

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions
of
MILLWARD BROWN, INC.
(BY KANTAR LLC, AS SUCCESSOR)
for Revisions of Determinations or for Refund of Sales
and Use Taxes under Articles 28 and 29 of the Tax
Law for the Period December 1, 2011 through
February 28, 2018.

DETERMINATION
DTA NOS. 830004, 850016
AND 850017

In the Matter of the Petition
of
DYNAMIC LOGIC, INC.
(BY KANTAR LLC, AS SUCCESSOR)
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 September 1, 2014 through
February 28, 2018.

Petitioner, Millward Brown, Inc. (by Kantar LLC, as successor) filed petitions for revisions of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2011 through February 28, 2018.

Petitioner, Dynamic Logic, Inc. (by Kantar LLC, as successor) 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 September 1, 2014 through February 28, 2018.

A hearing was held in Albany, New York, before Alexander Chu-Fong, Administrative Law Judge, on May 15 and 16, 2023. Petitioners appeared by Mayer Brown LLP (Leah

Robinson, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel). All briefs were due by April 17, 2024, which date began the six-month period for the issuance of this determination.

ISSUES

- I. Whether petitioners' services are information services under Tax Law § 1105 (c) (1).
- II. If so, whether any of the services are excluded from tax.
- III. Whether the Division of Taxation erred by applying tax to receipts from the sales of services that occurred outside of New York.

FINDINGS OF FACT

1. Petitioners, Millward Brown, Inc. (MB) and Dynamic Logic, Inc. (DL), entered into a joint stipulation of facts and exhibits (joint stipulation) with the Division of Taxation (Division), which contains 53 facts and 27 exhibits.
2. The joint stipulation contains approximately 1,400 original invoices, master service agreements, purchase orders, contracts, and similar documents. These items substantiate a majority of petitioners' sales from the period at issue.
3. As part of the joint stipulation, the parties provided spreadsheets summarizing the invoice data (Invoice Spreadsheets). The Invoice Spreadsheets provide the following information verbatim from the invoices: the client's name as it appears; the client's state or country; the invoice date; the project number, which is labeled "Job No."; the client's purchase order ("PO") number; the invoice customer number; the customer number; the job name; the line number; the invoice description; the "net amount currency," which indicates the sale amount; and the "Product Name." The invoice description on the Invoice Spreadsheet ties out to the "nature of work" category on the Division's audit schedules.

4. The joint stipulation also addresses a related matter that involves a prior sales tax period, *Matter of Dynamic Logic* (Tax Appeals Tribunal, January 20, 2022, *confirmed* 224 AD3d 1184 [3d Dept 2024], *lv granted* 41 NY3d 910 [2024]). As stipulated by the parties, the exhibits include the Division of Tax Appeals hearing transcript for that matter, which hearing was held on November 6, 2019, and the related audit file from the Division. Pursuant to State Administrative Procedure Act (SAPA) § 306 (4), official notice has been taken of the facts in that matter.

5. Petitioners submitted 155 proposed findings of fact. Pursuant to SAPA § 307 (1) and 20 NYCRR § 3000.15 (d) (6), petitioners requested rulings on each of the proposed findings of fact.

6. The Division did not object to or contest any of petitioners' proposed findings of fact.

7. Petitioners' proposed findings of fact 1 through 154 have been condensed and substantially incorporated herein. Proposed finding of fact 155 is rejected because it could not be verified. Additionally, at petitioners' request, to the extent possible, discussion of specific clients and trade secrets have been minimized.

8. The Division submitted 163 findings of fact but did not request a ruling on these facts. The relevant facts submitted by the Division have been incorporated herein.

Overview of Petitioners & Their Services

9. DL is a Delaware corporation authorized to do business in New York State. In 2005, MB acquired DL, which operated, at times, as "MillwardBrown Digital." On December 31, 2016, petitioners merged into Kantar LLC, a Delaware limited liability company.

10. Petitioners conduct studies, primarily online, to obtain data about their clients' business and, based upon that data, render insights and advice to their clients.

11. Petitioners' services are designed to study the effectiveness of marketing, such as individual ads, advertising campaigns, brands, through various methodologies but, primarily, online. During the period at issue, petitioners provided a range of services to their clients. These services, termed "projects," had variations that resulted in different service names or services with the same name but modifications to actual services.

12. Petitioners consider themselves to be a part of the "insights and consulting" industry, viewing companies such as McKinsey & Company, Boston Consulting Group, and Cambridge Consultants, as their primary competitors. Their own marketing slogan is "we help clients grow great brands."

13. For the period at issue, petitioners' clients fell into three categories: (1) advertisers; (2) media agencies; and (3) advertising publishers. Advertisers generally refer to large, Fortune 500 companies that make and sell products to customers, such as food and beverage, technology, and cars. Media agencies refer to companies that work with advertisers to help them plan their advertising spending. Publishers refer to large media platforms, such as television networks, internet websites, and billboards, which publish content and host advertising on their sites.

14. Petitioners were not advertisers, media agencies, or advertising publishers. Its clients were responsible for creating the tested brands and marketing content.

15. In performing their services, petitioners relied heavily upon consumer surveys to acquire information. Petitioners custom designed each survey for each project.

16. A survey asked questions of respondents, i.e., people who volunteer to answer questions. Petitioners typically hired an outside agency, i.e., a professional survey panel company, to recruit respondents through invitations delivered by emails or website banners.

17. While each survey was unique to the project and client, petitioners asked each respondent within the survey the same questions. Petitioners' clients did not seek their services solely to conduct surveys, but the entirety of the studies, which included analyzing the data, forming insights, and rendering actionable advice.

18. Petitioners' services varied per client and per project. The results of their marketing studies, including the PowerPoint presentations, were available to their clients through the internet.

19. Petitioners' services generally fell into four categories or "Product Groups." These groups are: Bespoke Consulting, Brand Services, Link Services, and Media Services. The joint stipulation contains sample client documentation and statements of work (SOWs) that, as agreed upon by the parties, fairly represent the services within each of the Product Groups.

Bespoke Consulting

20. Bespoke Consulting describes the group of services performed by the Vermeer division, which was a separate entity that MB acquired in 2014. As part of MB, and later, Kantar, Vermeer operated as a specialized division.

21. Petitioners' clients sought Bespoke Consulting services to better understand the nature of their markets, market segmentation, where growth opportunities laid, and to develop a market strategy. Projects in this Product Group also provided clients with insights into their brands' purposes and identities, as well as their positioning and messaging.

22. Bespoke Consulting projects gathered data to answer two questions: first, what segment of the client's consumer market would be most likely to purchase its products; and second, how can the client best connect with those consumers.

23. Projects in this Product Group bore labels such as Strategy, Workshops, Purpose, Excellent/Capability, Growthfinder, and the catchall title of Ad Hoc.

24. Bespoke Consulting also included products focused on marketing and organizational capability training. These services helped their clients “upskill” their staff and reorganize their clients’ internal marketing and insights departments to increase efficiency and capabilities.

25. The Brand Strategy projects often delivered sets of action items and instructions to increase market penetration. Per a sample SOW, a typical project would involve creating a “playbook” that, in a gameplan format, indicated where a client should play, how they win, how to deliver their offerings. Brand Strategy projects involved analytical tasks such as identifying and prioritizing their clients’ key opportunity areas, determining global strategy to target key “Sweet Space” opportunities, as well as developing guideline and action plans for “tackling” global opportunities.

