

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LENDINGTREE, INC.	:	DETERMINATION
	:	DTA NO. 829714
for Revision of a Determination or for Refund of New York	:	
State Sales and Use Taxes Under Articles 28 and 29 of the Tax	:	
Law for the Period September 1, 2014 through August 31,	:	
2017.	:	

Petitioner, LendingTree, Inc., filed a petition for revision of a determination or for refund of New York State sales and use taxes under articles 28 and 29 of the Tax Law for the period September 1, 2014 through August 31, 2017.

A videoconferencing hearing was held before Kevin R. Law, Administrative Law Judge, via CISCO Webex on November 17, 2020, and continued to completion on December 3, 2020, with all briefs due June 14, 2021, which date began the six-month period for the issuance of this determination. Petitioner appeared by Pillsbury Winthrop Shaw Pittman, LLP (Marc A. Simonetti, Esq., and Zachary T. Atkins, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel).

ISSUES

I. Whether petitioner's sales on its online loan marketplace are sales of taxable information services pursuant to Tax Law § 1105 (c).

II. Whether, if petitioner's sales on its online loan marketplace are sales of taxable information services pursuant to Tax Law § 1105 (c), the imposition of sales tax on the receipts thereof violates the federal Internet Tax Freedom Act.

FINDINGS OF FACT

The parties executed a stipulation of facts in connection with this matter. Such stipulated facts have been substantially incorporated into the findings of fact set forth herein. In addition, petitioner submitted 223 proposed findings of fact. Petitioner's proposed findings of fact 1 through 16, 18 through 48, 50 through 95, 97 through 207, and 210 through 223 are accepted and have been substantially incorporated into the findings of fact. Proposed findings of fact 17, 49, 96 and 209 are rejected as redundant. Proposed finding of fact 208 is rejected as conclusory.

1. Petitioner, LendingTree, Inc. (n/k/a LendingTree, LLC), is a Delaware limited liability company headquartered in Charlotte, North Carolina.

2. Petitioner operates an online loan marketplace through which it connects prospective borrowers seeking loans and other credit-based offerings to lenders seeking qualified borrowers whom they can sell loans or other credit-based offerings.

3. Petitioner provides services to both borrowers and lenders on the online loan marketplace.

4. Petitioner was formerly known as LendingTree, Inc., a corporation formed under the laws of Delaware in June 1996.

5. LendingTree, Inc. was acquired by IAC/InterActiveCorp in May 2003 and converted to a Delaware limited liability company, becoming petitioner LendingTree, LLC, in December 2004.

6. In April 2008, IAC/InterActiveCorp formed Tree.com, Inc., a Delaware corporation, as the sole member of petitioner.

7. On August 20, 2008, petitioner, along with its single member Tree.com, Inc., was spun off from IAC/InterActiveCorp into a separate publicly traded company.

8. Tree.com, Inc. changed its name to LendingTree, Inc. effective January 1, 2015.

9. Petitioner is a wholly owned subsidiary of the 2015 incarnation of LendingTree, Inc.

10. During the period September 1, 2014 through August 31, 2017 (the audit period), petitioner's revenue from sales of online loan marketplace services to lenders consisted of six different revenue streams: (i) mortgages; (ii) reverse mortgages; (iii) home equity loans; (iv) personal loans; (v) business loans; and (vi) auto loans.

11. Each of the six revenue streams comprising the online loan marketplace services corresponds to a particular type of loan product.

12. Petitioner's employees commonly refer to the company's various revenue streams as "verticals."

13. Petitioner's "mortgages" vertical includes purchase and refinance loan products.

14. Petitioner's online loan marketplace services match prospective borrowers seeking loans and other credit-based offerings with multiple lenders who can provide them with competing quotes for the products they are seeking.

15. During the audit period, petitioner also earned revenue from sales of other online services, consisting of six different revenue streams: (i) credit cards; (ii) bank deposit accounts; (iii) pre-prime credit services; (iv) insurance; (v) student loans; and (vi) real estate (collectively, Advertising Services).

16. During the audit period, petitioner's process for matching prospective borrowers with lenders on the online loan marketplace consisted of four steps: (i) a prospective borrower completes and submits a loan request form on the online loan marketplace to petitioner; (ii) petitioner matches the prospective borrower's loan request form to a lender participating on the online loan marketplace and transmits the form to the matched lender, (iii) the lender evaluates

the prospective borrower's loan request form, and (iv) the lender communicates a conditional offer to the prospective borrower (collectively, the Matching Process).

17. In the first step of the Matching Process, the prospective borrower completes and submits a loan request form with information regarding the type of loan the prospective borrower is seeking, loan preferences, and other data such as geographic region and, depending on the product sought, may consent to a "soft" credit inquiry.

18. A soft credit inquiry shows everything that is on a prospective borrower's credit file, including credit score.

19. Credit score is one of the key factors lenders use to make lending decisions.

20. Prospective borrowers must expressly consent to receive communications from the lenders with whom the prospective borrowers are matched.

21. In the second step of the Matching Process, petitioner verifies the information on the prospective borrower's loan request form and, depending on the product, performs a soft credit inquiry through third parties.

