2011, which asserted additional tax due of $2,005,693.22 plus interest. It is noted that the purchases of information services were not taxed in a prior audit.

43. The Division issued to petitioner a Notice of Determination, dated August 25, 2011, which asserted additional tax due of $1,947,366.42 plus interest. The Notice of Determination noted credits and payments made equal to the full amount of tax and interest due, leaving a balance due of $0.00. The payments were made subsequent to the issuance of the statement of proposed audit change and prior to the issuance of the Notice of Determination.

44. After a conference in the Bureau of Conciliation and Mediation Services (BCMS), an order was issued, dated November 2, 2012, which modified the additional tax due to $1,700,771.74 plus interest. However, the amount of tax determined to be due on the purchases of information services, $227,270.01, plus interest, was not part of the adjustment made by BCMS, and is the amount of tax in issue herein, constituting petitioner's refund claim.

SUMMARY OF THE PARTIES' POSITIONS

45. Petitioner argues that its purchases from RetailData are excluded from the tax imposed on information services by Tax Law § 1105(c)(1) since the information in the reports is personal and individual in nature and was not and may not have been incorporated in reports furnished to others.

46. Petitioner maintains that the facts demonstrate that the pricing information received by petitioner was personal and individual because the information provided by RetailData was dictated by the schedule of requested audits and the combined key item lists, which were created and customized by petitioner to suit its needs and the resulting pricing reports were, therefore, individual and personal in nature. Further, the reports were individual in nature because they were requested and formatted based on unique and proprietary pricing strategies.

47. Petitioner contends that the information included in the reports it purchased was not and may not have been included in reports furnished to others because RetailData conducted CPAs separately for all its clients, and information was not actually incorporated into reports for others. Further, due to the confidentiality of the requests and the quickness with which the pricing information becomes stale, the information RetailData compiled may not have been incorporated substantially into the reports furnished to others.

48. Petitioner argues that the information RetailData provided was not taken from a common database, rather, upon request, it was collected by physically travelling to specific store locations and manually recording the pricing information.

49. Petitioner points out that if there is any doubt as to whether petitioner is eligible for the exclusion from tax under Tax Law § 1105(c)(1), then the statute must be strictly construed in favor of the taxpayer.

50. The Division contends that petitioner does not qualify for the exclusion provided for in Tax Law § 1105(c)(1). The Division believes the purchase of information services by petitioner from RetailData was taxable because it was neither personal nor individual in nature and the information was and may have been substantially incorporated into reports furnished to others.

51. The Division urges that it is the source of the information that determines whether the information is personal or individual in nature and here the source was prices of products taken from store shelves, which the Division maintains was not personal or individual in nature. The Division notes that the second half of the requirement for the exclusion mandates that the information is not or may not be substantially incorporated into reports furnished to others. The Division argues that since a substantial portion of the information could have been furnished to others, the sale of such information was taxable.

52. The Division contends that the substantial incorporation requirement is a test of potentiality, where the critical examination focuses on whether the vendor of the information may sell the same information from the same source to more than one customer. The Division deduces that since a substantial portion of shelf pricing may be provided to more than one customer, the sale is subject to tax.

CONCLUSIONS OF LAW

A. Tax Law § 1105(c)(1) provides that the receipts from every sale, except for resale, of the following services are subject to sales tax:

> The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, and excluding the services of advertising or other agents . . . .

The Division's regulation at 20 NYCRR 527.3, provides as follows:

> (a) *Imposition.* (1) Section 1105(c)(1) of the Tax Law imposes a tax on the receipts from the service of furnishing information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any manner such as by tapes, discs, electronic readouts or displays.
>
> (2) The collecting, compiling or analyzing information of any kind or nature and the furnishing reports thereof to other persons is an information service.
>
> (3) Among the services which are information services are credit reports, tax or stock market advisory and analysis reports and product and marketing surveys.
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> * * *
>
> (b) *Exclusions.* (1) Sales tax does not apply to receipts from sales of information services which are for resale as such.
>
> (2) The sales tax does not apply to the receipts from the sale of information which is personal or individual in nature and which is not or may not be substantially incorporated into reports furnished to other persons by the person who has collected, compiled or analyzed such information.

B. It is uncontested that the written reports sold by RetailData to petitioner constituted the sale of information services. The issue before this forum is whether the pricing reports fell within the exclusion from the tax in Tax Law § 1105(c)(1) for furnishing information that was personal or individual in nature and which was not or may not have been substantially

incorporated in reports furnished to others. For the reasons stated below, it is determined that said reports do not qualify for the exclusion, which exclusion generally must be strictly construed in the taxpayer's favor (***Matter of Towne-Oller & Assoc. v. State Tax Commn.***, 120 AD2d 873 [1986], citing ***Matter of Grace v. New York State Tax Commn.***, 37 NY2d 193 [1975]).

C. The cases interpreting the two elements necessary to qualify for the exclusion, i.e., that the services were personal and individual in nature and not substantially incorporated into reports furnished to others, have consistently scrutinized the provision of information generated from common databases. In ***Matter of Twin Coast Newspapers v. State Tax Commn.*** (101 AD2d 977 [1984], ***appeal dismissed*** 64 NY2d 874 [1985]), the court found information, which was a mere distillation of widely available import and export bulletins, not to be of the uniquely personal nature contemplated by the exemption (like the confidential investigation reports on life insurance applicants in ***Matter of New York Life Ins. Co. v. State Tax Commn.*** [80 AD2d 675 (1981), ***affd*** 55 NY2d 758 (1981)]).

In ***Matter of Towne-Oller***, the court stated that even though reports generated from a common database were somewhat customized for individual customers, the service provided was not of a personal and individual character. There, the information in market reports was gleaned from one general source and the reports contained general information (***see also Matter of Rich Products Corp. v. Chu***, 132 AD2d 175 [1987] [where the court held that, although no two reports were likely to be the same and that the reports were customized in some respects to each client, those factors are not dispositive of entitlement to the exclusion where the information contained in the reports was derived from a single data repository that was not confidential and was widely accessible]).

The foregoing cases speak directly to the facts in the instant matter, where the data in the reports was culled from one general source, competitors' stores, and the reports contained general information, i.e., current prices, that was widely accessible and not confidential. Although there was some customizing of the information, driven by petitioner's specific instructions for each pricing audit, it did not transform the general information to something personal or individual in nature. The restrictions placed on pricing requests such as to perform a directed or undirected audit, specific key item lists, location, long and short term sale pricing and bonus packaging pricing were merely filters used by petitioner to receive the same general information, which then could be transformed by its pricing team into usable pricing strategies.

The courts have been careful to distinguish between general information and that which was highly individualized. In ***Matter of Westwood Pharmaceuticals v. Chu*** (164 AD2d 462 [1990], ***lv denied*** 77 NY2d 807 [1991]), the court found that the reports in issue did not provide the same general information to several subscribers. Most importantly, the court found that there was no common database used for different customers, and the database or "sample frame" developed for each customer was held in strict confidence. The description of the production of the service made it clear that the information generated for Westwood was not the mere culling of general information or extraction of information verbatim from a common database that was then included in a report to it. On the contrary, it was highly individualized information, held in confidence and not incorporated into the reports furnished to other clients (***cf. Matter of ADP Automotive Claims Svc. v. Tax Appeals Tribunal***, 188 AD2d 245 [1993] [where information culled from common database and somewhat customized to respond to the raw data supplied by the client was not eligible for the exclusion]).

RetailData's software, used to verify the accuracy of the pricing information it includes in its reports and its formatting of the report data in a manner readable by petitioner (COPSPA) may somewhat customize the report, but it did nothing to make the pricing information contained in the report any less general, less accessible or more confidential. The value to petitioner was received in the form of fresh prices that its pricing team could use to help formulate a pricing strategy. That transformation was performed entirely by petitioner. The focus in this matter should not be lost. It is that the information transmitted in the reports was general in nature, not confidential and extracted from a common source, and thus not personal or individual in nature.

Although petitioner has gone to great lengths to demonstrate that the information it received in the pricing reports it purchased from RetailData was personal and individual in nature, it began and ended as the prices of products taken from store shelves. As such, it was not confidential or personal and individual in nature and was widely accessible, thus failing to qualify for the exclusion provided for in Tax Law § 1105(c)(1).

This is not to discount the importance the information plays in petitioner's pricing strategies, which, no doubt, are complex and highly confidential. Petitioner and RetailData took steps to protect the requests for the pricing reports and the reports themselves from competitors, which might have been able to discern a strategy based on what products were the subject of analysis. However, neither the marketing strategies nor the steps taken to protect them change the nature of the information in the reports, and the information itself remains widely accessible and not confidential.

D. Although the likelihood that a pricing report produced for petitioner could be identical to one produced for another client of RetailData is de minimis or even mathematically impossible as in ***Rich Products***, this is not sufficient to demonstrate eligibility for the exclusion. The fact

that the reports were generated from a widely accessible common source that was not confidential has been consistently held by the Appellate Division not to be personal or individual in nature. (***ADP Automotive Claims Servs.***)

It is noted that the word "database" has been used by the courts interchangeably with "repository," "common source," "data repository" and possibly other terms that reference a specific pool of information from which information is extracted to create reports that are then sold. The term "database" does not appear in Tax Law § 1105(c)(1) and it is not deemed a term of art for purposes of the statute or the exclusion.