26. While each project differed per the client and its goals, all Brand Strategy projects included research and analysis, interviewing client personnel, developing best-in-class case studies, holding workshops, and forming advice.

27. The Bespoke Consulting Product Group includes marketing-related training sessions performed for client personnel. These sessions were not a mere add-on element to other projects. The training sessions themselves were the actual deliverables to petitioners’ clients.

28. Training sessions varied in length and content per the clients’ goals. The record contains examples of training services, which include the following objectives: facilitating the use of insights to further drive strategic decisions, inspiring and challenging thinking and development of an integrated social marketing and sales model strategy, structure and capabilities, developing a robust understanding of the consumer landscape to identify the

strategic target, and informing future strategy development while providing an actionable tool for the business to reach current and future target customers.

29. Bespoke Consulting projects include workshops, which were sessions with clients to evaluate their current strategy. These services advised clients as to what they needed to change, what they needed to stop doing, and what they needed to continue doing. These workshops' attendees included Vermeer's personnel and the client's stakeholders.

30. While a majority of this Product Group related to advising clients on their markets, other projects focused on creating or improving an advertising campaign or involved valuation work. An example of valuation would be determining the monetary value of a brand for purposes of a merger or acquisition.

31. Bespoke Consulting services relied on several sources of information. They included interviews with clients' stakeholders and reviews of client-provided data and research. Bespoke Consulting involved conducting custom online surveys to develop consumer feedback on particular questions or issues. This Product Group also made use of focus groups. Other projects involved other individual information development, such as sending analysts to shop alongside consumers to observe their behaviors. Regardless of the data source, all Bespoke Consulting services required petitioners to study the information, apply its expertise through analysis, and render advice.

32. Bespoke Consulting projects had multiple deliverables or outputs. For example, a project that had a report outlining the advice might also have multiple workshops to ensure that clients' personnel understood the findings and the developed strategy.

33. Other Bespoke Consulting projects did not involve a written report at all. As examples, the Vermeer division conducted training sessions to present insights and to provide exercises instructing clients' staffs on leveraging insights and identifying growth opportunities.

34. Samples of deliverables for this Product Group include providing an understanding of consumer shopping behaviors, emotions, and attitudes; workshops; and strategic advice for activating opportunities.

35. All Bespoke Consulting services required gathering information, which was then provided to clients in multiple forms, including advice. None of the gathered information went into reports provided to others or went into a database that was used for other clients in the future. Standard terms within Bespoke Consulting contracts prevented sharing any information created by petitioners or received from their clients.

Brand Services

36. The Brand Services Product Group consists of services delivered by petitioners' division of the same name. These services include products named Brand Dynamics, Brand Express, Brand Equity, and Dynamic Tracking services.

37. Projects in this Product Group focused on a client's brand. Petitioners explained that brands are one of the most important assets of companies because they play a very significant factor in consumers' purchase decisions. Due to this impact on consumers, petitioners' clients allocated significant portions of their budgets to advertising in order to maintain their brand standing.

38. Petitioners' Brand Services resolved disconnects between how a company thinks consumers perceive its brand and how consumers actually perceive it. Petitioners' clients wanted to better understand consumers' perceptions, and Brand Services provided them with the

data to better understand their brands, their marketplace standings, and how to improve them. By improving their brands, petitioners' clients sought to drive more business, typically sales.

39. These services involved consultations with clients, during which petitioners identified their clients' markets, brands strengths, weaknesses, as well as strategies for improvement.

40. The Brand Services Product Group did not focus on particular advertisements or advertising campaigns, but rather looked more "holistically" across a company.

41. Services within this Product Group relied upon survey data to acquire consumers' opinions of brands. Petitioners worked with their clients to understand their objectives, as well as their brand, and then designed a custom survey with their framework. They studied that data to form insights and advice. In some circumstances, petitioners' clients may have acquired and generated data. However, they engaged in Brand Services projects to analyze and build upon that information, for petitioners' analyses, and to arrive at concrete action items. Regardless of the source of raw data, petitioners studied the data in order to generate advice.

42. Brand Services projects occurred on three distinct timelines: continuous tracking, repeated tracking, and single point-in-time tracking. Dynamic Tracking was the service in which surveys were performed daily through a year or on a weekly basis. Services such as Brand Equity, BrandExpress, Custom Tracking, and Dynamic Tracking – Repeat Wave, were performed on a repeated basis depending on the contract, e.g., once every three or six months. BrandDynamics projects were performed at one point in time only and provided insights related to how the brand was performing at that time. These services functioned the same, but the time periods created different measurements and, thus, different insights and advice.

43. The record includes several examples of Brand Services projects. One project stated that the client wanted to understand where it fit in relation to the competition through customer perception metrics: brand affinity, differentiation, and saliency. The same project sought to assess ownership of equity attributes and differentiation vis-à-vis competition, and to identify areas in which to enhance the client's performance and brand positioning. The documents also outlined steps to accomplish these objectives, as well as insights sought by the client. This project's expected deliverables included a synthesis of key findings and implications across markets that are both actionable and relevant to the client.

44. Additional examples of Brand Services had similar objectives. They assessed the current state of the client's reputation or brand, where it stands amongst its peers, and what actions may be taken to improve.

45. The deliverables for this Product Group included providing information, analysis, and rendering advice. Petitioners typically advised spending more on advertising, e.g., put more ads on the air. When clients did not want to increase their advertising spending, petitioners worked with them based on the available actions. In delivering Brand Services projects, petitioners gathered empirical data, then applied their analytical frameworks to render advice that would, ideally, increase their clients' performance, typically sales.

46. As part of Brand Services projects, petitioners delivered live presentations consisting of PowerPoint presentations and in-person discussions with clients. Petitioners emphasized the importance of these elements because it helped clients understand the data, which underpinned their guidance and advice.

Link Services

47. Link Services Product Group include the entire Link family of services. This Product Group focused on ad development services. Link projects studied individual ads or advertising campaigns, from idea development through to ad testing, to give clients advice on how to improve them.

48. Petitioners' clients typically sought Link Services projects prior to the airing of an ad, i.e., while it was still in development. Projects could be performed at very early stages, when clients had concepts or animated designs of an ad. Performing these services at this stage allowed for petitioners' clients to save budgetary spending by improving concepts early in the development cycle.

49. Link Services projects tested whether a concept was worth filming or whether an ad was effective. All projects in this Product Group gathered data to measure effectiveness in the advertising space.

50. Link Services include several iterations. A Full Link project included petitioners' analysis of survey data, facial coding, as well as advice. Some shorter version of the Full Link service, such as LinkExpress, may not have included facial coding, but still included survey analysis and expertise. Other iterations bore client-specific names, such as Preview, AdCheck, and AdCertifier. Regardless of the name, a product within the Link family of services remained the same: petitioners applied their frameworks regardless of metrics, ad medium, or ad phase.

51. For all Link Services projects, petitioners showed a panel of survey respondents the ad or ad concept being tested. They then surveyed respondents, and those survey answers were used by petitioners to form their insights.

52. For all projects in this Product Group, petitioners rendered analysis from their studies. An example of this advice would have been to air the ad widely, discard it, or, most typically, improve upon parts of the ad.