22. Once petitioner verifies the information on the prospective borrower's loan request form, it matches the prospective borrower's loan request form data, credit profile, and geographic location against the criteria of lenders participating on petitioner's online loan marketplace and matches the prospective borrower with up to five lenders whose criteria the borrower meets.

23. Petitioner limits the number of matches to five to provide the prospective borrower with enough options to comparison shop for lenders and have a good experience on the online loan marketplace without overwhelming the borrower.

24. Petitioner does not guarantee that a prospective borrower will be matched with any lenders.

25. A prospective borrower may not be matched with any lenders if, for example, the prospective borrower's credit score is deemed too low by the lenders on the online loan marketplace or if the prospective borrower is located in a geographic region not targeted by any participating lenders.

26. Petitioner only matches prospective borrowers with lenders that participate in petitioner's online loan marketplace; petitioner does not match prospective borrowers with non-participating lenders.

27. Once petitioner makes a match between a prospective borrower and a lender, it transmits the prospective borrower's loan request form to the matched lender through a secure message.

28. The prospective borrower's information and, when applicable, the results of a soft credit inquiry are sometimes referred to as a 'lead.'

29. Petitioner does not transmit to the lender any information about the prospective borrower other than what the borrower provides in the loan request form and the borrower's credit score band designation.

30. When a prospective borrower is matched with multiple lenders, petitioner does not inform each lender of the identities of the other matched lenders.

31. In the third step of the Matching Process, the matched lender evaluates the information in the prospective borrower's loan request form to determine whether to make a conditional loan offer to the borrower or provide a "no offer" response.

32. The loan request form and the results of the soft credit inquiry provide the lender with a good understanding of the prospective borrower's risk profile.

33. A conditional offer is a lender's representation of the offer it is likely to provide the prospective borrower.

34. Lenders participating on petitioner's online loan marketplace are contractually obligated to uphold certain service standards with respect to how they interact with prospective borrowers, including standards relating to how quickly they respond to prospective borrowers' loan request forms.

35. For example, representative contracts between petitioner's and lenders participating on the online loan marketplace required lenders to respond to the prospective borrower's loan request form within one to five minutes after receiving it.

36. In the fourth step of the Matching Process, petitioner presents all matched lenders and their conditional offers (if any) to the prospective borrower on an "offers page" on petitioner's online loan marketplace.

37. Petitioner provides a prospective borrower with information about each matched lender, including the lender's ratings and reviews, the lender's Better Business Bureau rating, the rate the lender is offering, and the lender's contact information.

38. Petitioner surveys borrowers and asks them why they chose specific lenders or what they may be looking for when they shop for a lender.

39. Petitioner highlights unique attributes of specific lenders by displaying "badges," such as "No Upfront Fees" or "Phone Support," on the offers page to make the lender more appealing to borrowers.

40. The Matching Process is dynamic, with the entire process typically taking less than ten to fifteen seconds.

41. When the prospective borrower chooses to accept a lender's conditional offer, the borrower may interact with the chosen lender in a variety of ways.

42. Depending on the loan product and lender, the prospective borrower may click the chosen lender's "call to action" button, which will redirect the borrower to the lender's landing page to complete a loan application, or call or e-mail the chosen lender, or choose to receive a call from the chosen lender.

43. During the audit period, lenders were not permitted to contact a prospective borrower through the online loan marketplace unless the lender was matched with the prospective borrower.

44. Petitioner does not develop and maintain lists of prospective borrowers to sell to lenders.

45. Petitioner refers to the process by which a lender converts a loan request form received from petitioner into a closed loan as a "funnel" or "conversion funnel."

46. The conversion funnel consists of four steps or segments: (i) the lender receives a loan request form for a prospective borrower from petitioner; (ii) the lender makes a conditional offer to the prospective borrower; (iii) the prospective borrower clicks (selects) the lender; and (iv) the lender closes the loan with the borrower.

47. Petitioner tracks each lender's performance at each step in the conversion funnel.

48. Different lenders have different types of prospective borrowers with whom they want to connect.

49. Different lenders may have different margin profiles that they are targeting; they may have different cost of capital criteria; or they may have different underwriting requirements.

50. Petitioner's Canopy platform is a lender-facing portal that the Sales Team and lenders use to create and manage lender "campaigns."

51. A campaign is a specific set of criteria or "filters" established by the lender with the petitioner's sales team for the purpose of matching the lender with the exact type of prospective borrowers with whom the lender wishes to connect.

52. A filter may be, among other things, (i) a specific prospective borrower attribute, such as credit score, geographic location, or whether the prospective borrower is self-employed, (ii) a specific loan type sought by the prospective borrower, (iii) the loan amount sought by the prospective borrower, or (iv) in the case of mortgages and home equity loans, the type of property in question.

53. The lender, or the sales team acting on the lender's behalf, may also set different caps on the number of loan request forms the lender will receive on weekdays, weekends, and holidays, by campaign, in Canopy.