E. Finally, petitioner contends that the Division's failure to find the purchase of the pricing reports taxable on an earlier audit is evidence of the Division's confusion on the issue - stopping short of requesting that the Division be estopped from changing its policy. Regardless of which relief petitioner seeks, it is settled that taxing authorities may take into account a variety of factors in determining the application of the Tax Law to specific transactions and may alter interpretations of the Tax Law prospectively (***Matter of National Elevator Indus. v. New York State Tax Commn.***, 49 NY2d 538 [1980]; ***Matter of AGL Welding Supply Co., Inc.***, Tax Appeals Tribunal, May 11, 1995).

F. The petition of Wegmans Food Markets Inc. is denied.

DATED: Albany, New York
February 19, 2015

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE

(22)

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

WEGMANS FOOD MARKETS, INC. :

for Revision of a Determination or Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2007 through February 28, 2010. :

DECISION
DTA NO. 825347

Petitioner, Wegmans Food Markets, Inc., filed an exception to the determination of the Administrative Law Judge issued on February 19, 2015. Petitioner appeared by Gulotta Law Group, P.C. (Anthony C. Gulotta, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Hall).

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 Albany, New York on September 10, 2015, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner's purchases of pricing information were personal or individual in nature making them eligible for an exclusion from tax on information services provided for in Tax Law § 1105 (c) (1).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 43 and 44 to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. For the period in issue, Wegmans Food Markets, Inc. (Wegmans) was a grocery store chain operating in several states with 50 locations within New York State.

2. From June 1, 2007 through February 28, 2010 (audit period), Wegmans purchased competitive price audits (CPAs) from RetailData Services (RetailData), to reveal how its competitors priced specific items. Such reports accounted for in excess of 99 percent of petitioner's purchases from RetailData during the audit period.

3. The information provided by RetailData in its CPAs was an important step in Wegmans' determination of its own prices in accordance with its pricing strategies.

4. CPAs were either directed or undirected audits. A directed audit gathered prices for specific products as requested by Wegmans or any other RetailData customer. An undirected audit reported on all items in an entire store or in a discrete category selected by Wegmans.

5. Petitioner's pricing team, consisting of pricing managers and several pricing analysts, create specific pricing strategies within different departments and for different items, which are consistent with the company's goals and are used to price items throughout Wegmans' store locations. The pricing team was mindful of the differences between the typical shopping cart in its stores and its competitors, accounted for by location, target markets, store environments, types of inventory and pricing images.

6. Based on petitioner's pricing strategy, the pricing team created schedules of requested audits for entire calendar years, which were provided to RetailData to direct the scope of its CPA

39. COPSPA was a proprietary computer software program created by petitioner to examine pricing information in a way that allowed its pricing team to analyze the data and set store pricing according to its pricing strategy. Through COPSPA, pricing analysts were able to compare competitors' prices, sales and packaging to petitioner's own pricing and cost information.

40. The pricing reports prepared by RetailData and delivered to petitioner contained only information specifically requested in petitioner's schedule of requested audits. The reports did not contain information collected as part of CPAs performed for other clients of RetailData.

41. Once the report was delivered by RetailData into petitioner's COPSPA system, the information was analyzed by a pricing analyst. After comparing the information with its own, petitioner determined its prices in accordance with its pricing strategy.

42. The Division of Taxation (Division) conducted a field audit of petitioner's sales and use tax liability for the audit period and reviewed expense purchase records, capital purchase records and sales records. Based on the audit, the Division determined that additional sales and use tax was due and issued a statement of proposed audit change, dated August 4, 2011, which asserted additional tax due of $2,005,693.22 plus interest. It is noted that the purchases of information services were not taxed in a prior audit.

43. The Division issued to petitioner a notice of determination, dated August 25, 2011, which asserted additional tax due of $1,947,366.42, plus interest. Such additional tax due included $227,270.01 in tax asserted due on petitioner's purchases of information services as described herein. The notice of determination noted credits and payments made equal to the full amount of tax and interest asserted due, leaving a balance due of $0.00. The payments were

made subsequent to the issuance of the statement of proposed audit change and prior to the issuance of the notice of determination.

44. After a conference in the Bureau of Conciliation and Mediation Services (BCMS), an order was issued, dated November 2, 2012, that reduced the tax asserted due to $1,700,771.74, plus interest. The conciliation order did not reduce the amount of tax asserted due on the purchases of information services. The petition filed in the present matter protests only the assertion of tax due on petitioner's purchases of information services.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that the information services purchased by petitioner were not personal or individual in nature and were therefore subject to sales tax pursuant to Tax Law § 1105 (c) (1). In reaching this conclusion, the Administrative Law Judge observed that the information in RetailData's reports to petitioner was culled from one general source - the stores of petitioner's competitors - and that such reports contained general pricing information that was widely accessible and not confidential. While there was some customizing of the information, given petitioner's specific instructions for each pricing audit, RetailData's verification process, and the formatting of the report data in a manner readable by petitioner, the Administrative Law Judge concluded that such customization did not transform the information provided by RetailData from general pricing information to information that was personal or individual in nature. The Administrative Law Judge noted that the information provided to petitioner began and ended as the prices of products on supermarket shelves.

The Administrative Law Judge also noted that, under the relevant case law, the extreme unlikelihood that a RetailData pricing report produced for petitioner could be identical to one produced for another client of RetailData was not sufficient to demonstrate eligibility for the

exclusion. He found that the case law has consistently held that, where reports are generated from a widely accessible common source that is not confidential, then such reports are not personal or individual in nature within the meaning of Tax Law § 1105 (c) (1).

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner contends that the reports that it purchases from RetailData were personal and individual in nature because it specifically requested that RetailData gather all of the information contained therein. While the information gathered may have been general in nature, petitioner asserts that such general information is transformed into something personal when a report is based entirely on a customized request. Petitioner thus asserts that the Administrative Law Judge improperly focused in the source of the raw data, rather than the nature of the information contained in the reports.

Petitioner also contends that, although the Administrative Law Judge did not specifically rule on this point, his findings of fact show that petitioner's reports were not substantially incorporated into reports that RetailData furnished to other persons. Petitioner argues that it was inconsistent for the Administrative Law Judge to determine that RetailData's reports were prepared from a common source of information (or common database, as petitioner puts it), yet also find that information from any report is not substantially incorporated into any other report. Petitioner contends that substantial incorporation does not exist herein because RetailData does not rely on a database to gather its data.

Petitioner also argues that RetailData's process of "compiling, interpreting, analyzing, formatting, and verifying" the collected data converts such data into new data, which is personal and individual to petitioner. Petitioner asserts that the pricing data that sits on supermarket shelves has little value to it because such data has not been processed.

Petitioner contends that the Administrative Law Judge erroneously concluded that RetailData gathered pricing information from a common database or common source. Petitioner asserts that this interpretation of "common source" is too broad and is inconsistent with the relevant case law.

The Division contends that the determination correctly found that the information service at issue was taxable. More specifically, the Division contends that the information sold by RetailData to petitioner was not personal or individual in nature because it comes from a widely accessible public source. Contrary to petitioner's assertion, the Division further contends that the customization of the pricing information does not transform it into something that is personal or individual. The Division also contends that each of petitioner's reports contains data that might be provided to other customers of RetailData. Therefore, the Division asserts, the subject information service does not satisfy the substantial incorporation criterion for exclusion.

OPINION

Recently, in ***Matter of RetailData, LLC*** (Tax Appeals Tribunal, March 3, 2016), this Tribunal determined that the information service that is the subject of the present matter was taxable pursuant to Tax Law § 1105 (c) (1). For the same reasons, we reach the same conclusion herein. Below we discuss the basis for our conclusion and also address the specific arguments raised by petitioner in its exception.

Tax Law § 1105 (c) (1) imposes tax upon the receipts from every retail sale of an information service, defined as follows:

> "The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, *but excluding the furnishing of information which is personal or individual in nature and which is not or may not*

be substantially incorporated in reports furnished to other persons. . ."
(Emphasis added).

Tax Law § 1105 (c) (9) extends the taxation of information services to those provided by telephony or telegraphy, with the same exclusion.

There is no question that RetailData is in the business of collecting and compiling information and furnishing reports thereof to its clients, including petitioner. Petitioner thus purchased from RetailData an information service within the meaning of Tax Law § 1105 (c) (1) (***see*** 20 NYCRR 527.3 [a] [2]). What is in question is whether the information that petitioner purchased from RetailData is "personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons" (Tax Law § 1105 [c] [1]). If the subject information service meets these criteria, then petitioner's purchases of this service are excluded from sales tax.

Our resolution of this dispute is guided by the rule of construction that requires exclusions from taxation to be strictly interpreted in the taxpayer's favor (***Matter of Towne-Oller & Assoc. v State Tax Commn.*** 120 AD2d 873, 874 [1986]). Nevertheless, the burden of proof remains with petitioner to establish entitlement to the exclusion (***Matter of Sungard Sec. Fin. LLC***, Tax Appeals Tribunal, March 16, 2015).

The "personal or individual" component of the exclusion at issue "refers to uniquely personal information" (***Matter of Allstate Ins. Co. v State Tax Commn.***, 115 AD2d 831, 834 [1985], ***affd*** 67 NY2d 999 [1986]). By this notion, motor vehicle reports taken from records maintained by the Department of Motor Vehicles, to which there is unlimited public access, are not considered personal or individual in nature (***id.***). In contrast, confidential investigative character reports based on personal interviews that are used to determine the insurance risk

presented by applicants for life and health insurance policies are considered "uniquely personal" (*see Matter of New York Life Ins. Co. v State Tax Commn.*, 80 AD2d 675 [1981], *affd* 55 NY2d 758 [1981] ["It is somewhat difficult to imagine how any information could be more personal or individual"] [80 AD2d at 677]).