53. Link Services projects made use of then-emerging technologies, such as facial coding. Petitioners observed test subjects who consented to webcam recordings of their faces while they watched the tested ad. Using this technology, petitioners measured the test subjects' micro-expressions. Facial coding provided second-by-second reactions that informed whether the viewers were emotionally engaged, reacting positively or negatively, and whether they were paying attention to the ad. Petitioners used this data to inform their insights.

54. The record contains a Link Services project that included a sample facial coding study of a 30 second ad. In this analysis, they discovered that the ad was not appealing to viewers during the first 6 seconds, was appealing during seconds 6 to 17, and that appeal dropped off for the remainder of the ad. Petitioners provided this information to the client and rendered advice. In this instance, since advertising screen time was charged by the second, petitioners recommended that the client consider reducing the ad from 30 seconds to 15. More importantly, petitioner recommended that they edit the ad to remove the components leading to the decreased viewer appeal.

55. The record also contains a sample Link Services proposal. This identified three areas for evaluating a concept: (1) Does this ad connect with people? And does the brand have a role in the connection? (2) Does the ad affect brand association in the right way?; and (3) Does brand association make it more desirable at key moments? This proposal also included answers to be discovered by the study, including determining drivers of effectiveness and which channels would be most likely to maximize effective reach.

56. As part of Link Services Product Group, petitioners informed clients as to how the ad performed relative to other ads on the same metrics. These indicators told clients whether respondents enjoyed the tested ad more or less than a typical ad in the country of viewership.

57. To deliver this relative analysis or benchmarks, petitioners created a database from the results of prior Link Services projects. Petitioners did not create a particular benchmark unless they had at least 30 Link surveys from projects in the same market sector, which ensured quality data, and clients' anonymity.

58. Petitioners did not sell subscriptions to this Link Services database. Only petitioners had access to and used this database. Clients never saw any information from prior Link Services studies apart from benchmark scores derived from this database.

59. The services in the Link Services Product Group all involved gathering information, which was provided to clients. The results from projects in this Product Group was not provided to anyone apart from the specific client. Apart from that client, none of the data or reports from the Link family of services was provided to any party.

Media Services

60. DL exclusively sold projects within this Product Group. DL housed petitioners' media effectiveness and experience optimization practice.

61. During the periods at issue, MB did not make any sales within this Product Group.

62. A typical Media Services client would have been an advertiser running an ad campaign across multiple mediums, e.g., television, billboards, and the internet. Projects in this Product Group addressed which of these mediums performed best, which was most efficient, and, ultimately, where the advertiser should spend its budget. Media Services projects sought to

provide clients with a better understanding of an ad campaign's performance and how to improve future iterations.

63. This Product Group includes the AdIndex family of services. These projects aided clients in ascertaining the return on their investment in an ad campaign, and data that indicated suggestions for future improvements.

64. The AdIndex service typically proceeded as follows. First, a client presented an ad campaign and a list of internet sites where the campaign was airing. DL evaluated whether an AdIndex study was feasible for that campaign. If they proceeded, DL created a custom survey. Every survey contained a standard set of seven demographic questions, like age, gender, and income, as well as standardized questions. The remaining questions, of which there may be dozens, are "bespoke" questions, which is to say, specific for the particular survey. In consultation with the client, DL drafted these bespoke questions.

65. Before an AdIndex survey was distributed, DL used internet tags, commonly referred to as "cookies," which let them know who viewed the campaign. A view occurred when an internet user loaded the ad campaign on their computer. Requests for survey participation were sent to "exposed" individuals, or those who viewed the campaign, as well as "control" groups who had not viewed the campaign.

66. DL reviewed the survey responses provided by the exposed and control groups. It then "cleaned" the responses by applying a weighting scheme specific to each campaign. DL then filtered the cleaned response data to distinguish between the control and exposed groups.

67. Based upon the data, DL developed insights and advice that were captured in final reports. These documents contained various charts reflecting survey findings and also insights that combined petitioners' advice and "broader learnings." Typical advice included increasing or

decreasing advertising spending on a particular site based on a campaign's effective reach to the target consumer base.

68. DL provided AdIndex clients PowerPoint presentations as well as oral reports that summarized the studies' findings and advice.

69. DL provided neither the AdIndex presentations, nor any client-specific data, to any entity apart from the client or its designees.

70. The AdIndex services at issue is identical to the AdIndex service described and addressed in *Matter of Dynamic Logic* (see finding of fact 4).

71. From 2015 to 2016, DL phased out the AdIndex services in favor of a successor service, BrandLift Insights.¹ However, the AdIndex services remained active beyond 2016 for clients that had active, ongoing projects.

72. DL performed BrandLift Insights studies using the same AdIndex methodology. Custom surveys were sent to exposed and control groups of website visitors. DL analyzed the acquired data and formed advice about clients' ads, ad placements, and ad allocations.

73. DL differentiated BrandLift Insights from AdIndex projects by refining its analysis of the acquired data. Through incorporating technology acquired through the acquisition of another entity, DL could track whether respondents within the exposed group were unique individuals or prior viewers, e.g., individuals who cleared cookies from their browser, who used different browsers, or perhaps viewed the ad campaign on a laptop and again on a mobile device.

74. This technology added more granularity to DL's analysis, which led to more detailed insights. Specifically, BrandLift Insights studies better informed clients as to whether their placed ads hit the correct audience and whether they did so at the most efficient frequency.

¹ In the record, invoices for BrandLift Insights may appear as "BrandLift Insights," "BLI," or, in an apparent typo, "LBI."

75. DL provided neither the BrandLift Insights presentations, nor any client-specific data, to any entity apart from the client or its designees.

76. AdIndex and BrandLift Insights solely analyzed online campaigns.

77. DL's PowerPoint presentations summarizing BrandLift Insights and AdIndex studies included a benchmark statistic derived from DL's "MarketNorms" database. In each AdIndex and BrandLift Insights PowerPoint presentation, this benchmark statistic appeared on one slide. DL provided these benchmarks to show clients how their ads and ad campaigns fared in comparison to others in the same product sector. DL included these benchmarks as an additional data point supporting the study, but viewed it as complimentary to the totality of data gathered from the exposed and control groups.

78. DL's MarketNorms database is one of the largest media effectiveness databases within the world. The MarketNorms database contained anonymized and aggregated data, including responses to seven generic demographic questions included in the surveys delivered as part of the AdIndex and BrandLift Insights products. The MarketNorms database did not contain any of the custom questions, responses, none of the advice, insights, or guidance, provided as part of the AdIndex service.

79. DL offered clients subscriptions to the MarketNorms database. Subscribers had access to view only benchmark data, which showed scoring for how generalized ad campaigns performed on average. The provided data did not allow subscribers to view the performance for individual ads or brands or particular ads or brand campaigns. MarketNorms subscribers had access to only anonymized, non-identifying information.

80. AdIndex and BrandLift Insights services involved acquiring new data, not merely gathering preexisting information. Neither product was purely computer generated. Delivering

AdIndex and BrandLift Insights projects took 15 to 20 days for DL analysts to study the data, and to draft advice and insights.

81. This Product Group also included the CrossMedia family of products, which also provided advice and guidance to clients regarding advertising campaigns.² DL sold three different CrossMedia products: “CrossMedia (legacy),” which was offered until May 2017; “CrossMedia Model,” which was offered from May 2017 to February 2018; and “CrossMedia Experimental,” which was also offered from May 2017 to February 2018.

82. CrossMedia projects studied ad campaigns across various media channels, such as television, billboards, print, and online.