54. A lender may run multiple campaigns simultaneously on petitioner's online loan marketplace.

55. The filters set in Canopy dictate the prospective borrowers with whom the lender will be matched.

56. Campaigns are fundamental to lenders' ability to make more loans using petitioner's online loan marketplace services because they allow lenders to match with prospective borrowers who meet the lenders' pre-established criteria.

57. The lender and the sales team are able to view the results of the lender's campaigns in Canopy.

58. Within a particular campaign, the lender and the sales team are able to view the loan request forms the Lender "won," "missed by price," or "missed by capacity."

59. Loan request forms "won" refers to loan request forms the lender received from petitioner.

60. Loan request forms "missed by capacity" refers to loan request forms the lender did not receive because the loan request forms exceeded the lender's capacity cap.

61. Loan request forms "missed by price" refers to loan request forms the lender did not receive because it did not pay enough to receive it.

62. If a lender misses a loan request form, petitioner does not show the corresponding prospective borrower's personal information to the lender.

63. A lender can upload their performance data, such as their closed-loan data and "lock" data, to Canopy.

64. The lender and the sales team also can generate or access reports relating to the lender's performance on the online loan marketplace, such as trending reports and closed loan reports, in Canopy.

65. Petitioner invests significant time and resources on marketing to attract prospective borrowers to participate on the online loan marketplace.

66. Petitioner has a large marketing team dedicated to optimizing petitioner's marketing campaigns to attract prospective borrowers who are willing and ready to enter into transactions on the online loan marketplace.

67. Petitioner actively attracts prospective borrowers to the online loan marketplace through traditional advertising and search engine optimization methods, including through television, paid search, display, and social media.

68. Any prospective borrower may participate on petitioner's online loan marketplace.

69. Petitioner does not search public sources to find prospective borrowers for the online loan marketplace.

70. Depending on the vertical and lender, petitioner may charge upfront match fees, closed loan fees, or both for petitioner's online loan marketplace services.

71. Petitioner negotiates match fees and closed loan fees on a lender-by-lender basis.

72. Petitioner may charge match fees with respect to (i) mortgages, (ii) reverse mortgages, (iii) home equity loans, (iv) personal loans, (v) business loans, and (vi) auto loans.

73. Petitioner charges a match fee when it matches a lender with a prospective borrower through the online loan marketplace.

74. A representative agreement between petitioner and a lender offering personal loans, for example, required the lender to pay petitioner a match fee equal to a set dollar amount for each prospective borrower loan request from petitioner transmitted to the lender.

75. Match fees can vary dramatically between verticals and lenders.

76. Petitioner may charge closed loan fees with respect to (i) personal loans, (ii) business loans, and (iii) auto loans.

77. Petitioner charges a closed loan fee when a lender closes a loan with a borrower who petitioner matched with the lender.

78. Petitioner requires lenders that pay on a closed loan fee basis to report when they have closed a loan with a borrower who petitioner matched with the lender.

79. During the audit period, petitioner recognized closed loan fees for accounting purposes at the time a lender reported a closed sale to petitioner.

80. The closed loan fee that petitioner charges a lender may be based on a set dollar amount per loan or a set number of basis points.

81. For example, a representative agreement between petitioner and a lender offering business loans required the lender to pay petitioner: (i) for accounts receivable financing products, a closed loan fee equal to a percentage of all gross revenue generated from any accounts receivable financing products; and (ii) for commercial term loans, a closed loan fee equal to a percentage of the principal amount of each initial loan plus a percentage of the renewal or equal to a percentage of the net origination fees received by the lender.

82. Petitioner may charge lenders using a hybrid model, charging both upfront match fees and closed loan fees.

83. Petitioner did not charge closed loan fees with respect to mortgages, reverse mortgages, or home equity loans during the audit period due to concerns relating to federal laws and regulations on real estate settlement services.

84. Petitioner does not charge borrowers fees for online loan marketplace services.

85. A lender's success is measured in terms of its amount of originations, i.e., the total value of loans closed, and cost per funded loan.

86. A lender makes a certain amount of money on each loan it closes.

87. A lender incurs costs, including payments to loan officers, processors, and underwriters, in connection with each loan it closes.

88. A lender's cost per funded loan is a measure of the profitability of a given closed loan.

89. If a lender's cost per funded loan is too high, then closing a loan is unprofitable for the lender.

90. Lenders have cost per funded loan goals and closely track their cost per funded loan.

91. Petitioner tracks each lender's performance data, including the lender's cost per funded loan.

92. Petitioner calculates a lender's cost per funded loan by dividing the lender's total monthly spend with petitioner by the number of loans closed based on loan request forms transmitted to the lender from petitioner.

93. Petitioner calculates a lender's total monthly spend by multiplying the amount petitioner charges per loan request form transmitted to the lender (whether as a match fee, closed loan fee, or both) by the total number of loan request forms petitioner transmitted to the lender.

94. The cost a lender is willing to pay relative to a loan is closely tied to the lender's "conversion ratio" or "conversion rate," which is equal to the number of loan request forms from petitioner that the lender converts into closed loans over the total number of loan request forms the lender receives from petitioner.