The pricing information that petitioner purchases from RetailData is obtained from products on the shelves of supermarkets that are open to the public. There is nothing "uniquely personal" about the price of an item in a supermarket. Furthermore, such information is obviously not confidential, as it is accessible to anyone who enters a store. These facts thus indicate that the information provided by RetailData to petitioner is non-personal and non-individual in nature and therefore taxable. A closer comparison of the present matter and *Matter of Allstate Ins. Co. v State Tax Commn.* makes it clear that this conclusion is correct.

In *Matter of Allstate*, the information service provider was in the business of obtaining motor vehicle reports of specific motorists from the Department of Motor Vehicles at its customer's direction. Here, RetailData is in the business of obtaining pricing information from supermarkets at petitioner's direction. While the specific means by which the information was collected and provided differs in the two cases, such differences are insignificant. What matters is that in each case an information service provider was directed by its customer to obtain and provide specific non-personal and non-individual information and did so. In *Matter of Allstate*, the court held that the service was a taxable information service and, consistent with that holding, we reach the same conclusion here.

We reject petitioner's contention that its customized requests for pricing data transformed the generalized pricing information on supermarket shelves into personal or individual information. "[T]he fact that no two reports to different customers are likely to be the same and

that such reports are customized in some respects to respond to the needs of the particular client is not dispositive of entitlement to the exclusion" (***Rich Prods. Corp. v Chu***, 132 AD2d 175 [1987], ***lv denied*** 72 NY2d 802 [1988]). Accordingly, the question to be answered to determine eligibility for the exclusion is whether the information in the report is uniquely personal; it is not whether each report is the same (***see Matter of Towne-Oller & Assoc. v State Tax Commn.*** 120 AD2d at 874 ["Although there is some customizing of reports for individual customers by petitioner, the service provided is not of a personal and individual character."]). Indeed, petitioner's contention is directly at odds with ***Matter of Allstate***. In that case, all of the requests by the insurance company for motor vehicle reports appear to have been "entirely customized." That is, the insurance company requested motor vehicle reports associated with specific drivers. As noted, the court found that the exclusion from the tax on information services did not extend to such reports.

We also disagree with petitioner's contention that the data gathered by RetailData is transformed into personal or individual information by RetailData's process of "compiling, interpreting, analyzing, formatting, and verifying." As discussed, the compilation of information, even if the request is customized, is insufficient to meet the personal or individual requirement. As to interpretation and analysis, we find that the information in the reports regarding various indicators denoting sale prices and related information (***see*** finding of fact 9) is simply more pricing information and thus does not change the nature of the information provided. Additionally, we agree with the Administrative Law Judge's conclusion that RetailData's verification procedures and its formatting of the report data so as to be readable by petitioner's computer software "did nothing to make the pricing information contained in the report any less general, less accessible or more confidential."

Consistent with the foregoing discussion, we reject petitioner's assertion that RetailData converted raw data into new data similar to the information service provider in ***Westwood Pharms. v Chu*** (164 AD2d 462 [1990], ***lv denied*** 77 NY2d 807 [1991]). In that case, after collecting raw data, mostly from the client, the information service provider converted the raw data into new data (called a "sample frame") using confidential analytic and statistical procedures. The reports provided to the client consisted of such new data, which was unique and confidential. The court held that the reports qualified for the exclusion from tax on information services because they were personal and individual in nature and the information contained in the reports could not be substantially incorporated into reports furnished to others. Most important to the court's conclusion was that the information provided to the client was prepared from this new data (***see*** 164 AD2d at 467).

In the present matter, in contrast to the facts in ***Westwood Pharms.***, RetailData did not create any new information (the noted "compiling, interpreting, analyzing, formatting, and verifying" notwithstanding). Rather, as the Administrative Law Judge put it, the information provided by RetailData to petitioner "began and ended as the prices of products taken from store shelves." ***Westwood Pharms.*** is thus distinguishable.

We also disagree with petitioner's contention that the Administrative Law Judge erroneously interpreted the common source or common database rule, as discussed in cases that have examined the issue of whether information is "personal or individual in nature." Such cases have consistently held that where "the provided service comes from a common source or a data repository that is not confidential and is widely accessible," then it is not "personal or individual in nature" (***Matter of ADP Automotive Claims Servs., Inc. v Tax Appeals Trib.*** 88 AD.2d 245, 248 [1993], ***lv denied*** 82 NY2d 655 [1993], citing ***Rich Prods. Corp. v Chu***, 132 AD2d 175

[1987], ***lv denied*** 72 NY2d 802 [1988] [information in reports derived from data collected by information service provider from hundreds of grocery warehouses] and ***Towne-Oller & Assoc.*** [information service provider obtained information contained in reports by purchasing data from wholesalers and distributors]). Additional examples of cases involving a common source or data repository include ***Matter of Allstate*** [information in reports taken from public records to which there was unlimited public access]) and ***Matter of Twin Coast Newspapers v State Tax Commn.***, 101 AD2d 977 [1984], ***appeal dismissed*** 64 NY2d 874 [1985] [information in reports extracted from two weekly newspapers published by the information service provider]).

In the present matter, the relevant information sits on supermarket shelves until compiled by RetailData. This does not differ significantly from the situation in ***Matter of Allstate***, where data resided in the electronic records of the Department of Motor Vehicles until removed by the DMV at the information service provider's specific request. As noted previously, there is no question that the information collected by RetailData is widely accessible. There is also no question that the same source of information, i.e., any given supermarket, may become the source of a competitive price audit for another client of RetailData. Accordingly, we find that the information purchased by petitioner "comes from a common source . . . that is not confidential and is widely accessible" within the meaning of ***Matter of ADP Automotive Claims Servs., Inc.*** and the line of cases cited above.

Also on this point, we note our disagreement with petitioner's contention that the common database rule requires that the raw data be extracted from a pool of information that was previously compiled into an electronic database or a published bulletin. ***Matter of ADP Automotive Claims Servs., Inc.*** provides that the common source of information must be "widely accessible" and not that such information must be in any particular format. In our view,

a supermarket is such a "widely accessible" source for the purpose of obtaining the prices of the items contained therein.

Our conclusion that the information provided to petitioner by RetailData was not "personal or individual in nature" within the meaning of Tax Law § 1105 (c) (1) is sufficient to establish that the service at issue is taxable. Accordingly, we do not address the issue of whether the information in question met the second criterion necessary to merit exclusion from tax, i.e., whether such information "is not or may not be substantially incorporated in reports furnished to other persons."

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Wegmans Food Markets, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Wegmans Food Markets, Inc. is denied; and

4. The notice of determination, dated August 25, 2011, as modified by the conciliation order, dated November 2, 2012, is sustained.

DATED: Albany, New York
March 10, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner

Wegmans Food Mkts., Inc. v. Tax Appeals Tribunal of N.Y.

Decision Date:	22 November 2017
Citation:	65 N.Y.S.3d 296, 155 A.D.3d 1352
Parties:	In the Matter of WEGMANS FOOD MARKETS, INC., Petitioner, v. TAX APPEALS TRIBUNAL OF the STATE of New York et al., Respondents.
Court:	New York Supreme Court — Appellate Division

Id. vLex Fastcase: VLEX-885546987

Link: https://fastcase.vlex.com/vid/wegmans-food-mkts-inc-885546987

155 A.D.3d 1352

65 N.Y.S.3d 296

In the Matter of WEGMANS FOOD MARKETS, INC., Petitioner,

v.TAX APPEALS TRIBUNAL OF the STATE of New York et al., Respondents.

Supreme Court, Appellate Division, Third Department, New York.

Nov. 22, 2017.[*297]

Ward Greenberg Heller & Reidy LLP, Rochester (Jeffrey J. Harradine of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, Albany (Frederick A. Brodie of counsel), **[*298]** for Commissioner of Taxation and Finance, respondent.

Before: EGAN JR., J.P., DEVINE, CLARK, MULVEY and RUMSEY, JJ.

EGAN JR., J.P.**[**1352]**

Proceeding pursuant to CPLR article 78 (initiated in this Court pursuant to Tax Law § 2016) to review a determination of respondent Tax Appeals Tribunal denying petitioner's request for certain refunds of sales and use tax imposed under Tax Law articles 28 and 29.

Petitioner is a regional supermarket chain headquartered in the City of Rochester, Monroe County, which operates retail locations in several states, including approximately 50 locations throughout New York. As part of its business operations, petitioner monitors the

retail prices charged by its competitors in order to competitively price its products in accordance with its pricing strategy. Since 1995, petitioner has contracted with RetailData, LLC for the provision of competitive price audits (hereinafter CPAs) or price checks in order to determine how much its competitors charge for certain specifically requested retail products. RetailData collects this raw data and compiles it into a report, according to certain specifications provided by petitioner, that petitioner thereafter uses to inform its pricing strategies. In 2011, the Department of Taxation and Finance conducted an audit of petitioner's sales and use tax liability for **[**1353]** the period between June 2007 and February 2010. Following the audit, the Department determined that petitioner's purchase of CPAs from RetailData, and the corresponding reports derived therefrom, constituted the purchase of taxable information services (*see* Tax Law § 1105[c][1]) and issued a notice of determination imposing upon petitioner an additional tax amount due of $227,270.01 for the relevant time period. Petitioner thereafter filed a petition in the Division of Tax Appeals challenging the determination and seeking a redetermination and refund of its sales tax liability. Following a hearing, an Administrative Law Judge (hereinafter ALJ) sustained the determination, concluding that the CPAs and written reports produced by RetailData and purchased by petitioner did not fall within the applicable exclusion from the imposition of sales tax because the information purchased was not, among other things, personal and individual in nature to petitioner (*see* Tax Law § 1105[c][1]). Petitioner filed an exception to the ALJ's determination and, following a hearing, respondent Tax Appeals Tribunal affirmed the ALJ's determination. Petitioner then commenced this proceeding, seeking to, among other things, annul the Tribunal's determination.