83. Generally, a CrossMedia study helped a client understand whether its advertising budget was spent on the most efficient channel and reaching the desired consumers at the optimal time. DL’s clients typically sought to better understand the efficiencies across media channels and to optimize their mixes.

84. DL created a CrossMedia (legacy) study by surveying respondents, consisting of an exposed group and a control group. After collecting and analyzing the responses, DL analysts drew conclusions, created a report, and then presented the data, insights, and guidance through a PowerPoint and an oral discussion.

85. DL did not have or use a database for conducting CrossMedia (legacy) projects. Specifically, it did not include MarketNorms data in CrossMedia (legacy) studies. DL also did not integrate CrossMedia (legacy) data into the MarketNorms database.

86. DL did not provide CrossMedia studies to anyone other than the project’s client. The data from CrossMedia (legacy) studies was not provided to others.

² In the record, CrossMedia studies may appear as “CrossMedia,” “CrossMedia Insights,” “CMI,” “CrossPlatform,” “X-Media,” or “XM.”

87. The CrossMedia (legacy) services at issue herein is identical to CrossMedia services described and addressed in *Matter of Dynamic Logic* (see finding of fact 4).

88. After acquiring new technologies, DL moved on from CrossMedia (legacy) to two successor services, CrossMedia Model and CrossMedia Experimental.

89. Both CrossMedia Model and CrossMedia Experimental performed the same goals as CrossMedia (legacy) in that these projects studied the overall synergy of an ad campaign and sought the optimal mix of different media channels. By integrating new technologies, DL made the CrossMedia process more model-based, which enabled standardizing survey questions.

90. CrossMedia Experimental typically bore all the features of CrossMedia Model, but added additional depth because, similar to BrandLift Insights, this service identified and distinguished between unique and repeat users in the exposed group.

91. Using the new methodology and technologies enabled DL to create a database for a portion of the CrossMedia survey responses.

92. DL only utilized a few survey responses from CrossMedia Model and CrossMedia Experimental in the new CrossMedia database. This CrossMedia database was not available for separate sale or subscription. It was only used to create benchmarks used in future CrossMedia projects.

93. The record contains a representative example of a CrossMedia SOW. This document identified the client's goals as understanding the following: how did the campaign perform; regression modelling from survey respondents; what was the contribution of the different elements and what was their cost efficiency in delivering impact; and what optimizations for media should be made. Under the fourth objective, the SOW states that DL was to provide clear advice for future media allocations, diagnosis of frequency, understanding of media duplication

targets, and media weight guidance. This SOW reflects the type of goals for all CrossMedia studies.

94. The Media Services Product Group also included a catch-all group called “Other Media Consultancy.” When entering a new project, DL analysts could select this drop-down option, which required the input of a job-specific description that was then placed on the particular project’s invoice.

95. In addition to the four Product Groups, MB’s services also fell into a Miscellaneous category. A review of the record did not clearly identify which invoices, if any, corresponded to the services in this category.

The Audits

96. In September 2014, the Division commenced a sales tax field audit of MB for the period of December 1, 2011, through August 31, 2014. The Division assigned Mirjana Marceta, a sales tax auditor 1, to conduct this audit.

97. In October 2014, the auditor met with MB’s representative, Brian Stephan. She learned that MB was in the business of performing ad research, mostly online. The auditor also discovered that MB delivered its reports through email or online, and did not provide its clients with books, newsletters, subscriptions, apps or software. At that meeting, Mr. Stephan informed her that all the research results were shared only with the customer for whom the research was performed.

98. The Division made several requests for records. MB provided sales and expense data, as well as a list of assets acquired during the audit period. It also provided a list of services with descriptions. The Division repeatedly requested copies of contracts to substantiate the list, which it received in December 2015. The Division requested more documentation to

substantiate MB's claim that its services were personal or individual in nature. Eventually, the Division concluded that MB's receipts constituted sales of taxable information services and did not qualify for an exclusion from taxation.

99. The Division and MB ultimately agreed upon using sales from April and June 2014 as a test-period. As part of this process, MB provided the Division with contracts, SOWs, and similar documentation, related to 28 separate sales. The total sales price of these services amounted to \$1,904,185.62.

100. After reviewing the documentation, the Division determined that 20 of the 28 sales were nontaxable, while 8 were taxable. The total value of the taxable sales amounted to \$440,563.00.

101. The Division computed the percentage of sales that were taxable by generating an error rate. As computed during the audit, the Division divided the taxable sales of \$440,563.00 by the total sales of the test period, i.e., \$1,904,185.62, yielding an error rate of 23.137%. Any modifications to taxable sales during the test period would impact the error rate and, thus, the tax due. This percentage was multiplied by the total sales of the entire period, i.e., \$75,912,880.93, to arrive at total taxable sales of \$17,563,607.38. The Division then applied sales tax to arrive at additional tax due of \$1,472,082.34.

102. The audit methodology for determining a service's taxability produced different conclusions on the same product for different clients. As an example, the Division determined that sales of "Dynamic Tracking – Continuous," which constituted approximately 15% of the taxable sales, were taxable to some clients, but not others.³ Additionally, this methodology also

³ As an example, compare invoice number 1010090972 against invoice number 101090403.

imposed tax upon products sold to the same client that, in the same audit, the Division determined to be nontaxable.⁴

103. The Division's audit methodology for determining the taxability of a service also did not account for the clients' locations, asserting tax due on sales regardless of whether the client receiving MB's services was located within or outside of New York State.⁵

104. On August 13, 2016,⁶ at the conclusion of its audit, the Division issued notice of determination (notice) L-045410026, which asserted additional tax due of \$1,472,082.32, plus interest. MB paid the total amount of tax, plus interest, as asserted due.

105. On or about August 16, 2019, MB timely filed an application for credit or refund of sales or use tax (refund claim), seeking a refund of \$2,030,311.41. This amount represented the tax asserted due on MB's sales of its services, i.e., \$1,454,407.08, plus interest. In an attachment to its refund claim, MB asserted that it was entitled to a refund because its services were not specifically enumerated as taxable.

106. On February 3, 2020, the Division issued a refund denial that denied MB's refund claim. It denied the claim due to a lack of sufficient information.

107. On July 30, 2020, MB timely filed a petition with the Division of Tax Appeals, which assigned it DTA number 830004.

108. In July 2017, the Division commenced a sales tax field audit of DL for the period of September 1, 2014, through February 28, 2018. The Division assigned this audit to Carlos Ferrer, who left the Division prior to the hearing in these matters.

⁴ As an example, notice L-045410026 determined tax to be due on invoice number 101090448, which MB sold under a master service agreement with the client. The Division, in its audit log, found other sales under this specific agreement to be nontaxable.

⁵ As an example, notice L-045410026 determined tax to be due on invoice number 101091112, which bears a shipping address in California.

⁶ Joint Stipulation ¶ 10 incorrectly identifies the issuance date of L-045410026 as September 13, 2016.

109. On August 15, 2017, Auditor Ferrer met with DL's representative, Mr. Stephan. The parties discussed assets and expenses, as well as the sales portion of the audit.