95. If a lender does not convert enough loans to reach its cost per funded loan goal, the lender may stop purchasing petitioner's online loan marketplace services.

96. It is in petitioner's interest to improve lenders' conversion ratios.

97. Petitioner's Sales Team has two primary responsibilities: (i) attracting prospective lenders to the online loan marketplace and encouraging them to become petitioner clients; and (ii) once lenders become clients, helping them become more successful on the online loan marketplace by closing more loans.

98. Petitioner's Sales Team consists of several sub-teams, including a New Lender Sales Team, a Lender Development Team, a Sales Analytics Team, and a Sales Operations Team.

99. The New Lender Sales Team is responsible for attracting new lenders to the online loan marketplace and persuading them to become petitioner's customers.

100. The Lender Development Team (also referred to as Account Management) is responsible for managing petitioner's relationships with participating lenders and helping them become more successful.

101. The Sales Analytics Team supports the New Lender Sales Team and Lender Development Team by analyzing lenders' data and helping them identify trends and opportunities for lenders.

102. The Sales Operations Team's responsibilities include assisting with the process of "on-boarding" (i.e., integrating) new lenders to petitioner's online loan marketplace.

103. All of the Sales Team's activities help petitioner generate revenue.

104. Petitioner wants to match as many prospective borrowers and lenders as it can on the online loan marketplace.

105. Bringing new lenders to petitioner's online loan marketplace is very important to petitioner's business because the number of prospective borrowers searching for products on the online loan marketplace can exceed existing lenders' capacity.

106. Some prospective borrowers may have unique financial situations or may be searching for unique products, and the New Lender Sales Team looks for prospective lenders with whom it can match such borrowers.

107. The New Lender Sales Team is responsible for finding prospective lenders that would be a good fit for petitioner's online loan marketplace and persuading them to become petitioner's customers.

108. The New Lender Sales Team looks for lenders that are large enough to handle the volume of prospective borrowers on the marketplace, have the skillset necessary to be successful on the marketplace, and offer unique products.

109. Petitioner seeks lenders that will be long-term customers of its Online Loan Marketplace Services; petitioner is not interested in short-term relationships with lenders because petitioner invests a lot of resources to bring new lenders onto the online loan marketplace.

110. Petitioner also receives inbound interest from lenders who wish to participate on petitioner's online loan marketplace.

111. Petitioner turns away lenders that may not be a good fit for the online loan marketplace, such as lenders who do not have the appropriate systems in place to succeed on the marketplace or prospective lenders with very poor reputations.

112. The process of onboarding a new lender starts with a conversation between a New Lender Sales Team account executive and the prospective lender to discuss expectations, to ensure that the prospective lender has the ability to be successful on the online loan marketplace, and to ensure that the lender has a good reputation.

113. The New Lender Sales Team discusses with a prospective lender how that lender can succeed on the online loan marketplace, including the need for a strategy for contacting prospective borrowers with whom they are matched and a strategy for ensuring the lender receives good ratings and reviews.

114. The major selling points of petitioner's Online Loan Marketplace Services that the New Lender Sales Team communicates to the prospective lender include the Sales Team's Lender support, analytics, account reviews, diagnostic checks, and proposals.

115. Will Adams, Petitioner's Vice President of Sales, testified that the New Lender Sales Team advises prospective lenders that petitioner is responsible for helping the lender along their journey of customer acquisition at scale and at profitability.

116. Lenders that wish to participate on petitioner's online loan marketplace must undergo petitioner's screening process, which includes legal review and compliance review.

117. If the New Lender Sales Team account executive and prospective lender mutually agree to move forward, the Sales Operations Team runs background checks on the lender and integrates the lender to ensure that it can receive loan request forms and push back offers.

118. For example, if the prospective lender is a mortgage company, the Sales Operations Team will verify that the lender is properly licensed through NMLS (Nationwide Multistate Licensing System), which regulates mortgage companies and mortgage loan officers.

119. The Sales Operations Team also investigates whether the prospective lender has had any judgments or liens against it, bankruptcies, foreclosures, or criminal records.

120. The prospective lender must enter into an agreement with petitioner to participate on the online loan marketplace.

121. When the onboarding process has been completed, the Sales Operations Team sends a completed notification that the lender is ready to "go live" on the online loan marketplace, and the New Lender Sales Team account executive schedules a welcome call between the lender and an account manager on the Lender Development Team.

122. Petitioner assigns an account manager from the Lender Development Team to each new lender.

123. On the welcome call, the account manager introduces himself or herself to the lender, from which point on the account manager “owns” the relationship with the lender.

124. Also on the welcome call, the account manager reviews the lender’s goals and establishes one or more campaigns in Canopy so that the lender will begin being matched with prospective borrowers and receiving loan request forms.

125. Petitioner views its relationships with lenders who participate on the online loan marketplace as long-term partnerships, and many lenders have been petitioner’s clients for more than ten years.

126. Petitioner’s relationship with a lender does not end once it transmits a loan request form to the lender.

127. Petitioner wants loans to close, and the Sales Team is always working with lenders to make sure they are doing what they need to do to maximize the number of loans they close.