This Court's review of the Tribunal's determination is limited. So long as the Tribunal's determination is rationally based and is supported by substantial evidence, it must be confirmed, even where a different conclusion is reasonable (*see Matter of American Food & Vending Corp. v. New York State Tax Appeals Trib.*, 144 A.D.3d 1227, 1228, 41 N.Y.S.3d 572 [2016] ; *Matter of Hwang v. Tax Appeals Trib. of the State of N.Y.*, 105 A.D.3d 1151, 1152, 963 N.Y.S.2d 423 [2013]). "Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom," the courts are generally deferential "to the governmental agency charged with responsibility for administration of the statute" (*Matter of Colt Indus. v. New York City Dept. of Fin.*, 66 N.Y.2d 466, 470–471, 497 N.Y.S.2d 887, 488 N.E.2d 817 [1985] [internal quotation marks, brackets and citation omitted]); however, if "the **[*299]** question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely upon any special competence or expertise of the administrative agency and its interpretive regulations are, therefore, to be accorded much less weight" (*Matter of New York Life Ins. Co. v. State Tax Commn.*, 80 A.D.2d 675, 676, 436 N.Y.S.2d 380 [1981], *affd.* 55 N.Y.2d 758, 447 N.Y.S.2d 245, 431 N.E.2d 970 [1981]). The burden is on the taxpayer to establish that the determination being challenged clearly falls within the applicable exclusion (*see* ***[**1354]*** *Matter of 677 New Loudon Corp. v. State of N.Y. Tax Appeals Trib.*, 19 N.Y.3d 1058, 1060, 955 N.Y.S.2d 795, 979 N.E.2d

1121 [2012], *cert. denied* 571 U.S. ——, 134 S.Ct. 422, 187 L.Ed.2d 280 [2013] ; *Matter of American Food & Vending Corp. v. New York State Tax Appeals Trib.*, 144 A.D.3d at 1228, 41 N.Y.S.3d 572). "Where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning" (*Matter of Charter Dev. Co., L.L.C. v. City of Buffalo*, 6 N.Y.3d 578, 581, 815 N.Y.S.2d 13, 848 N.E.2d 460 [2006] [internal quotation marks, brackets and citation omitted]); however, in the event of ambiguity, " where, as here, an exclusion rather than an exemption is involved, the statute must be strictly construed in favor of the taxpayer" (*Matter of New York Life Ins. Co. v. State Tax Commn.*, 80 A.D.2d at 676, 436 N.Y.S.2d 380 ; *see Matter of Grace v. New York State Tax Commn.*, 37 N.Y.2d 193, 196, 371 N.Y.S.2d 715, 332 N.E.2d 886 [1975] ; *Matter of Towne–Oller & Assoc. v. State Tax Commn.*, 120 A.D.2d 873, 874 n., 502 N.Y.S.2d 544 [1986] ; *Matter of Greco Bros. Amusement Co. v. Chu*, 113 A.D.2d 622, 624, 497 N.Y.S.2d 206 [1986] ; *but see Matter of Mobil Oil Corp. v. Finance Adm'r of City of N.Y.*, 58 N.Y.2d 95, 99, 459 N.Y.S.2d 566, 446 N.E.2d 130 [1983]).1

Petitioner contends that the Tribunal erred as a matter of law by determining that its purchase of pricing information from RetailData was not personal and individual in nature and, therefore, not subject to the tax exclusion provided by Tax Law § 1105(c)(1). As relevant here, Tax Law § 1105(c)(1) provides that sales tax may be imposed upon the sale of the service of "furnishing ... information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons." Tax Law § 1105(c)(1) excludes from sales tax, however, "the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons" (*see Westwood Pharms. v. Chu*, 164 A.D.2d 462, 465, 564 N.Y.S.2d 1020 [1990], *lv. denied* 77 N.Y.2d 807, 569 N.Y.S.2d 610, 572 N.E.2d 51 [1991] ; *Matter of New York Life Ins. Co. v. State Tax Commn.*, 80 A.D.2d at 676, 436 N.Y.S.2d 380).

There is no dispute that the CPAs and written reports that RetailData provided to petitioner qualify as an information service, as their primary purpose is to **[*300]** disseminate information (*see **[**1355]** Matter of Towne–Oller & Assoc. v. State Tax Commn.*, 120 A.D.2d at 873–874, 502 N.Y.S.2d 544). Accordingly, as the Tribunal properly delineated, the primary issue to be determined is whether the information furnished in these CPAs and written reports "is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons" (Tax Law § 1105[c][1]). Respondent Commissioner of Taxation and Finance argues that, inasmuch as the raw data that served as the basis for RetailData's CPAs and written reports consisted solely of pricing information obtained from products on the shelves of supermarkets that were open to the public, the information furnished was not personal or individual in nature, as the data clearly derived from a common source or data repository.

While there is no question that the pricing information that RetailData collects on petitioner's behalf is information that is available to the public, we agree with petitioner

that, under the circumstances presented here, such information does not derive from a singular, widely accessible common source or database as that test has previously been applied and commonly understood in determining the applicability of the subject tax exclusion (*see Matter of ADP Automotive Claims Servs. v. Tax Appeals Trib.*, 188 A.D.2d 245, 246–247, 594 N.Y.S.2d 96 [1993], *lv. denied* 82 N.Y.2d 655, 602 N.Y.S.2d 804, 622 N.E.2d 305 [1993] [information derived from database of autopart prices and estimate installation times]; *Matter of Rich Prods. Corp. v. Chu*, 132 A.D.2d 175, 521 N.Y.S.2d 865 [1987] ; *Matter of Towne–Oller & Assoc. v. State Tax Commn.*, 120 A.D.2d at 874, 502 N.Y.S.2d 544 [information derived from tapes from wholesalers and distributors identifying products and stores]; *Allstate Ins. Co. v. Tax Commn. of State of N.Y.*, 115 A.D.2d 831, 831–832, 495 N.Y.S.2d 789 [1985], *affd.* 67 N.Y.2d 999, 502 N.Y.S.2d 1004, 494 N.E.2d 109 [1986] [information derived from motor vehicle reports accessible in the Department of Motor Vehicles]). Here, based on its own unique and confidential pricing strategy, petitioner provided RetailData with its collection criteria for the audits to be performed, including the specific stores that it wanted RetailData to audit, the specific pricing information that it wanted RetailData to collect and the frequency with which it wanted these audits to be conducted. Such requests routinely involved RetailData auditing multiple competing supermarkets chains and multiple retail locations within each competing chain.2 RetailData would then physically send data collectors to each individual location to manually record the **[**1356]** requested pricing information. To the extent that the pricing information for each of petitioner's competitors regularly fluctuated accordingly to their own unique pricing strategies, there was no singular preexisting common source or data repository that RetailData could access to timely obtain the specific pricing information that petitioner had requested. The data requested, therefore, was not collected from one general source (*see Westwood Pharms. v. Chu*, 164 A.D.2d at 466–467, 564 N.Y.S.2d 1020).

Significantly, once the raw data or specified pricing information was collected, pursuant to RetailData's collection methodology, it was maintained as a separate and **[*301]** distinct work component or database for RetailData's sole use in preparing its written report for petitioner. This information, therefore, was not maintained in a general database that was viewable or for use by any of RetailData's other clients,3 there is no evidence that any such information ever was shared with other clients and, significantly, the contract between petitioner and RetailData contained a confidentiality provision that expressly prohibited RetailData from providing any such information to third parties. RetailData then analyzed and verified the information through its own propriety software according to specifications set forth by petitioner, and a written report was generated in a customized format pursuant to petitioner's specifications that was only compatible with petitioner's propriety price management system.4 At all relevant times throughout the process, therefore, the information furnished to petitioner was uniquely tailored to petitioner's specifications and was related exclusively to implementation of its confidential pricing strategy. On the record before us, therefore, we find that the information services that petitioner purchased from RetailData were personal or individual in nature and were not substantially incorporated

into reports of others such that petitioner's purchase of these information services should have been excluded from taxation pursuant to Tax Law § 1105(c)(1) (*see Westwood Pharms. v. Chu*, 164 A.D.2d at 465–466, 564 N.Y.S.2d 1020 ; *Matter of [**1357] New York Life Ins. Co. v. State Tax Commn.*, 80 A.D.2d at 677, 436 N.Y.S.2d 380 ; *see also* N.Y. St. Dept. of Taxation & Fin. Advisory Op. No. TSB–A–17[12]S, at 1–3; *compare*

Matter of ADP Automotive Claims Servs. v. Tax Appeals Trib., 188 A.D.2d at 246–248, 594 N.Y.S.2d 96 ; *Matter of Towne–Oller & Assoc. v. State Tax Commn.*, 120 A.D.2d at 874, 502 N.Y.S.2d 544).5 In our view, to expand the interpretation of Tax Law § 1105(c)(1) to allow for the Tribunal's denial of the subject tax exclusion based solely on the fact that the information ultimately furnished derived from a public source would, under the circumstances presented, serve to defeat the purpose of the exclusion (*see Matter of*

New York Life Ins. Co. v. State Tax Commn., 80 A.D.2d at 677–678, 436 N.Y.S.2d 380).