110. The Division reviewed DL's sales for the period of September 1, 2014 through May 31, 2017, as well as reported exempt sales for the period of June 1, 2017 through February 28, 2018. For the latter period, corresponding to that last three quarters of the audit, DL did not provide itemized sales details during the audit. It stated that DL is an "online research company that measures and analyzes marketing effectiveness." Regarding DL's services, the Division stated, "[T]hey provide digital solutions to improve online ad effectiveness and maximize brand impact." As it had previously (*see* finding of fact 4), the Division determined that DL's services constituted taxable information sales. After reviewing the records, the Division concluded that they were inadequate, specifically, that DL failed to provide enough support or responses to substantiate their claimed exempt sales. Determining that 100% of DL's sales during the period were taxable, the Division computed \$9,434,433.52 in additional sales tax due.

111. By using a methodology that determined 100% of DL's sales to be taxable, this audit asserted tax on all sales regardless of whether DL delivered the services to clients within or outside of New York State.

112. The Division also reviewed DL's expenses. Using a straight-line method derived from prior test periods, it projected additional tax on DL's expenses, arriving at an amount due of \$45,170.72.

113. On October 15, 2021, the Division issued notice L-054439310, asserting a total amount of sales tax due of \$9,479,604.24, plus interest.⁷

⁷ Joint Stipulation ¶ 19 incorrectly identifies the issuance date of L-054439310 as November 5, 2021.

114. DL timely filed a petition with the Division of Tax Appeals, which assigned it DTA number 850016.

115. Notice L-054439310 asserted tax due of DL in the amount of \$1,042,07.00 for Other Media Consultancy. The Invoice Spreadsheets indicate that, \$725,175.00 of this amount was attributable to CrossMedia services.

116. Subsequent to the issuance of notice L-054439310, the parties agreed to certain modifications. The parties agreed to reductions for tax asserted due on sales to entities that provided DL with direct-pay permits, and to companies that underwent overlapping audits. DL conceded the taxability of receipts for the MarketNorms service. Additionally, DL conceded to tax due on its expenses.

117. In May 2017, the Division commenced a sales tax field audit of MB for the period of September 1, 2014, through February 28, 2018. The Division also assigned this audit to Auditor Ferrer.

118. On June 8, 2017, Auditor Ferrer again met with Mr. Stephan, who indicated that he would provide information as to how MB's products are taxed. The parties also discussed assets and expenses. Regarding sales, Mr. Stephan explained that not much had changed since the Division's last audit.

119. The Division reviewed MB's sales for the period of September 1, 2014 through May 31, 2017, as well as reported exempt sales for the period of June 1, 2017 through February 28, 2018. For the latter period, corresponding to that last three quarters of the audit, MB did not provide itemized sales details during the audit. The review included contracts and invoices to determine the nature of MB's work. It stated that MB is an "online market research company that measures and analyzes marketing effectiveness." Regarding MB's services, the Division

stated, “[t]hey provide digital solutions to improve online ad effectiveness and maximize brand impact.” As it had previously (*see* finding of fact 99), the Division determined that MB’s receipts constituted sales of taxable information services. After reviewing the records, the Division concluded that they were inadequate, specifically, that MB failed to provide enough support or responses to substantiate their exempt sales. Determining 100% of MB’s sales during the period to be taxable, the Division computed \$6,899,950.39 in additional sales tax due.

120. By using a methodology that determined 100% of MB’s sales to be taxable, the Division asserted tax on all sales, regardless of whether MB delivered the services to clients located within or outside of New York State.

121. The Division also reviewed MB’s expenses. Using previous test periods, it projected additional tax due on purchases of business cards, software licenses, and office supplies, arriving at an additional \$34,046.49 of sales tax due.

122. The Division also reviewed MB’s fixed assets and found MB’s records to be inadequate, primarily due to missing invoices on repairs and maintenance. As MB could not substantiate that it paid tax on these items, the Division determined an additional \$22,406.19 due in sales tax.

123. On October 15, 2021, the Division issued notice L-054454954, asserting a total amount due of \$6,956,403.07, plus interest and penalties.

124. MB timely filed a petition with the Division of Tax Appeals, which assigned it DTA number 850017.

125. Subsequent to the issuance of notice L-054454954, the parties agreed to certain adjustments to notice L-054454954. The parties stipulated that no penalties should be imposed, and that interest should be calculated at the non-penalty statutory rate. The parties agreed to

reductions for sales tax assessed on tax exempt entities, on entities that provided MB with direct-pay permits, and on sales to companies that underwent overlapping audits. MB conceded to tax due on its capital and expenses. Additionally, the parties agreed that any final amount due should be reduced by \$65,897.41 to reflect credits given by MB to its clients.

126. Notice L-054454954 asserted tax due on a category of services called “Null,” which corresponds to services without a filled invoice description, or nature of work, column on the Invoice Spreadsheets.

127. The total amount of tax due for the Null category was \$110,420.00.⁸ Using the invoices, petitioners sorted \$103,178.00 of the asserted tax due on services in the Null category into the following Product Groups:

Product Group	Product	Assessed Amount
Bespoke Consulting	Awareness Attitude and Usage (U&A)	\$2,019.00
Bespoke Consulting	Capability Building	\$7,241.00
Bespoke Consulting	Segmentation	\$9,245.00
Bespoke Consulting	Strategy	\$3,166.00
Bespoke Consulting	Valuation	\$4,437.00
Brand	Brand Express	\$4,113.00
Brand	Brand Tracking	\$2,263.00
Brand	Dynamic Tracking	\$3,180.00
Link	Link	\$34,373.00
Other	Other	\$33,142.00
<u>Total Sorted Null</u>		<u>\$103,178.00</u>

This leaves the Null category with asserted tax due for the unsorted amount of \$5,757.00, and \$33,143.00 for receipts bearing the Product Group and the Product of “Other” (Other-Other).

128. A review of the record could not identify which invoices, if any, corresponded to these Other-Other receipts.

⁸ The tax due for the Null category, as well as other services, differs from the joint stipulation ¶ 40 due to the parties’ adjustments (*see* finding of fact 130) and further sorting of the corresponding invoices.

129. The concessions made by the Division (*see* findings of fact 116, 125) reduced the amounts at issue in these matters. As the Division made no concessions regarding the refund denial for notice L-045410026, the amount remains unchanged. The following table summarizes the total concessions, exclusive of interest:

Pet / DTA Number	DL / 850016	MB / 850017
<i>Notice</i>	<i>L-054439310</i>	<i>L-054454954</i>
Capital	N/A	\$22,406.19
Expenses	\$45,170.72	\$34,046.49
Sales of MarketNorms ⁹	\$17,819.23	\$0.00
<u>Total Concession</u>	<u>\$62,989.95</u>	<u>\$56,452.68</u>

130. The parties have made numerous post-issuance adjustments, including after entering into the joint stipulation, to notices L-054439310 and L-054454954 (*see* findings of fact 116, 125), which altered the number of taxable services and tax assessed. Only the refund claim and sales tax asserted due for petitioners’ sales remain at issue.

131. Accounting for the concession for MarketNorms (*see* finding of fact 116), for the sorting of the Null category (*see* finding of fact 127), and other adjustments (*see* finding of fact 130), the sought refund and sales tax asserted due per Product Group, exclusive of interest, roughly correspond to the following:

Pet / DTA Number	MB / 830004	DL / 850016	MB / 850017
<i>Notice</i>	<i>Refund Denial</i>	<i>L-054439310</i>	<i>L-0544544954</i>
Bespoke Consulting	(\$409,435.00)	\$794,333.00	\$988,979.00
Brand Services	(\$613,832.00)	\$184,967.00	\$1,500,102.00
Link Service	(\$445,574.00)	\$132,330.00	\$917,561.00
Media Services	N/A	\$7,229,588.00	N/A
Miscellaneous	(\$3,240.00)	\$2,039.00	\$22,958.00
Null	N/A	N/A	\$38,898.00
<u>Total (Refund) or Assessment</u>	<u>(\$1,472,081.00)</u>	<u>\$8,343,257.00</u>	<u>\$3,468,498.00</u>

⁹ The parties adjusted the amount of MarketNorms sales post-issuance (*see* finding of fact 130). The briefs indicate that the parties may have further adjusted this amount, even after entering into the joint stipulation.

