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New York Broadly Applies Information Service Tax to Marketing Analytic Services

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A year and a half following the New York Court of Appeals' significant 2019 decision in *Matter of Wegmans Food Markets, Inc. v. Tax Appeals Tribunal of State of New York,* 33 NY3d 587 (2019), New York continues to grapple with the sales tax treatment of information services.

In a recent determination by the Division of Tax Appeals (DTA), *Matter of Marketshare Partners LLC,* DTA 828526, the Administrative Law Judge (ALJ) issued a 55-page opinion analyzing the interplay between taxable information services, nontaxable consulting services and the personal and individual exclusion for information services under Section 1105(c)(1) that was the subject of the *Wegmans* case. This opinion is an important development in an area that has been the source of much confusion and ambiguity in recent years.

As the *Marketshare Partners* case illustrates, the challenge in determining the taxability of information technology services is that they do not fall neatly into one category. The taxpayer in this case was a marketing analytics firm selling advertising services, media company services, white paper services and an advertising agency product. The ALJ determined that the advertising and media company services were nontaxable consulting services, the white paper product was a taxable

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information service (based on lack of sufficient evidence to qualify for exemption or exclusion), and the advertising agency product was treated as a taxable software license.

With respect to the advertising and media company services, the NYS Tax Department contended that these services constituted a taxable information service because the taxpayer collected data and used that data to build models and then disseminate information and recommendations to the customer. The ALJ, however, sided with the taxpayer, who claimed that the service was a nontaxable consulting service, notwithstanding the inclusion of data in the product provided to the customer. The ALJ emphasized that the taxpayer provided critical guidance to customers to develop and implement their marketing strategies, including meeting with the customers, rather than merely disseminating electronic data. Thus, the services were more akin to nontaxable professional consulting services than information services. The ALJ confirmed that under the regulations and existing precedent, services that principally include advice and guidance do not fall within the scope of information services.

Although the issue was moot (since the ALJ concluded that the services did not constitute information services), the ALJ nonetheless briefly addressed the taxpayer's argument that the services were eligible for the exclusion from taxable information services because the data was personal or individual in nature and cannot be substantially incorporated into reports furnished to other persons. Following *Wegmans*, the ALJ held that, if the services did constitute information services, the taxpayer would not be eligible for the exclusion under Section 1105(c)(1) because the taxpayer had not produced sufficient evidence that the information was not from publicly available data nor that it could not be incorporated into a product for another customer.

Overall, this case is helpful for its deep analysis of the distinction between consulting services and information services and the significant overlap between the two services. However, there remains the unanswered question in a post-*Wegmans* landscape – as to what qualifies as personal and individual information services sufficient to qualify for the sales tax exclusion. It is likely only a matter of time before another case will find its way before DTA on this issue.