DEVINE, CLARK, MULVEY and RUMSEY, JJ., concur.

ADJUDGED that the determination is annulled, without costs, and petition granted.

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1 Although we note that *Matter of Mobil Oil Corp. v. Finance Adm'r of City of N.Y.*, 58 N.Y.2d 95, 99, 459 N.Y.S.2d 566, 446 N.E.2d 130 (1983) indicates that exclusions are to be construed against the taxpayer, to the extent that the proposition in *Mobil* relies upon precedent that refers to exemptions rather than exclusions (*see Matter of Young v. Bragalini*, 3 N.Y.2d 602, 605–606, 170 N.Y.S.2d 805, 148 N.E.2d 143 [1958] ; *Matter of Schwartzman*, 262 App.Div. 635, 636, 30 N.Y.S.2d 882 [1941], *affd.* 288 N.Y. 568, 42 N.E.2d 22 [1942]), we find that, as this Court previously held in *Matter of Towne–Oller & Assoc. v. State Tax Commn.*, 120 A.D.2d at 874 n., 502 N.Y.S.2d 544, precedent indicates otherwise.

2 In performing its CPAs, RetailData conducted either directed audits wherein petitioner would provide a specific "key item list" for certain retail products that it wanted RetailData to audit at certain specified retail locations or it would conduct an undirected audit, wherein petitioner would request RetailData to audit a whole category of products (i.e., dairy or cosmetics) at certain specified retail locations.

3 Although it was certainly possible that two of RetailData's customers could request the same pricing information for a particular item at a particular retail location (*compare Matter of Towne–Oller & Assoc. v. State Tax Commn.*, 120 A.D.2d at 873–874, 502 N.Y.S.2d 544), the evidence clearly indicated that, despite any such overlap, RetailData did not use data it collected for one client to complete a price audit for another client.

4 Specifically, RetailData would analyze the raw data collected and, where appropriate, remove outlying information based upon pricing information that appeared to be

historically inconsistent within a specified time frame or was otherwise collected outside the requested time frame.

5 Although the Tribunal did not make an express finding regarding whether the information service that RetailData furnished to petitioner was not and could not be substantially incorporated into reports produced for other persons or entities (*see* Tax Law § 1105[c][1]), we find remittal unnecessary to the extent that our independent factual review of the record reveals ample evidence in support of such finding (*see* CPLR 7804[g]).

Wegmans Food Markets, Inc. v. Tax Appeals Tribunal of State

Decision Date:	27 June 2019
Docket Number:	No. 56, 56
Citation:	131 N.E.3d 876, 33 N.Y.3d 587, 107 N.Y.S.3d 769
Parties:	In the Matter of WEGMANS FOOD MARKETS, INC., Respondent, v. TAX APPEALS TRIBUNAL OF the STATE of New York, Respondent, Commissioner of Taxation and Finance of the State of New York, Appellant.
Court:	New York Court of Appeals Court of Appeals

Id. vLex Fastcase: VLEX-887550776

Link: https://fastcase.vlex.com/vid/wegmans-food-markets-inc-887550776

33 N.Y.3d 587

131 N.E.3d 876

107 N.Y.S.3d 769

In the Matter of WEGMANS FOOD MARKETS, INC., Respondent,

v.TAX APPEALS TRIBUNAL OF the STATE of New York, Respondent,Commissioner of Taxation and Finance of the State of New York, Appellant.

No. 56

Court of Appeals of New York.

Decided June 27, 2019

OPINION OF THE COURT

FEINMAN, J.**[*590]**

Tax Law § 1105(c)(1) imposes a sales tax on certain information services, "but exclud[es] the furnishing of information which is personal or individual in nature and which is not or may not be

substantially incorporated in reports furnished to other persons." In this CPLR article 78 proceeding, we hold that respondent Tax Appeals Tribunal of the State of New York (the Tribunal) rationally determined that the information services receipts at issue were not excluded from the tax.

I.

Petitioner Wegmans Food Markets, Inc. is a regional supermarket chain that operates throughout New York. Wegmans monitors its competitors' retail prices as part of its pricing strategy. Since 1995, Wegmans has engaged RetailData, LLC to perform such monitoring through competitive price audits (CPAs). Wegmans selects the products and period covered by a CPA and which of its competitors, and their specific locations, RetailData should surveil. RetailData's data collectors then travel to the locations specified in Wegmans's request and collect the information by scanning prices from the store shelves using scanners or smart phones. After collecting the prices, RetailData validates the information, creates reports, and furnishes the reports to Wegmans in its requested format. The CPAs and the resulting reports are kept confidential to prevent Wegmans's competitors from discovering the products it monitors and its pricing strategies.

The New York State Department of Taxation and Finance (the Department) conducted an audit of Wegmans's sales and use tax liability for the period June 2007 through February 2010. During the audit, the Department concluded that Wegmans's purchases of CPAs and the corresponding reports from RetailData were taxable receipts under Tax Law § 1105(c)(1). After the Department issued a notice of determination imposing additional sales tax, Wegmans petitioned the Division of Tax Appeals challenging the determination. Wegmans sought a refund of the money it **[**878]** paid to satisfy the tax liability, arguing that "the services rendered by RetailData qualify as an exempt information service **[***771]** which is 'personal and individual in nature.' "

Following an evidentiary hearing, an administrative law judge (ALJ) denied the petition. Upon Wegmans's exception to the ALJ's determination, the Tribunal, among other things, affirmed. **[*591]**

It concluded that the information services at issue do not qualify for section 1105(c)(1)'s exclusion because the data in the CPA reports was culled from supermarket store shelves, which are widely-accessible and contain non-confidential data. In addition, although there was some customization of the information, that process did not render the information personal or individual in nature. Given its determination, the Tribunal declined to reach the exclusion's second requirement, that is, whether the information may be substantially incorporated into reports furnished to RetailData's other clients. Wegmans commenced this CPLR article 78 proceeding against the Tribunal and respondent Commissioner of Taxation and Finance of the State of New York (the Commissioner) in the Appellate Division pursuant to Tax Law § 2016, seeking a judgment annulling the Tribunal's determination.

The Appellate Division granted the petition and annulled the Tribunal's determination. Initially, the Court stated that "in the event of ambiguity, where, as here, an exclusion rather than an exemption is involved, the statute must be strictly construed in favor of the taxpayer" (155 A.D.3d 1352, 1354, 65 N.Y.S.3d 296 [3d Dept. 2017] [internal quotation marks and citation omitted]). The Court recognized "that *Matter of Mobil Oil Corp. v. Finance Adm'r of City of N.Y.*, 58 N.Y.2d 95, 99, 459 N.Y.S.2d 566, 446 N.E.2d 130 (1983) indicates that exclusions are to be construed

against the taxpayer" (155 A.D.3d at 1354 n. 1, 65 N.Y.S.3d 296). However, the Court disagreed with our statement of law, explaining that "the proposition in [*Matter of Mobil Oil Corp.*] relies upon precedent that refers to exemptions rather than exclusions" (*id.*).

Turning to application of the statutory exclusion, the Court acknowledged that "the pricing information that RetailData collects on [Wegmans's] behalf is information that is available to the public," but nonetheless concluded that "such information does not derive from a singular, widely accessible common source or database as that test has previously been applied and commonly understood in determining the applicability of the subject tax exclusion" (*id.* at 1355). The Court further determined that "the information furnished to [Wegmans] was uniquely tailored to [its] specifications and was related exclusively to implementation of its confidential pricing strategy" (*id.* at 1356). Accordingly, Wegmans's "purchase of these information services should have been excluded from taxation" because "the information services that [Wegmans] purchased from RetailData were personal or individual in nature and **[*592]** were not substantially incorporated into reports of others" (*id.*).1 We granted the Commissioner leave to **[**879]** appeal from the Appellate Division judgment, and now reverse.**[***772]**

II.

In *Matter of Mobil Oil Corp.*, we concluded: "In the case of statutory exclusions, the presumption is in favor of the taxing power" (58 N.Y.2d at 99, 459 N.Y.S.2d 566, 446 N.E.2d 130). We reaffirm this straightforward statement of law in light of the Appellate Division's refusal to apply it. By doing so, we neither state a new rule under which "the taxpayer always loses" (concurring op. at 596, 107 N.Y.S.3d at 775, 131 N.E.3d at 882) nor overrule *Matter of Grace v. New York State Tax Commn.*, 37 N.Y.2d 193, 371 N.Y.S.2d 715, 332 N.E.2d 886 [1975], ***rearg. denied*** 37 N.Y.2d 816 [1975]), despite the concurrence's hyperbolic claims to the contrary. We reiterate our settled rule of construction to ensure consistent application of taxing statutes in the face of our colleagues' apparent invitation for continued evasion (*see* concurring op. at 602, 107 N.Y.S.3d at 779, 131 N.E.3d at 886; Wilson, J., dissenting op. at 604, 107 N.Y.S.3d at 780–81, 131 N.E.3d at 887–88).