132. The following chart roughly summarizes the amount of sales tax asserted due for sales of AdIndex and its successor product, BrandLift Insights:

Pet / DTA Number	DL / 850016
<i>Notice</i>	<i>L-054439310</i>
AdIndex	\$2,065,906.00
BrandLift Insights	\$3,371,658.00
<u>Total AdIndex & Successor Product</u>	<u>\$5,437,564.00</u>

133. The same notice includes assessments for CrossMedia (legacy) and its related successor products. The following chart roughly summarizes the sales tax at issue on these services:

Pet / DTA Number	DL / 850016
<i>Notice</i>	<i>L-054439310</i>
CrossMedia (legacy)	\$289,927.00
CrossMedia Experimental	\$464,708.00
CrossMedia Model	\$21,298.00
Other Media Consultancy (CrossMedia)	\$725,175.00
<u>Total CrossMedia (legacy) & Successor Products</u>	<u>\$1,501,108.00</u>

The Hearing

134. At the hearing, the Division provided the testimony of the auditor. She testified credibly about the audit methodology underlying notice L-045410026.

135. The determination of taxability relied upon her understanding of a taxable information service. The auditor explained that she understood this term to include any service involving the collection, processing, compilation, analysis, or presentation of information. She was unsure whether the source of information, i.e., the generation of new data or collection of existing data, impacted the determination of taxability. The auditor also expressed uncertainty as to what services would not constitute a taxable information service but did acknowledge that services might be nontaxable if a taxpayer established that the service was personal and

individual in nature. She testified that in applying this methodology, if there was doubt about taxability or uncertainty about the nature of the work, the audit assumed that the service was subject to tax.

136. In her recollection of the audit, the auditor found that MB was in the business of conducting surveys on advertisements, processing the data, and presenting it to its clients. The application of her understanding meant that MB's services were taxable. The audit concluded that the services did not constitute consulting, which the auditor testified was nontaxable, because the underlying work performed by MB involved gathering, compiling, and presenting data. The audit methodology did not consider clients' locations because MB did not raise this issue during the audit.

137. The auditor could not recall or explain certain aspects of the audit. As an example, she could not recall specific services or their functions. The disparate treatment of the same service for different clients could not be explained by the auditor. The methodology used to distinguish between taxable services and nontaxable consulting was not clearly explained. She recalled that while conducting the audit, she relied upon the data and records as provided by MB.

138. At the hearing, petitioners presented credible testimony of petitioners' employees about their services. Each individual had a long tenure working with petitioners and possessed significant experience in the various divisions responsible for delivering services in each of the four Product Groups. They provided detailed testimony explaining their respective divisions' operations and, drawing from the joint stipulation, walked through the work performed for specific clients.

SUMMARY OF THE PARTIES' POSITIONS

139. Petitioners challenge the notices on several grounds. Regarding the CrossMedia (legacy) services, they contend that the ruling in *Matter of Dynamic Logic* (see finding of fact 4) should be extended because these services are identical to those addressed therein. With regard to AdIndex, as the parties did not stipulate that it was the same product as in the prior period, petitioners argue that the decision to extend the holding in *Matter of Dynamic Logic* rests with the ruling herein.

140. Regarding the remaining services, petitioners set forth their arguments in an analytical framework that questions, first, whether the statute imposes tax, if so, whether any of the exceptions to tax apply, and, if not, whether the Division erred by imposing tax on sales delivered to clients outside of New York State.

141. In challenging the Division's determination of taxability, petitioners argue that the audits applied a definition of taxable information services that discounts portions of the statutory language. Specifically, they argue that the words "printed," "mimeographed," "multigraphed," and "duplicating" indicate the Legislature intended to tax certain types of information services, ones whose primary functions are duplication of existing information. Petitioners contrast these services with consulting, which, as they define it, possesses the primary purpose of providing advice and guidance. It is their contention that the services at issue constitute consulting as opposed to duplication and, therefore, petitioners submit that the Division erred in determining that their services were subject to tax. This argument was not raised at the administrative level in *Matter of Dynamic Logic* and was not addressed in its article 78 proceeding.

142. Petitioners posit that if any of the services are deemed taxable, then the analysis should shift to whether any of their services fall with the exceptions to tax. They incorporate the

primary function test within their analyses of each issue. Petitioners contend that each of the exceptions apply to their services and, therefore, the Division erroneously determined their services to be taxable because each of the statutory exceptions apply.

143. If the services fall within the taxing clause but not within the exception, petitioners' analysis turns to the question of whether their services constitute advertising. They cite to various testimony and examples in the record for the proposition that their consulting services, as a whole, involve workshopping advertising, as well as measuring and increasing advertising effectiveness. Given these characteristics, petitioners argue that the Division erred by determining that their services were not advertising and in subjecting them to tax.

144. Petitioners argue that, if the services are taxable and none of the exceptions apply, the Division erred by asserting tax on sales delivered to clients outside of New York State and, therefore, the notices must be modified to remove tax on these sales.

145. The Division argues that the notices should be sustained because petitioners failed to meet their burden. On the determination of taxability, it argues that its interpretation need only be reasonable to be upheld. While it does not address the argument regarding the statutory language, the Division stated that the statute imposes sales tax on all receipts from the furnishing of information "including the services of *collecting, compiling or analyzing information* of any kind or nature and furnishing reports thereof to other persons . . ." It cites to statutes and its own regulations for the proposition that all receipts from information services are subject to tax until the contrary has been established. The Division argues that all petitioners' services primarily function as marketing studies and, collect and analyze information constitute taxable information services.

146. The Division contends that none of the exceptions apply. It claims that petitioners' services rely on public information because others can use the services of professional survey panel companies to acquire web traffic data. It notes that petitioners use databases, like MarketNorms, as well as private benchmark databases, and frameworks, thereby incorporating their learning into reports furnished to others. The Division also notes that petitioners themselves are not advertisers. As such, it contends that it correctly determined that none of the statutory exceptions apply to any of petitioners' services.

147. The Division failed to address the issue of its taxation of petitioners' sales delivered to clients outside of New York State.

CONCLUSIONS OF LAW

A. Tax Law § 1105 (c) (1) imposes sales tax upon the receipts from every retail sale of the following service:

“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. . . .”

Tax Law § 1105 (c) (9) extends the taxation of information services to those provided by telephony or telegraphy, with the same exclusion (*Matter of Dynamic Logic*). The Division's regulations include “product and marketing surveys” among examples of information services listed therein (20 NYCRR 527.3 [a] [3]).