128. The Sales Analytics Team analyzes lender performance data, identifies opportunities to grow and optimize, and builds reports that the Lender Development Team, in turn, uses to perform account reviews and create proposals to help lenders close more loans.

129. The Lender Development Team’s role is a very analytical in nature.

130. The Lender Development Team works extensively with lenders to improve their conversion ratios.

131. A core function of the Lender Development Team, specifically account managers on the Lender Development Team, is to (i) perform account reviews, (ii) provide diagnostic checks, and (iii) make proposals.

132. Account reviews, diagnostic checks, and proposals are ways petitioner makes lenders successful on the online loan marketplace.

133. The Lender Development Team's process of performing account reviews and diagnostic checks and making proposals is ongoing and continuous.

134. An account review is a substantive presentation that, using data and analytics, gives a lender an overview of the lender's performance on petitioner's online loan marketplace.

135. The purpose of an account review is to break down the different parts of the loan process and identify what a lender is and is not doing well.

136. For example, an account review may show a lender the amount of loan request forms it received by month and its close rate (i.e., of the loan request forms received, how many loans closed), offer rate, click-through rate, click-to-close rate, and no-click-to close rate.

137. The closed loan data the Lender Development Team uses as part of an account review is data provided by the lender.

138. As part of an account review, the Lender Development Team may benchmark a lender's funnel performance against the average funnel performance of the lender's peers.

139. By benchmarking a lender's funnel performance against the peer average, the Lender Development Team helps the lender identify points in the funnel where it needs improvement to ultimately increase its conversion ratio.

140. Petitioner never shares an individual lender's performance data with other lenders.

141. Account reviews are usually performed on a monthly basis.

142. Diagnostic checks are performed by account managers on the Lender Development Team and involve a conversation or meeting with the lender.

143. In the case of larger lenders, the account manager may be joined by an analyst, the account manager's manager, the Vice President of Sales, or the Senior Vice President and General Manager of Consumer and Mortgage at the diagnostic check meeting.

144. The purpose of a diagnostic check is to diagnose the reason or reasons why a lender may not be performing well at certain points in the funnel and help them improve so that ultimately the lender's conversion ratio improves.

145. As one example, the Lender Development Team may look at how the lender is displaying itself on the prospective borrower's offers page to make sure that the presentation is accurate, look for typos, and make sure that the Lender's ratings and reviews are good and that there are enough of them.

146. As another example, the Lender Development Team may look at the lender's offer analytics to make sure that the lender is making an appropriate offer to the prospective borrower and that the offer is competitive relative to the lender's peers.

147. As a further example, if a lender's "click rate" (the number of times prospective borrowers clicked on the lender's offers) was low, as part of the diagnostic check the Lender Development Team would attempt to diagnose why prospective borrowers are not selecting the lender and identify ways of making the lender more appealing to increase the lender's click rate.

148. As part of a diagnostic check, the Lender Development Team may give the lender best practices, such as making enough offers and making offers consistent with what the prospective borrower is searching for and emphasize the importance of the lender's ratings and reviews on petitioner's online loan marketplace.

149. Diagnostic checks are usually performed on a quarterly basis.

150. A proposal is an opportunity that petitioner identifies for the lender as a result of performing an account review and analyzing the lender's performance data.

151. For example, an account manager may determine during an account review that the lender is performing very well with specific types of loan request forms but, due to a capacity cap the lender may have established, the lender is not receiving enough volume. The account manager may propose that the lender accept more loan request forms so that it can close more loans, provided it fits with the lender's goals for originations.

152. The purpose of a proposal is to use the lender's performance data to make an "educated proposal" that will help the lender close more loans, so that the lender will be inclined to purchase more Online Loan Marketplace Services from petitioner.

153. Lenders expect to receive account reviews, diagnostic checks, and proposals from petitioner.

154. Petitioner also monitors its own performance by tracking the total number of loan request forms that prospective borrowers submit through its online loan marketplace and the number of loan request forms it transmits to lenders.

155. Petitioner tracks the number of loan request forms it transmits to lenders to determine whether petitioner is effectively attracting prospective borrowers and lenders that are more likely to close loans.

156. Petitioner offers training, referred to as LendingTree University, to lenders who participate on the online loan marketplace.

157. Petitioner contracts with a consultant to train lenders in order to help the lenders increase their conversion rate and achieve greater success on the online loan marketplace.

158. Petitioner may subsidize the lender's ability to receive a more detailed, onsite, customized training from the consultant.

159. For example, the consultant may train the lender's loan officers on how to have a conversation with a borrower, how to build rapport with a borrower, how to identify the needs of the borrower, and how to meet the borrower's needs.

160. The consultant will also help the lender with customer service to make sure the borrower has a good experience with the lender through the sales process and the fulfillment process; i.e., processing, underwriting, and closing of the loan.

161. Building rapport with the borrower, understanding the borrower's needs, and meeting the borrower's needs improve the lender's conversion ratio.

162. Improving the borrower's experience and customer service relative to the lender also improves the lender's conversion ratio.