In general, "[a] statute which levies a tax is to be construed most strongly against the government and in favor of the citizen" (*Matter of Grace*, 37 N.Y.2d at 196, 371 N.Y.S.2d 715, 332 N.E.2d 886 [internal quotation marks and citation omitted]; *see Matter of Mobil Oil Corp.*, 58 N.Y.2d at 99, 459 N.Y.S.2d 566, 446 N.E.2d 130). "The principle is, however, applicable only in determining whether property, income, a transaction[,] or event is subject to taxation" (*Matter of Grace*, 37 N.Y.2d at 196, 371 N.Y.S.2d 715, 332 N.E.2d 886). "[T]he rule is otherwise with respect to the taxpayers' right to exclude items from taxation" (*Matter of Mobil Oil Corp.*, 58 N.Y.2d at 99, 459 N.Y.S.2d 566, 446 N.E.2d 130). In other words, when the matter at issue "is subject to the taxing statute," but the question is whether taxation is negated by a statutory exclusion or exemption, "a different rule applies" (*Matter of Grace*, 37 N.Y.2d at 196, 371 N.Y.S.2d 715, 332 N.E.2d 886). In that instance, "the presumption is in favor of the taxing power" (*Matter of Mobil Oil Corp.*, 58 N.Y.2d at 99, 459 N.Y.S.2d 566, 446 N.E.2d 130 ; *see Matter of Grace*, 37 N.Y.2d at 196, 371 N.Y.S.2d 715, 332 N.E.2d 886).

In defining the applicable rules for construing tax statutes, we have not differentiated between exemptions, exclusions, **[*593]** and deductions (*see Matter of 677 New Loudon Corp. v. State of N.Y. Tax Appeals Trib.*, 19 N.Y.3d 1058, 1060, 955 N.Y.S.2d 795, 979 N.E.2d 1121 [2012], ***rearg.***

denied 20 N.Y.3d 1024, 960 N.Y.S.2d 60, 983 N.E.2d 1244 [2013], *cert denied* 571 U.S. 952, 134 S.Ct. 422, 187 L.Ed.2d 280 [2013] ; *Matter of Charter Dev. Co., L.L.C. v. City of Buffalo,* 6 N.Y.3d 578, 582, 815 N.Y.S.2d 13, 848 N.E.2d 460 [2006]).2 Contrary to the Appellate Division's conclusion (*see also Matter of Towne–Oller & Assoc. v. State Tax Commn.,* 120 A.D.2d 873, 874 n., 502 N.Y.S.2d 544 [3d Dept. 1986]) and Wegmans's argument, our cases in this regard do not turn on syntactical errors conflating these concepts. Rather, we have adopted a functional analysis that affords a singular and workable rule for construing exemptions, exclusions, and deductions, each of which operate to negate **[**880]** the taxpayer's obligation to pay the otherwise applicable tax.

In *Matter of Grace,* for instance, we concluded that "[t]he same rules apply" to **[***773]** deductions and exemptions because "[a] deduction is functionally a particularized species of exemption from taxation" (37 N.Y.2d at 197, 371 N.Y.S.2d 715, 332 N.E.2d 886). We explained that "[a]n exemption from taxation" and, therefore, a deduction, "must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption" (*id.* at 196, 371 N.Y.S.2d 715, 332 N.E.2d 886 [internal quotation marks and citation omitted]). "Indeed, if a statute or regulation authorizing an exemption is found, it will be construed against the taxpayer" (*id.* [internal quotation marks and citation omitted]). "This is because an exemption is not a matter of right, but is allowed only as a matter of legislative grace" (*id.*). Still, "the interpretation should not be so narrow and literal as to defeat [the exemption's] settled purpose" (*id.*).

The concurrence concedes, as it must, that *Matter of Grace* did "not expressly state that ambiguities in statutory *exclusions* are interpreted in favor of the taxpayer" (concurring op. at 598, 107 N.Y.S.3d at 776, 131 N.E.3d at 883). *Matter of Grace* did not make this statement because it is not the law. Rather than overrule *Matter of Grace,* in *Matter of Mobil Oil Corp.* we extended the functional approach, relying on the analysis previously applied to exemptions and deductions. On the strength of this analysis, we held that, like exemptions, "[t]ax exclusions are never presumed or preferred and before [a] petitioner may have the benefit of them, the **[*594]** burden rests on [the petitioner] to establish that the item comes within the language of the exclusion" (*Matter of Mobil Oil Corp.*, 58 N.Y.2d at 99, 459 N.Y.S.2d 566, 446 N.E.2d 130). Consequently, as with exemptions, "the presumption is in favor of the taxing power" when construing "statutory exclusions" (*id.*).3 We decline the invitation, endorsed by the concurrence and both dissents, to overrule this clear precedent based on a revisionist analysis that ignores our case law.

III.

A taxpayer has the burden "to overcome tax assessments" (*Matter of Grace*, 37 N.Y.2d at 195, 371 N.Y.S.2d 715, 332 N.E.2d 886) and to "establish its entitlement to an exclusion from tax" (*Matter of Colt Indus. v. New York City Dept. of Fin.,* 66 N.Y.2d 466, 471, 497 N.Y.S.2d 887, 488 N.E.2d 817 [1985], *rearg. denied* 67 N.Y.2d 757, 500 N.Y.S.2d 1028, 490 N.E.2d 1234 [1986]). In the sales tax context, in particular, "it shall be presumed that all **[**881]** receipts for ... services of any type mentioned in" Tax Law § 1105(c) "are subject to tax until the contrary is established" (Tax Law § 1132[c][1]). Moreover, "[i]f there are any facts or reasonable inferences **[***774]** from the facts to sustain it, the court must confirm the [Tribunal's] determination" (*Matter of Grace*, 37 N.Y.2d at 195, 371 N.Y.S.2d 715, 332 N.E.2d 886).

Our application of the principles articulated above begins with the text of Tax Law § 1105(c)(1), which imposes a tax on "[t]he receipts from every sale" of "[t]he furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons." The statute "exclud[es] the furnishing of information which is personal or individual in nature and which **[*595]** is not or may not be substantially incorporated in reports furnished to other persons" (Tax Law § 1105[c][1]).

Here, Wegmans concedes that the information services provided by RetailData fall within the general taxing provision of section 1105(c)(1). The determinative issue before this Court, therefore, is whether the Tribunal rationally determined that those information services were not excluded from the sales tax (*see Matter of Colt Indus.*, 66 N.Y.2d at 471, 497 N.Y.S.2d 887, 488 N.E.2d 817). We conclude that the Tribunal's determination that Wegmans failed to establish its entitlement to the statutory exclusion, because the information at issue was not personal or individual in nature, was rational and should be confirmed.

The information that RetailData compiled and the reports it furnished to Wegmans derived from a non-confidential and widely-accessible source, the supermarket shelves of Wegmans's competitors. There is nothing about the information itself that is personal or individual in nature. RetailData simply collected the prices of products at grocery stores and compiled that information into reports which it furnished to Wegmans. The Tribunal rationally concluded that the information RetailData furnished to Wegmans was not personal or individual in nature because it was collected from prices on supermarket shelves, which are publicly available, widely-accessible, and not confidential. Moreover, in these circumstances, it was rational for the Tribunal to determine that RetailData's customization of the publicly-available information it collected from supermarket shelves into a report format did not render the furnished information personal or individual in nature (*see Matter of ADP Automotive Claims Servs. v. Tax Appeals Trib.*, 188 A.D.2d 245, 248, 594 N.Y.S.2d 96 [3d Dept. 1993], *lv denied* 82 N.Y.2d 655, 602 N.Y.S.2d 804, 622 N.E.2d 305 [1993] ; *Matter of Rich Prods. Corp. v. Chu*, 132 A.D.2d 175, 177–178, 521 N.Y.S.2d 865 [3d Dept. 1987], *lv denied* 72 N.Y.2d 802, 530 N.Y.S.2d 554, 526 N.E.2d 45 [1988]).4 Accordingly, the **[**882]** Appellate Division judgment should **[*596]** be reversed, with costs, the Tribunal's determination confirmed, and the petition dismissed.

STEIN, J. (concurring).**[***775]**

Effectively overruling our landmark decision in *Matter of Grace v. New York State Tax Commn.*, 37 N.Y.2d 193, 371 N.Y.S.2d 715, 332 N.E.2d 886 1975), the majority today declares a new rule: in New York, the taxpayer always loses. Instead of confronting our four-decade-old precedent, the majority states that the distinction we drew in *Grace* between tax exclusions and exemptions, for purposes of resolving any disagreement over the meaning of a tax statute, does not exist. I write separately to explain that this dramatic departure from our long-standing rule, which the majority refuses to acknowledge, is not only inconsistent with this Court's precedent, but also unnecessary to decide this case, which must be reversed in any event under the analytical framework set forth in *Grace*. Therefore, I concur with the majority in result alone.

I.