B. Because retail sales of services are not subject to sales tax unless specifically included among the services listed in Tax Law § 1105 (c), whether a given service may be taxable is properly construed pursuant to the rule applicable when determining whether a transaction is subject to taxation at all (*see Matter of Grace v State Tax Commn.*, 37 NY2d 193, 196 [1975],

rearg denied 37 NY2d 816 [1975], *lv denied* 338 NE2d 330 [1975]); that is, construed most strongly against the government and in favor of the citizen (*see Matter of Building Contrs. Assn. v Tully*, 87 AD2d 909, 910 [3d Dept 1982]). “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” (*Matter of Grace v State Tax Commn.*, 37 NY2d at 196 [internal quotation marks and citation omitted]).

Even with this construction, the burden to prove that the services at issue were not information services within the meaning of the statute remains with petitioner (*Matter of Exxon Mobil Corp.*, Tax Appeals Tribunal, May 23, 2013). “[I]t is 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” (*Matter of Audell Petroleum Corp. v State Tax Commn.*, 69 NY2d 818, 819-820 [1987]). Accordingly, a service’s primary function controls whether it is subject to sales tax under Tax Law § 1105 (c) (1) (*Matter of SSOV ’81 Ltd.*, Tax Appeals Tribunal, January 19, 1995). To determine such a primary function, the focus is on “the service in its entirety, as opposed to reviewing the service by components or by the means in which the service is effectuated” (*id.*). If a service’s primary function is the collection and dissemination of information, then the service may be subject to tax under Tax Law § 1105 (c) (1) (*id.*).

C. *Matter of Dynamic Logic* controls these matters. Therein, the Tax Appeals Tribunal (Tribunal) addressed the services of AdIndex and CrossMedia (legacy) for prior periods. It held that the petitioners’ market studies were not consulting but fell within the definition of an information service (*id.*, *see Matter of ADP Automotive Claims Servs. v Tax Appeals Trib.*, 188 AD2d 245 [3d Dept 1993], *lv denied* 82 NY2d 655 [1993] [report with intelligence and analysis

that customers did not previously have is an information service]; *Matter of Finserv Computer Corp. v Tully*, 94 AD2d 197, 198 [3d Dept 1983], *affd* 61 NY2d 947 [1984]). In so doing, they stated the following:

“[T]he record shows that this component is subordinate to the services’ evaluation function. A review of the reports in the record shows that most of the recommendations therein are drawn directly from the data. In other words, without the data there would be no basis for most of the recommendations” (*Matter of Dynamic Logic*).

D. The primary function of the services at issue mirror those addressed in *Matter of Dynamic Logic*. That is to say, the services in the Product Groups operate by gathering and analyzing data and, from there, rendering advice. Indeed, the services at issue that matter, AdIndex and CrossMedia (legacy), are also at issue herein. It is indisputable that petitioners’ clients purchased the services in the Product Groups for advice and insights. However, the key to rendering that advice was the acquisition of information about their clients’ businesses, be it their markets, customers, brands, or advertising. The representative samples from the Product Groups, particularly, the SOWs, and the testimony at hearing, reinforce that the centrality of the data acquisition petitioners’ services. In simplest terms, the services in the Bespoke Consulting, Brand Services, Link Services, and Media Services Product Groups all revolved around acquiring information about petitioner’s clients, analyzing that data, and distributing the analysis in the form of actionable advice. In this way, the services in the Product Groups are indistinguishable from those addressed in *Matter of Dynamic Logic*. Accordingly, the holding must be extended. It is determined that all of services at issue constitute taxable information services under Tax Law § 1105 (c) (1).

E. Petitioners argue that the statute only imposes tax upon services that replicate existing materials. They correctly note that the taxing clause of Tax Law § 1105 (c) (1) imposes tax upon

the furnishing of information by certain methods, namely “by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner.” Prior matters addressing information services almost entirely discount this language (*see e.g. ADP Automotive Claims Servs.* 188 AD2d at 248 [using ellipsis to skip this language]; *Matter of Finserv Computer Corp. v Tully*, 94 AD2d 197, 198 [skipping the language entirely]).

However, the statutory language does not exclusively tax the duplication of written or printed matter.

Tax Law § 1105 (c) (1) begins by enumerating “the furnishing of information by printed, mimeographed or multigraphed matter” as a taxable service. As interpreted by the Tribunal, Tax Law § 1105 (c) (9) (i) extends this tax to services provided over telecommunications (*Matter of Dynamic Logic*). This section imposes a tax upon:

“The furnishing or provision . . . of an information service (but not an information service subject to tax under paragraph one of this subdivision), which is furnished, provided, or delivered by means of telephony or telegraphy or telephone or telegraph service (whether intrastate or interstate) of whatever nature, such as . . . information services provided through 800 or 900 numbers or mass announcement services or interactive information network services. Provided, however that in no event (i) shall the furnishing or provision of an information service be taxed under this paragraph unless it would otherwise be subject to taxation under paragraph one of this subdivision if it were furnished by printed, mimeographed or multigraphed matter or by duplication written or printed matter in any other manner. . .” (Tax Law § 1105 [c] [9] [i]).

Instead of printing, petitioners collected, compiled, and analyzed data over the internet, and, through the same means, made their reports available to clients. Therefore, under the standards set forth in *Matter of Dynamic Logic*, petitioners’ services qualify as enumerated services, and, therefore, their argument on duplication is rejected.

F. In concluding that petitioners’ services are information as enumerated in Tax Law § 1105 (c) (1), the next issue to be addressed is whether any services fall within the exclusion

contained in that section as “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” (Tax Law § 1105 [c] [1]). Like exemptions, exceptions are to be construed against the taxpayer seeking them (*see Wegmans Food Mkts., Inc. v Tax Appeals Trib.*, 33 NY3d 587, 592-593 [2019]).

In determining whether the information is personal or individual in nature, the source of the information is controlling (*see id.*).¹⁰ In *Matter of Wegmans*, the petitioner engaged the services of RetailData, LLC (RetailData) to monitor competitors’ retail prices through competitive price audits as part of its pricing strategy. Wegmans selected the products, time periods covered and locations of specific competitors for RetailData to surveil. RetailData’s data collectors then traveled to the specified locations and collected information by scanning prices from the store shelves using scanners or smart phones. After collecting the prices, RetailData validated the information, created reports and furnished the reports to Wegmans. The competitive price audits and resulting reports were kept confidential to prevent Wegman’s competitors from discovering the products it monitors and its pricing strategies. In affirming the Tribunal’s decision that the information was not personal or individual in nature, the Court of Appeals found that:

“The information that RetailData compiled and the reports 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

¹⁰ The decision in *Matter of Dynamic Logic* did not address the personal and individual in nature prong with regard to AdIndex and CrossMedia (legacy) because the Division did not take exception to this issue.

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....” (*Matter of Wegmans Food Mkts., Inc. v Tax Appeals Trib. of State of NY* at 595, citations omitted).

Unlike the publicly available source that information was derived from in *Matter of Wegmans*, the information gathered by petitioner for its clients in this matter was not publicly available or widely accessible. The services at issue do not operate on data that can be easily accessed. For each of the Product Groups, petitioners gathered information from either their clients’ market or from the public. Information from their clients, such the market they believe themselves to operate within or their internal modalities, is not public information. Similarly, their client’s customers’ opinions, such as those on brands and advertisements, are not public information, and would not be discovered if not they were not solicited. It is concluded that the source of the data that drives all the services in the Product Groups is not publicly available information but is personal and individual in nature.

G. In determining that the source of the Product Groups’ information was personal and individual in nature, the next question, as to whether the exclusion applies, is whether the information “is not or may not be substantially incorporated in reports furnished to other persons” (Tax Law § 1105 [c] [1]).