163. The success of petitioner's business model depends on providing value to both lenders and borrowers.

164. Lenders purchase petitioner's Online Loan Marketplace Services to connect with prospective borrowers who have high intent to engage, meaning prospective borrowers who have raised their hand at that specific point in time and said, "I am looking for a loan product right now."

165. Connecting with prospective borrowers who are "high-intent" is very important to lenders because it impacts lenders' conversion ratios, which impacts their cost per funded loan.

166. Lenders purchase petitioner's Online Loan Marketplace Services to connect with "highly targeted" prospective borrowers, meaning prospective borrowers who meet the precise criteria established by the lenders.

167. Lenders purchase petitioner's Online Loan Marketplace Services to connect with highly targeted prospective borrowers because it is difficult and expensive for lenders to market to and connect with the same prospective borrowers on their own.

168. Lenders purchase petitioner's Online Loan Marketplace Services to connect with a predictable volume of prospective borrowers, i.e., a steady amount of customers who fit the lenders' lending profile.

169. Connecting with a predictable volume of prospective borrowers is very important to lenders because it impacts lenders' conversion ratios, which impacts their revenue.

170. Lenders purchase petitioner's Online Loan Marketplace Services to connect in a cost-efficient manner because, while petitioner's fees may be higher than its competitors, prospective borrowers received from petitioner are more likely to convert to closed loans than prospects received from petitioner's competitors.

171. Lenders view petitioner as a tool to help them issue loans.

172. Petitioner views itself as a matchmaker between prospective borrowers searching for loan products or other credit-based offerings and lenders searching for high-intent, highly targeted, prospective borrowers.

173. Petitioner's lender support, analytics, account reviews, diagnostic checks, and proposals separate petitioner from its competitors.

174. Prospective borrowers participate on the online loan marketplace in order to compare multiple loan offers, obtain loans at competitive rates, and save money.

175. Petitioner provides borrowers with financial tools and resources, including a free credit score inquiry, general information about rates and terms, and ratings and reviews of each lender.

176. During the audit period, petitioner was not registered for New York State sales and use tax purposes and did not file New York State sales and use tax returns.

177. The Division's district audit manager for the Midwestern Regional Field Office, Robert Cronin, recommended petitioner for a sales and use tax audit after reading an article about petitioner in Fortune magazine.

178. Mr. Cronin's job responsibilities generally do not include recommending companies for audits; recommending a company for audit was out of the ordinary for Mr. Cronin.

179. By letter dated October 4, 2017, the Division notified petitioner that it had been selected for a sales and use tax field audit for the audit period.

180. The audit spanned almost two years, during which time the Division's auditor recorded a total of 75 hours of work on the audit.

181. During the field audit, the auditor made several requests for petitioner's accounting books and records and other documents pertaining to the audit period.

182. The books and records petitioner made available to the Division were sufficient for the Division to perform a detailed audit.

183. At the hearing in this matter, Mr. Cronin testified that he believed there was a probability that petitioner's services would be taxable information services when he recommended petitioner for audit.

184. Mr. Cronin told the auditor that petitioner's services may be taxable information services.

185. Mr. Cronin testified that analyzing the primary function of a service can make a sales and use tax audit more complicated.

186. On the very first day of the audit, the auditor determined that petitioner “gathered and provided information services.”

187. The auditor concluded that petitioner’s primary function was to sell leads, which he viewed as taxable information services.

188. On October 4, 2017, the auditor issued an information document request (IDR) to petitioner.

189. On November 6, 2017, the auditor issued a second IDR and provided preliminary workpapers to petitioner.

190. On February 23, 2018, the auditor issued a third IDR and provided revised preliminary workpapers, which proposed additional tax on all of petitioner’s services, to petitioner.

191. On or about May 25, 2018, petitioner’s representative at the time, PricewaterhouseCoopers (PwC), submitted a position letter to the Division explaining that petitioner provided nontaxable matching services and non-matching services.

192. The Division agreed that petitioner provided both matching and non-matching services.

193. The Division determined that petitioner’s Online Loan Marketplace Services were matching services and that petitioner’s Advertising Services were non-matching services and that both were taxable.

194. The Division did not issue any additional IDRs after reviewing the position letter.

195. By letter dated July 25, 2018, Mr. Cronin responded to the PwC position letter. and reiterated the Division’s position that all of petitioner’s services were taxable.

196. Mr. Cronin was not part of the audit team or involved in any fieldwork during the audit nor does he regularly provide guidance to auditors regarding their audits. Mr. Cronin acknowledged that it was unusual for him to prepare a written response to a letter from a representative during audit.

197. At the hearing, Mr. Cronin admitted that he had a personal interest in the outcome of the audit because he identified petitioner for audit.

198. On December 5, 2018, Mr. Cronin, the auditor, and members of the Division's Field Audit Management (FAM) met with petitioner's representatives.

199. After the December 5, 2018 meeting, FAM instructed Mr. Cronin and the auditor to stop treating petitioner's Advertising Services as taxable services.

200. Mr. Cronin was under the impression that lenders only pay upfront match fees.

201. Mr. Cronin testified that if petitioner were paid when a lender closes a loan, his conclusion that petitioner's Online Loan Marketplace Services are taxable could change.