In the decision on review in this CPLR article 78 proceeding, the Tax Appeals Tribunal stated that its "resolution of this dispute is guided by the rule of construction that requires exclusions from taxation to be strictly interpreted *in the taxpayer's favor* " (emphasis added). The Tribunal has applied that rule of construction for decades, in recognition that it is based on a proper interpretation of this Court's decision in *Grace* (*see e.g. Matter of Exxon Mobil Corp.*, 2012 WL 1980652, *8, 2012 N.Y. Tax LEXIS 43, *19 [N.Y. St. Div. of Tax Appeals DTA No. 823437, May 24, 2012]; *Matter of N.A.E., Inc., Gen. Partner,* 1993 WL 491195, *16, 1993 N.Y. Tax LEXIS 495, *42 [N.Y. St. Div. of Tax Appeals DTA Nos. 810045, 810046, 810210, Nov. 18, 1993]; *Matter of 1605 Bookcenter, Inc.*, 1990 WL 204903, *14, 1990 N.Y. Tax LEXIS 216, *38–39 [N.Y. St. Div. of Tax appeals DTA No. 800121, May 17, 1990]; *see Matter of Towne–Oller & Assoc. v. State Tax Commn.*, 120 A.D.2d 873, 874, 502 N.Y.S.2d 544 (3d Dept. 1986) [citing *Grace* for the proposition that, "[w]here an exclusion from taxability is involved, it must be strictly construed in the taxpayer's favor"]; *see also Westwood Pharms. v. Chu,* 164 A.D.2d 462, 465, 564 N.Y.S.2d 1020 [4th Dept. 1990], *lv denied* 77 N.Y.2d 807, 569 N.Y.S.2d 610, 572 N.E.2d 51 [1991] [following *Towne–Oller*]).**[*597]**

Nevertheless, in the case presently before us, the Commissioner of Taxation and Finance repudiates that rule of construction, arguing that it derives from a "formalistic distinction" between exclusions and exemptions that this Court established in *Grace*. The Commissioner argues that, in *Matter of Mobil Oil v. Finance Adm'r of City of N.Y.*, 58 N.Y.2d 95, 99, 459 N.Y.S.2d 566, 446 N.E.2d 130 (1983), this Court overruled *Grace* sub silentio and held that the distinction between exemptions and exclusions, which was concededly drawn by the Court in *Grace*, has no force. Thus, the Commissioner maintains, "the *Mobil Oil* Court recognized" in 1983 that "both exemptions and exclusions should ... be construed *in favor of the government and against the taxpayer.* " However, the Commissioner's argument is contrary to the reading of *Grace* and *Mobil Oil* that both the courts and the Tribunal have employed since the 1980s, and the majority goes even further than the Commissioner.**[**883]**

While the Commissioner argues that we should state that *Mobil Oil* overruled *Grace* in holding that the distinction between exemptions and exclusions has no force – an argument that is simply unsupported by the law – the majority simply denies that this Court has ever differentiated between exemptions and exclusions in the first place (*see* majority op. at 592–593, 107 N.Y.S.3d at 771–73, 131 N.E.3d at 878–80), ignoring decades of administrative and judicial authority to the contrary. **[***776]**

The majority's reading of *Grace* is untenable.

In *Grace,* the Court explained:

> "It is often said ... that '[a] statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax' (*People ex rel. Mutual Trust Co. v. Miller,* 177 N.Y. 51, 57 [69 N.E. 124] [1903] ; *Matter of Voorhees v. Bates*, 308 N.Y. 184, 188 [124 N.E.2d 273] [1954] ; *see Matter of American Cyanamid & Chem. Corp. v. Joseph*, 308 N.Y. 259, 263 [125 N.E.2d 247] [1955] ; *American Locker Co. v. City of New York,* 308 N.Y. 264, 269 [125 N.E.2d 421] [1955] ; *cf. Gould v. Gould,* 245 U.S. 151, 153, 38 S.Ct. 53, 62 L.Ed. 211 [1917]). The principle is, however, applicable

only in determining whether property, income, a transaction or event is subject to taxation. Thus, in each of the cases cited above, the issue was whether taxpayer's affairs were subject to the taxing statute at all (*see People ex rel. Mutual Trust Co. v. Miller,* 177 N.Y. 51, 53 [69 N.E. 124], *supra* [corporate **[*598]** franchise tax]; *Matter of Voorhees v. Bates*, 308 N.Y. 184, 187–188 [124 N.E.2d 273], *supra* [unincorporated business tax]; *Matter of American Cyanamid & Chem. Corp. v. Joseph*, 308 N.Y. 259, 262 [125 N.E.2d 247], *supra* [sales tax]; *American Locker Co. v. City of New York,* 308 N.Y. 264, 267 [125 N.E.2d 421], *supra* [sales tax]; *Gould v. Gould,* 245 U.S. 151, 153 [38 S.Ct. 53], *supra* [individual income tax]).

"When, however, it is undisputed that the taxpayer's income is subject to the taxing statute, but he claims an exemption from taxation, a different rule applies. An exemption from taxation 'must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption' (*People ex rel. Savings Bank of New London v. Coleman,* 135 N.Y. 231, 234 [31 N.E. 1022] [1892] ; *seeMatter of Young v. Bragalini*, 3 N.Y.2d 602, 605–606 [170 N.Y.S.2d 805, 148 N.E.2d 143] [1958]). Indeed, if a statute or regulation authorizing an exemption is found, it will be 'construed against the taxpayer,' although the interpretation should not be so narrow and literal as to defeat its settled purpose (*seeEngle v. Talarico*, 33 N.Y.2d 237, 240 [351 N.Y.S.2d 677, 306 N.E.2d 796] [1973] ; *People ex rel. Watchtower Bible & Tract Soc. v. Haring,* 8 N.Y.2d 350, 358 [207 N.Y.S.2d 673, 170 N.E.2d 677] [1960] ; *People ex rel. Mizpah Lodge v. Burke,* 228 N.Y. 245, 247–248 [126 N.E. 703] [1920]). This is because an exemption is not a matter of right, but is allowed only as a matter of legislative grace (*cf., e.g.,Colgate v. Harvey,* 296 U.S. 404, 435 [56 S.Ct. 252, 80 L.Ed. 299] [1935]).

''A deduction is functionally a particularized species of exemption from taxation" (37 N.Y.2d at 196–197, 371 N.Y.S.2d 715, 332 N.E.2d 886).

To be sure, *Grace* does not expressly state that ambiguities in statutory *exclusions* are interpreted in favor of the taxpayer. It is also true that the *Grace* Court **[**884]** used the words "exemption" and "deduction," but did not use the word "exclusion," which is evidently the cause of the majority's confusion in this case.1 However, **[***777]** what the majority overlooks is that the precedent **[*599]** upon which the Court relied in *Grace* for the proposition that a statute levying a tax must be interpreted in favor of the taxpayer involves exclusions (*see American Cyanamid,* 308 N.Y. 259, 125 N.E.2d 247 [exclusion from sales tax for resales]; *Voorhees,* 308 N.Y. 184, 124 N.E.2d 273 [whether directing an orchestra for radio broadcasts fell within exclusion from definition of "unincorporated business"]). Thus, both parties in the instant matter correctly acknowledge what has long been obvious to the bench and bar – in *Grace,* this Court distinguished between exemptions and exclusions for purposes of construing such provisions in tax statutes.

It bears emphasis that this Court repeated that distinction several years later in a case that majority also ignores, citing *Grace* for the proposition that statutory "exclusions" refer to properties "not covered because definitionally excepted," where as statutory "exemptions" refer to properties "which meet the statutory conditions precedent to regulation but are, as an act of legislative grace, nonetheless excepted" (*La Guardia v. Cavanaugh,* 53 N.Y.2d 67, 80, 440 N.Y.S.2d 586, 423 N.E.2d 9 [1981]). Moreover, the Division of Tax Appeals has recognized for decades that *Grace* "discusses the differing burdens of proof for an exemption from tax, as opposed to that for an

exclusion from tax" (*Matter of Katz,* 1994 WL 268115, *9, 1994 N.Y. Tax LEXIS 318, *21 [N.Y. St. Div. of Tax Appeals DTA No. 811673, June 9, 1994]; *see Matter of Dunham's Resort Corp.,* 2004 WL 2016219, *7, 2004 N.Y. Tax LEXIS 183, *16 [N.Y. St. Div. of Tax Appeals DTA No. 819106, Sept. 2, 2004] [relying on *Grace* in explaining that "the burden of proof to show entitlement to an exemption ... (or) an exclusion is placed upon petitioner, though the burden (for exclusions) is a lighter one because exclusions are strictly construed against the taxing authority"]; *Matter of 1605 Bookcenter, Inc.,* 1990 WL 204903, *11, *14, 1990 N.Y. Tax LEXIS 216, *28, *38–39 [N.Y. St. Div. of Tax appeals DTA No. 800121, May 17, 1990] [noting that *Grace* provides both that exemptions are strictly construed against the party claiming the exemption and that exclusions must be construed strictly in favor of the taxpayer]). Similarly, the Appellate Division has long recognized this Court's distinction between exemptions and exclusions in *Grace,* and required that statutory exclusions be construed in the taxpayer's favor (*see Matter of New York Life Ins. Co. v. State Tax Commn.*, 80 A.D.2d 675, 676, 436 N.Y.S.2d 380 [3d Dept. 1981], *affd for* ***[*600]*** *reasons stated in App.Div. mem* 55 N.Y.2d 758, 447 N.Y.S.2d 245, 431 N.E.2d 970 [1981] [citing *Grace* for the proposition that "where, as here, an exclusion rather than an exemption is involved, the statute must be strictly construed in favor of the taxpayer"]; *Matter of Burger King v. State Tax Commn.,* 70 A.D.2d 447, 450, 421 N.Y.S.2d 668 [3d Dept. 1979], *affd as mod* 51 N.Y.2d 614, 435 N.Y.S.2d 689, 416 N.E.2d 1024 [1980] [same]; *see also* ***[**885]*** *Matter of United Artists Theatre Circuit, Inc. v. State Tax Commn.,* 52 N.Y.2d 1013, 1014, 438 N.Y.S.2d 295, 420 N.E.2d 93 [1981], *revg* 76 A.D.2d 995, 996, 429 N.Y.S.2d 299 [3d Dept. 1980] [reversing "essentially for reasons stated in Presiding Justice A. Franklin Mahoney's dissenting opinion at the Appellate Division;" that dissenting opinion relied on *Grace* in concluding that exclusions, unlike exemptions, must be construed in the taxpayer's favor]). In light of this jurisprudential history – now ironically dismissed by the majority as "revisionist analysis that ignores our case law" (majority op. at 594, 107 N.Y.S.3d at 773, 131 N.E.3d at 880) – **[***778]** it is simply disingenuous to fail to acknowledge that *Grace* drew a distinction between exemptions and exclusions for purposes of statutory construction, requiring that exemptions be construed in favor of the government, but that exclusions be construed in favor of the taxpayer.