The decision *Matter of Dynamic Logic* guides this prong of the analysis. Therein, the Tribunal cited to *Matter of Rich Prods. Corp. v Chu* (132 AD2d 175, 177-178 [3d Dept 1987], *lv denied* 72 NY2d 802 [1988]) for the holding that the exclusion does not apply when evidence establishes that reports contain information that was also provided to third parties (*Matter of Dynamic Logic*). It also cited to *Matter of Sunguard Securities Finance LLC* (Tax Appeals Tribunal, March 16, 2015) for the holding that third party access to an information service’s aggregated data constitutes the furnishing of information to other persons for the purposes of the

statutory exclusion. Applying these holdings to AdIndex, the Tribunal concluded that it did not qualify for the exclusion because this service generated information incorporated into the MarketNorms product. The Tribunal applied the same to CrossMedia (legacy), which was not used to create a benchmark and, unlike AdIndex and MarketNorms, did not generate data that was available to third parties through any other means. As it was not substantially incorporated into reports furnished by others, the Tribunal concluded that CrossMedia (legacy) qualified for the exception.

Herein, the Tribunal's conclusions for the AdIndex and CrossMedia (legacy) services must be extended because they are the same services. Accordingly, sales of AdIndex are not excluded from taxation because the AdIndex data was incorporated into the MarketNorms product. CrossMedia (legacy) services, however, do qualify for the exception because it was not substantially incorporated in reports furnished to others.

H. The holding in *Matter of Dynamic Logic* regarding AdIndex also applies to its successor service, BrandLift Insights. This service uses new methodologies but achieves the same goals as AdIndex. Due to the incorporation of its data into the MarketNorms database, its information is substantially incorporated into reports furnished to others. Accordingly, it is determined that the exclusion from taxation does not apply to sales of BrandLift Insights.

I. The holding with regard to CrossMedia (legacy) does not apply to its successor services, specifically, Other Media Consultancy (CrossMedia), CrossMedia Model and Experimental. While these services achieve the same goals as their predecessor, they generate data used to create an internal database used by DL for benchmarking future CrossMedia projects.

Benchmarks are a consideration in whether information is substantially incorporated in reports furnished to others (*see Matter of Dynamic Logic; Matter of Sunguard*). The benchmark's characteristics and use determine whether it is substantially incorporated into reports furnished to others (*see Rich Prods. v Chu* [exclusion does not apply where common database contained industry information used for reports to all customers, even though customer requested what specific information was to be included in the report]; *compare Westwood Pharms. v Chu*, 164 AD2d 462, 464 [1990], *lv denied* 77 NY2d 807 [1991] [exclusion does apply where there is a separate database used only for the preparation of individual customers' report and that customer's information "is never included in market reports furnished to other clients"]).

The CrossMedia database does not contain market information, but information drawn specifically from prior CrossMedia studies. Unlike AdIndex and BrandLift Insights, the CrossMedia data is not sold in a separate service and is not otherwise available to third parties. On balance, the creation and use of the CrossMedia database does not rise to the level of substantial incorporation into reports delivered to others. As such, Other Media Consultancy (CrossMedia), CrossMedia Model and Experimental qualify for the exclusion from taxation under Tax Law § 1105 (c) (1).

J. Separating out AdIndex and CrossMedia (legacy) and their successor services renders the record insufficient to determine whether the remaining services in the Media Product Group qualify for an exclusion to taxation. The record is insufficient to establish that these remaining services were not substantially incorporated in reports furnished to others. Accordingly, it must be concluded that DL did not meet its burden of establishing that the remaining services in the Media Product Group qualify for the exclusion from taxation under Tax Law § 1105 (c) (1).

K. Turning to the Bespoke Consulting and Brand Services Product Groups, the information generated by these services was not incorporated into reports delivered to others. Accordingly, sales of these Product Groups qualify for the exception from taxation under Tax Law § 1105 (c) (1).

L. Projects within the Link Services Project Group utilize an internal database for benchmarking. As with the CrossMedia database, apart from generating the benchmark, the Link Services database is not used for any other purpose and not provided to third parties. Based upon these characteristics and its use, the Link Services database does not constitute substantial incorporation into reports (*see Westwood Pharms.*) Accordingly, sales of the Link Service Product Group qualify for the exception from taxation under Tax Law § 1105 (c) (1).

M. Turning to the Miscellaneous category of services, the record does not clearly identify which invoices correspond to these services. It is, therefore, not possible to evaluate petitioners' challenges based on the services' substance. With regard to these services, it must be concluded that petitioners failed to meet their burden. Accordingly, presumptions of correctness prevail (*see e.g. Matter of Suburban Restoration Co. v Tax Appeals Trib.*, 299 AD2d 751 [3d Dept 2002]), and the Division's imposition of tax on products in the Miscellaneous category is sustained.

N. The record also does not clearly identify the invoice corresponding to the Other-Other services in the Null category. Absent identifying the invoices, it is impossible to evaluate petitioners' challenge based on the services' substance. The presumption of correctness prevails because petitioners failed to meet their burden as it pertains to these services. Accordingly, the Division's imposition of tax on sales of Other-Other services is sustained.

O. Turning to issue III, a sales tax, such as that imposed under Tax Law § 1105 (c) (1), is a destination tax (*see e.g. Matter of David Hazan, Inc.*, Tax Appeals Tribunal, April 21, 1988). Regarding notices L-054439310 and L-054454954, the record contains numerous examples of sales delivered to clients outside of New York State. These notices should be modified to remove sales tax on these non-New York State sales. Similarly, the refund denial for notice L-045410026, should be modified and a refund granted with respect to non-New York sales.

P. The notice of disallowance for MB's refund claim, related to notice L-045410026, is modified to the extent that a refund shall be granted for tax paid on sales of the Bespoke Consulting, Brand Services, and Link Services Product Groups, plus interest. In accordance with conclusion of law O, a refund shall be granted for tax paid on sales delivered to clients outside of New York State. In all other respects, the refund denial is sustained.

Q. Notice L-054439310, issued to DL, is modified to the extent that tax asserted due on sales of the Bespoke Consulting, Brand Services, and Link Services Product Groups is cancelled. Regarding the Media Services Product Group, tax asserted due on the sales of CrossMedia (legacy), other Media Consultancy (CrossMedia), CrossMedia Model and Experimental services is cancelled. In accordance with conclusion of law O, tax asserted due on sales delivered to clients outside of New York State is canceled. In all other respects, notice L-054439310 is sustained.

R. Notice L-054454954, issued to MB, is modified to the extent that tax asserted due on sales of the Bespoke Consulting, Brand Services, and Link Services Product Groups is cancelled. In accordance with conclusion of law O, tax asserted due on sales to clients delivered outside of New York State is canceled. In all other respects, notice L-054454954 is sustained.

S. The petitions of Millward Brown, Inc. (by Kantar LLC, as successor) and Dynamic Logic, Inc. (by Kantar LLC, as successor) are granted to the extent indicated in conclusions of law P, Q, and R, but are otherwise denied. The notice of determination denying the refund claim, dated February 3, 2020, as modified, is sustained. The notices of determination, dated October 15, 2021, as modified, are sustained.

DATED: Albany, New York
October 17, 2024

/s/ Alexander Chu-Fong
ADMINISTRATIVE LAW JUDGE