202. Petitioner's revenue from sales of Online Loan Marketplace Services to lenders with New York billing addresses during the audit period was as follows:

Year	New York Online Loan Marketplace Revenue
2014 (09/01-12/31)	\$ 919,330.20
2015	\$3,230,412.92
2016	\$7,793,673.87
2017 (01/01-08/31)	\$12,648,854.54
Total	\$24,592,271.53

203. On or about June 5, 2019, the auditor issued proposed audit adjustments and workpapers for the audit period to petitioner.

204. The auditor reviewed 156 different sales records issued to New York customers for Online Loan Marketplace Services during the audit period and deemed the total amount invoiced, \$24,592,271.53, taxable.

205. Based on his review, the auditor determined that petitioner owed additional New York sales tax in the amount of \$2,159,457.47, interest in the amount of \$839,329.61, and penalties in the amount of \$863,789.69.

206. On or about August 13, 2019, the Division provided petitioner with a form AU-346, statement of proposed audit change for sales and use tax, with additional workpapers.

207. The Division issued notice of determination number L-050414634, on or about August 21, 2019.

208. The notice of determination asserts that as of August 21, 2019, petitioner owed additional New York sales tax in the amount of \$2,159,475.47, interest in the amount of \$853,656.56, and penalties in the amount of \$863,789.69 for the audit period, as shown in the table below:

Period Ended	Tax	Interest	Penalty	Subtotal
Feb. 28, 2015	\$79,782.65	\$69,532.35	\$31,912.93	\$181,227.93
Feb. 29, 2016	\$280,971.25	\$173,908.59	\$112,388.45	\$567,268.29
Feb. 28, 2017	\$682,963.81	\$273,508.30	\$273,185.36	\$1,229,657.47
Aug. 31, 2017	\$1,115,757.76	\$336,707.32	\$446,302.95	\$1,898,768.03
Total	\$2,159,475.47	\$853,656.56	\$863,789.69	\$3,876,921.72

209. The penalties asserted in the notice of determination consist of a 30% penalty under Tax Law § 1145 (a) (1) (i) in the amount of \$647,842.13, and a 10% penalty under Tax Law § 1145 (a) (1) (vi) in the amount of \$215,947.56.

210. By letter dated September 10, 2019, the Division notified petitioner that the Division had completed its sales and use tax field audit.

211. At the hearing, Mr. Cronin admitted that it was unusual for the Division to impose a failure to file penalty and a substantial understatement penalty, and he testified that the Division should not have asserted the substantial understatement penalty.

212. Counsel for the Division conceded at hearing that the 10% penalty under Tax Law § 1145 (a) (1) (vi) asserted in the notice of determination was erroneous. In its brief in opposition, the Division has agreed to cancel all remaining penalties at issue.

CONCLUSIONS OF LAW

A. The Tax Law imposes sales tax on every retail sale, except for resale, of tangible personal property (Tax Law § 1105 [a]) and of certain enumerated services (Tax Law § 1105 [c]). Among the services subject to tax is 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 (*see* Tax Law § 1105 [c] [1]; *see also* Tax Law § 1105 [c] [9] [furnishing information services provided by means of telephony or telegraphy or telephone or telegraph service of whatever nature subject to sales tax so long as such would be subject to sales tax pursuant to Tax Law § 1105 [c] [1] if it were furnished by one of the means enumerated therein]). Explicitly excluded from the tax on information services is the furnishing of information that is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons (*see* Tax Law § 1105 [c] [1], [9]). The Division's regulations provide that "[t]he collecting, compiling or analyzing

information of any kind or nature and the furnishing reports thereof to other persons is an information service” (20 NYCRR 527.3 [a] [2]) and identify taxable information services to include “credit reports, tax or stock market advisory and analysis reports and product and marketing surveys” (20 NYCRR 527.3 [a] [3]). Examples of taxable information services include a weekly newsletter showing the range of commodity prices, a monthly bound volume of current advertising rates, lists of prospective customers’ telephone numbers, and a computer service company’s print-out of cases and statutes containing the word “assessment” as requested by customers (20 NYCRR 527.3 [a], examples 1-4). Examples of nontaxable information services include a private detective agency’s report to its client, an auto insurance damages appraisal report, and a computer services company’s withholding tax payroll report to subscribers (20 NYCRR 527.3 [b], examples 1-3).

B. The question presented herein is whether the services petitioner provides to lenders that pay a fee for the use of its online loan marketplace are subject to tax as an information service. As will be hereafter discussed, the services provided by petitioner are not a taxable information service. In *Matter of SSOV ‘81 Ltd.* (Tax Appeals Tribunal, January 19, 1995), the Tax Appeals Tribunal (Tribunal) explained that an information service “has been interpreted to mean ‘the sale of the service of furnishing information by a business whose function it is to collect and disseminate information which is taxable under Tax Law § 1105 (c) (1) and not the mere sale of information’ In order to determine a service's taxability, the analysis employed by the New York courts and the Tax Appeals Tribunal focuses on the service in its entirety, as opposed to reviewing the service by components or by the means in which the service is effectuated” (citations omitted). In *Matter of SSOV’ 81 Ltd.*, the Tribunal focused on the “primary function” of the service, which was to enable members of a dating referral service to meet others. In

concluding that such primary function was not one of the enumerated taxable services set forth in Tax Law § 1105 (c), the Tribunal recognized that the proper focus should be on the primary function itself and not upon whether the service might, as an incident thereof, involve the provision of information. In so holding, the Tribunal stated that, “[t]o neglect the primary function of petitioner's business in order to dissect the service it provides into what appears to be taxable events stretches the application of Article 28 far beyond that contemplated by the Legislature” (*id.*).