The majority's failure to acknowledge the distinction drawn in *Grace* appears to be rooted in an attempt to emulate federal law in interpreting our state tax statutes (*see* majority op. at 593 n. 2, 107 N.Y.S.3d at 772 n. 2, 131 N.E.3d at 879 n. 2). The majority relies upon *Mobil Oil,* which the Commissioner argues overturned *Grace.* In *Mobil Oil,* the Court stated – without further discussion – that

> "[w]hile it is the general rule that a statute which levies a tax is to be construed most strongly against the government and in favor of the taxpayer, the rule is otherwise with respect to the taxpayers' right to exclude items from taxation. In the case of statutory exclusions, the presumption is in favor of the taxing power" (58 N.Y.2d at 99, 459 N.Y.S.2d 566, 446 N.E.2d 130 [internal citation omitted]).

The *Mobil Oil* Court did not expressly overrule *Grace* and, inasmuch as "[w]e do not overrule important authorities sub silentio" (*Pratt Inst. v. City of New York,* 183 N.Y. 151, 161, 75 N.E. 1119 [1905]), *Mobil Oil* should not be read as doing so.

In fact, the decision in *Mobil Oil* did not even cite *Grace;* rather, the Court relied upon *Matter of Schwartzman,* 262 App.Div. 635, 636, 30 N.Y.S.2d 882 (3d Dept. 1941), *affd no opn* 288 N.Y. 568, 42 N.E.2d 22 (1942), a case involving an *exemption,* not an exclusion. The Court of Appeals

(48)

decision in *Schwartzman* simply affirmed, without opinion, a decision of the Appellate Division, Third Department. However, as explained above, the rule in the Third Department – prior to *Mobil Oil* and based upon our case law – **[*601]** was that, "while the taxpayer ordinarily must bear the burden of overcoming a tax assessment, where ... an exclusion rather than an exemption is involved, the statute must be strictly construed in favor of the taxpayer" (*New York Life Ins.*, 80 A.D.2d at 676, 436 N.Y.S.2d 380 ; *see Burger King*, 70 A.D.2d at 450, 421 N.Y.S.2d 668). Thus, when the Third Department decided *Fairland Amusements v. State Tax Commn.*, 110 A.D.2d 952, 487 N.Y.S.2d 879 (3d Dept. 1985), *revd* 66 N.Y.2d 932, 498 N.Y.S.2d 796, 489 N.E.2d 765 (1985) shortly after *Mobil Oil* was handed down, it is not surprising that a dissenting opinion, in challenging the interpretation of an exclusion in favor of the government, stated the well-settled rule that, "in determining if there is an exclusion under the Tax Law, any ambiguities in the tax statute must be construed most strongly in favor of the taxpayer and against the government" (*id.* at 954, 487 N.Y.S.2d 879 [Mikoll, J. dissenting]). Nor is it surprising that this Court expressly agreed with the dissent in *Fairland* and reiterated our long-standing rule in interpreting the statutory language – providing for an exclusion – in favor of the taxpayer, stating "[w]e agree with the dissenters below that there is an ambiguity in the **[**886]** statutory scheme which must be construed most strongly in favor of the taxpayer and against the government" (*Fairland*, 66 N.Y.2d at 934, 498 N.Y.S.2d 796, 489 N.E.2d 765). Thus, contrary to the majority's conclusion, *Fairland* supports Wegmans' argument that the statement in *Mobil Oil* was a syntactical error – the result of the Court using imprecise language in describing exclusions versus exemptions, as the Third Department correctly recognized six months after *Fairland* reiterated the rule as set forth in *Grace* (*see Towne–Oller*, 120 A.D.2d at 874 n., 502 N.Y.S.2d 544).2 In any event, even absent **[***779]**

Fairland, Mobil Oil

– based on a misreading of Appellate Division precedent and failing to cite *Grace* – cannot be **[*602]** read as overruling *Grace* sub silentio. Therefore, the rule remains that, in determining entitlement to a tax exclusion, tax statutes are "to be construed most strongly against the government and in favor of the citizen," but "if a statute or regulation authorizing an exemption is found, it will be construed against the taxpayer" (*Grace*, 37 N.Y.2d at 196, 371 N.Y.S.2d 715, 332 N.E.2d 886).

II.

That said, I agree with the majority that reversal is required here. Wegmans concedes that, as the taxpayer, it bears the ultimate burden to establish its entitlement to the tax exclusion at issue. Moreover, the Tribunal's determination must be upheld unless shown to be irrational (*see Matter of 677 New Loudon Corp. v. State of N.Y. Tax Appeals Trib.*, 19 N.Y.3d 1058, 1060, 955 N.Y.S.2d 795, 979 N.E.2d 1121 [2012], *cert denied* 571 U.S. 952, 134 S.Ct. 422, 187 L.Ed.2d 280 [2013] ; *Grace*, 37 N.Y.2d at 195–196, 371 N.Y.S.2d 715, 332 N.E.2d 886). Thus, "[i]f there are any facts or reasonable inferences from the facts to sustain it, the court must confirm the ... determination" (*Grace*, 37 N.Y.2d at 195, 371 N.Y.S.2d 715, 332 N.E.2d 886). Even if any ambiguity in the statutory exclusion at issue is construed against the government – as the Tribunal did here, applying the traditional rule – Wegmans has failed to demonstrate that the Tribunal's interpretation is unreasonable. Accordingly, I agree that the information furnished cannot be deemed "personal or individual in nature" within the meaning of Tax Law § 1105(c)(1) (*Matter of ADP Automotive*

Claims Servs. v. Tax Appeals Trib., 188 A.D.2d 245, 248, 594 N.Y.S.2d 96 [3d Dept. 1993], *lv denied* 82 N.Y.2d 655, 602 N.Y.S.2d 804, 622 N.E.2d 305 [1993]).

I reiterate that the new rule pronounced by the majority here – namely, that statutory exclusions must be construed against the taxpayer – is inconsistent with our precedent. Significantly, however, I note that even the majority does not contend **[**887]** that it is necessary to construe section 1105(c)(1)'s exclusion against the taxpayer in order to reach the result that it does. Therefore, I am also compelled to emphasize that the majority's statements regarding statutory construction are, in fact, dicta. The majority's declaration that New York taxpayers are now deprived of a protection they have long enjoyed – in a misguided attempt to resolve confusion in the lower courts that never existed – is not only wrong, but completely unnecessary.

FAHEY, J. (dissenting).

I respectfully dissent. The key question on this appeal is the distinction in the interpretation of tax exclusions and tax **[***780]** exemptions. For decades the Appellate **[*603]** Division has correctly analyzed this area of law in holding that an exclusion should be interpreted in favor of the taxpayer (*see Matter of New York Life Ins. Co. v. State Tax Commn.*, 80 A.D.2d 675, 676, 436 N.Y.S.2d 380 [3d Dept. 1981] ["where ... an exclusion rather than an exemption is involved, the (tax) statute must be strictly construed in favor of the taxpayer"], *affd for reasons stated* 55 N.Y.2d 758, 447 N.Y.S.2d 245, 431 N.E.2d 970 [1981] ; *Matter of Burger King v. State Tax Commn.*, 70 A.D.2d 447, 450, 421 N.Y.S.2d 668 [3d Dept. 1979] [holding that an exclusion from taxation is "to be strictly construed in favor of the taxpayer"], *affd as mod* 51 N.Y.2d 614, 435 N.Y.S.2d 689, 416 N.E.2d 1024 [1980] ; *see also Matter of United Artists Theatre Circuit v. State Tax Commn.*, 52 N.Y.2d 1013, 1014, 438 N.Y.S.2d 295, 420 N.E.2d 93 [1981], *revg* 76 A.D.2d 995, 996, 429 N.Y.S.2d 299 [3d Dept. 1980] ; *see generally Matter of Grace v. New York State Tax Commn.*, 37 N.Y.2d 193, 196, 371 N.Y.S.2d 715, 332 N.E.2d 886 [1975]). I agree with the Appellate Division order in this case, and I adopt both its holding and its reasoning as my own.

WILSON, J. (dissenting).

If there is any fixed star in our statutory construction constellation, it is that "the primary consideration of courts in interpreting a statute is to ascertain and give effect to the intention of the Legislature" (*Riley v. County of Broome*, 95 N.Y.2d 455, 463, 719 N.Y.S.2d 623, 742 N.E.2d 98 [2000]). We announced that principle as early as 1855 (*Corwin v. New York & E.R. Co.*, 13 N.Y. 42, 48 [1855]), reiterated it earlier this month (*Nadkos Inc. v. Preferred Constr. Ins. Co. Risk Retention Group LLC*, 34 N.Y.3d 1, 108 N.Y.S.3d 375, 132 N.E.3d 568, 2019 N.Y. Slip Op. 04641, 2019 WL 2424488 [Ct. Apps. June 11, 2019]), and repeatedly reasserted it in the intervening years (McKinney's Cons Laws of NY, Book 1, Statutes § 92[a] [collecting cases]). Nevertheless, neither the Tax Appeals Tribunal, nor any appellate court—including the majority in this case—has attempted to determine with the usual tools of statutory interpretation what the legislature meant by the words "personal or individual" in Tax Law § 1105(c)(1), the tax exclusion now before us.

Without attempting to discern the legislature's meaning, the majority upholds the Tribunal's determination that the grocery price reports at issue here, "CPAs," are "not personal or individual in nature because [they were] collected from prices on supermarket shelves, which are publicly