C. Under the foregoing, to be an information service, the taxpayer's primary function must be the business of furnishing information, including the services of collecting, compiling or analyzing information and furnishing reports thereof. In this case, the primary function of petitioner is to facilitate the writing of loans by its customers, its network of lenders. While the provision of information does take place; i.e., petitioner's transmission of a prospective borrower's financial information and loan requirements to a matched lender, petitioner's primary function is to consummate a loan. This conclusion is directly supported in the case of those loans that earn closed loan fees; petitioner does not get paid unless the loan closes. It is clear that in these cases, the lending institution is not paying for the information transmitted by petitioner, but a commission on the loan. In addition, petitioner's ongoing partnership with its network of lenders vis-à-vis the Sales Analytics and Lender Developments teams are further evidence that petitioner's primary function is to ensure that its lenders are closing loans. The evidence adduced at hearing indicates that petitioner places great importance on its lending partners actually closing loans. Further, the evidence clearly establishes that petitioner does not allow all lenders to participate in its online loan marketplace; only those lenders that pass its compliance and background checks and those that have the capacity to write enough loans. Moreover,

petitioner's job does not stop when it matches a prospective borrower with a lender, it performs diagnostics and account reviews that attempt to determine where in the process the lender is failing and offers guidance on how to improve.

D. In asserting that the petitioner's sales via its online loan marketplace are sales of information services, the Division relies upon the Tribunal's holding in *Matter of Principal Connections*, Tax Appeals Tribunal, February 12, 2004. The petitioner in *Principal Connections* provided a subscription-based service featuring one of the largest listings of apartments for sale or rent in New York City. The listings were collected from its subscriber members as well as from publicly available sources. The Tribunal held that the petitioner's service was a taxable information service under Tax Law § 1105 (c) (1) because the primary function of the service was the information the petitioner transmitted to its subscribers; i.e., the rental and sale listings which were collected from its members as well as from public sources. The present matter is vastly different from a listing service using information gathered from its subscribers as well as from public sources. In this case, petitioner does not connect prospective borrowers or lenders participating on the online loan marketplace with non-participants, nor do petitioner's lending customers have full access to prospective borrowers that each lender can contact on its own. Only a matched borrower gets matched with a prospective lender which occurs in real time. In addition, the service provided by petitioner is vastly different from the examples of taxable information services provided for in the Division's regulations; i.e., market reports, customer lists, advertising rates, etc. (*see* 20 NYCRR 527.3 [b]). As noted by petitioner, the primary function of the service, and not the means of effectuating the service, dictates whether the service is taxable. Based upon the foregoing, it is concluded that petitioner does not

provide a taxable information service as the furnishing of information is but a means to the end – the actual writing of a loan.

E. In the alternative, petitioner argues that imposing sales tax on its sale of online marketplace services violates the federal Internet Tax Freedom Act (Pub Law 105–277, Div. C, Title XI § 1101 [Oct. 21, 1998] [enacted as a statutory note to 47 USC § 151] amended by P.L. 107-75, P.L. 108-435, P.L. 110-108, P.L. 113-164, P.L. 113-235, P.L. 114-53, P.L. 114-113, and P.L. 114-12) (ITFA). Although this argument has been rendered moot in accordance with conclusions of law C and D, it will nonetheless be addressed for sake of a complete record (*see Matter of Riehm v Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992], *reargument denied* 80 NY2d 893 [1992]). According to petitioner, taxing its services that are provided over the internet, but not taxing the same services that are provided orally (see 20 NYCRR 527.3 [b] [3] [providing that sales tax does not apply to information services only furnished orally]), is a per se violation of ITFA’s prohibition of discriminatory taxes on electronic commerce. This argument is a red herring.

F. ITFA bars state and local governments from imposing multiple or discriminatory taxes on electronic commerce and taxes on Internet access, except for Internet access taxes allowed under grandfather clauses (*id.*) A tax discriminates against electronic commerce if it “imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means” (IFTA § 1105(2)(A)(iii). Petitioner has presented no evidence that there are any businesses similar to its business that escape taxation because its information is transmitted orally. For this reason alone, petitioner’s argument fails. Moreover, Tax Law § 1105 (c) is a

taxing statute of general application and in no way can it be said that it was intended to discriminate against electronic commerce.

G. Based upon the foregoing, the petition of LendingTree, Inc., is granted, and the August 21, 2019 notice of determination is cancelled.

DATED: Albany, New York
December 09, 2021

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE