STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ADP COLLISION ESTIMATING SERVICES, INC.	:	DECISION DTA No. 804973
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 March 1, 1983 through November 30, 1986.	:	

Petitioner ADP Collision Estimating Services, Inc., One ADP Boulevard, Roseland, New Jersey 07068, filed an exception to the determination of the Administrative Law Judge issued on June 7, 1990 with respect to its 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 March 1, 1983 through November 30, 1986. Petitioner appeared by Arnold B. Panzer, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in reply. Oral argument was not requested.

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

ISSUES

I. Whether petitioner's preparation of reports on the cost of repairing the collision damage sustained by particular motor vehicles based upon information furnished by its customers was the provision of information services which were not "personal or individual in nature" within the meaning of the exclusion from tax contained in Tax Law § 1105(c)(1).

II. Whether certain management reports prepared by petitioner for its customers were "personal or individual in nature" within the meaning of the exclusion contained in Tax Law § 1105(c)(1).

III. Whether petitioner is liable for its failure to have collected tax on sales to its New York customers under the facts and circumstances of this case.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "31" and "33" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findingsof fact, the modified findings of fact and the additional finding of fact are set forth below.

At all times herein relevant, petitioner, ADP Collision Estimating Services, Inc. (hereinafter "ADP"), was a foreign corporation principally engaged in providing a data processing service marketed to the public under the name "Audatex."

Audatex is a data processing service specifically designed to automatically generate appraisals or estimates, estimating the cost involved in repairing the collision damage sustained by a particular motor vehicle, based upon information furnished by customers.

The principal customers for the appraisals/estimates generated by Audatex are automobile insurance companies, which use the appraisal/estimates to determine the amount that they will offer to pay toward the repair of a vehicle insured under one of their policies. Audatex is also used by a number of vendors engaged in the business of repairing collision damage for the purpose of furnishing estimates for repair work to prospective customers, their insurers, or both. Typically, this group would include body shops, dealerships and independent advisory services.

The process of producing an estimate or appraisal of collision damage sustained by a particular vehicle includes a physical inspection of the vehicle in order to determine the extent of damage and the parts required to be replaced, repaired, and refinished in order to restore the vehicle to its prior condition. Persons hired by the insurance company to perform this function may be variously referred to as "estimators," "appraisers" or "adjusters".

After collecting the information concerning the nature of the damage sustained, an appraiser must ascertain the cost of any replacement parts, calculate the total time required to

make each necessary replacement and/or repair to the vehicle, calculate labor time attributable to included operations and eliminate or adjust overlapping repair steps. Then the adjusted labor time for each category of labor must be totalled and multiplied by an hourly rate for the specific type of labor. Additionally, the cost of all replacement parts must be added together and combined with total labor cost and with the final allowance made for any betterment, policy deductible, or applicable sales tax on parts and labor.

Historically, the cost of replacement parts was found in publications containing current prices charged by the vehicle manufacturer such as Motor Crash Estimating Guide, published by the Hearst Corporation and the Mitchell Guide. As alluded to above, the replacement prices reflected in these manuals are based upon information periodically furnished by manufacturers.

The manuals referred to above do not provide information concerning the prices charged for similar parts, if any, sold by independent auto part manufacturers also referred to as "economy parts" or "after market parts".

In order to enable the adjustor or repair shop to identify the part in question, the manuals also provide a sketch or drawing of each available part. The adjustor uses the manual by first turning to the section covering the model and year of the vehicle in question. Utilizing these drawings, he then identifies the name of each part required to be replaced, noting the manufacturer's price and stock number listed adjacent thereto.

The manuals also list an estimate of labor time required for the installation of each such part, as well as the estimated time required for painting, refinishing, and other repairs. Such times are generally rounded off to the nearest tenth of an hour. The data concerning estimated time is supplied by the manufacturer.

In computing the total time to be allowed for installing replacement parts, it is necessary for the appraiser to eliminate from the total of the replacement times shown in the manual the time allowed for each replacement part whose removal and installation have already been taken into account in computing the estimated labor time allowed for the installation of one or more of the other parts required to be replaced or removed in connection with the repair of the vehicle

in question. The body of an automobile is typically constructed in such a manner that the replacement of most of its parts will of necessity require the removal of one or more other parts or assemblies, regardless of whether such other parts or assemblies themselves have sustained any damage. Thus, the time allowed in the manual for the replacement of any particular part will also make allowance for the time required to remove and reinstall any and all of the other parts whose removal is required in order to replace the part in question. If one or more of the parts required to be replaced in connection with the repair of a particular vehicle are parts whose removal and reinstallation are included in the time allowed in the manual for the installation of another replacement part (an "included operation"), the appraiser's failure to eliminate the replacement times for such parts would substantially overestimate the actual time required to install all necessary replacement parts.

The manuals generally caution the user to make whatever adjustments for included operations as may be appropriate. The manuals provide a guide to estimating which the appraiser uses to identify each operation for which allowance has been made in determining the estimated labor times listed therein. Consequently, the adjustment for included operations must be made by the appraiser on the basis of his accumulated knowledge and experience from training and the use of the manual.

The proper computation of estimated labor time also requires that a downward adjustment be made for operations involving so-called "overlap". Operations in which there is overlap are those in which part of the work required to be done in order to accomplish one task is also required to do another, and reduces the total time which would otherwise be required to do either separately. Overlap occurs in connection with the replacement of parts, where another part or group of parts must be removed in order to remove or replace either of two adjacent parts. Overlap also occurs in connection with refinishing or repainting, where windows must be covered, paint mixed, sprayers assembled, etc.

The amount of the deduction to be made with respect to overlapping operations is largely a matter of judgment, based on the field appraiser's knowledge and experience, but there are generally accepted rules of thumb which are frequently used. Overlap labor information is generally included at the beginning of each subgroup within a chapter of the manuals. Where overlap information is not provided, appropriate allowances are negotiated after the on-the-spot evaluation.

Another variable which must be considered is the different rates for labor involved in repairing automobile collision damage. Such rates fall into four classifications: (1) sheet metal or exterior body (2) frame or work relating to the steel frame which supports both the engine and the body (3) electrical or mechanical and (4) refinishing. Therefore it is important that each repair task be properly assigned to the appropriate category in order that the proper labor rate is charged. The rates charged for various types of labor involved in repairing collision damage may vary substantially depending upon the location of the repair facilities in which the vehicle in question is to be repaired. In the cases of appraisals prepared for insurance companies, the rates allowed for labor are established for various regions of the country by the customer's own management.

Because the process of inspecting the extent of the damage sustained by a particular vehicle is functionally separate from the process of actually calculating the estimate, the two steps may be performed by different persons.

Specifically with regard to the Audatex system, as long as the proper form has been accurately filled out and properly prepared for computer entry, the calculation of the estimate of the cost of repairing the damage may be computed with equal or greater accuracy by Audatex than by the person who made the actual inspection. It is noted that the Audatex system is no more accurate than the information it is provided by the inspector or appraiser. When the precise nature of the damage sustained and the hourly rates to be allowed for labor are provided to Audatex, the system can be used as a tool to generate an error free estimate of the cost of repairs which will take into account adjustments for overlap and included operations. It is

further noted that the inspection of damage, the providing of said information including hourly rates to Audatex and the calculation of the replacement parts all comprise what is referred to as an appraisal or estimate, for without any one of the steps no appraisal or estimate would be possible.

Each Audatex subscriber is provided with a series of worksheets prepared by Audatex for most models of domestic and foreign automobiles likely to be encountered by a subscriber. Insurance adjustors utilizing the Audatex system carry a selection of Audatex worksheets and standard manuals with them when performing on-site inspections.

Each worksheet contains a scale drawing of each exterior part of the automobile in question. The drawings are similar to those contained in the manuals but are organized and arranged in a manner as to indicate the relative positions in the assembled automobile. Each part shown in the drawings is connected by a straight line to the particular Audatex "guide" number listed in the column on the side of the page. Adjacent to each guide number is a series of columns in which the person performing the inspection is to make an appropriate entry to indicate the nature of the repair required with respect to the part represented by the guide number.

In the first column alongside the identification number is printed the symbol "E". Circling the "E" in the row indicates that the part in question must be replaced, and that the replacement will be made using a part manufactured by the same company that produced the vehicle in question, known as the "original equipment manufacturer" or "OEM". Other symbols may be circled to indicate that the part is to be refinished or repaired. Additional codes and notations may be inserted in blank spaces to indicate that parts other than those produced by the manufacturer of the vehicle should be used, or to indicate that there has been prior damage.

Besides marking off the columns provided for the parts to be replaced or repaired, the adjustor or repair shop must also provide Audatex with the hourly rate to be used in computing the cost of all necessary labor. As in the case of an appraisal prepared manually, the customer

requesting the Audatex report must supply the hourly rate to be allowed for each hour of labor time.

When completed, the entries in the worksheet provide a complete description of the damage and the work necessary to restore the automobile to its prior condition. This document is not itself an estimate or appraisal. However, it does provide sufficient information for a complete estimate to be computed on the basis thereof by Audatex. It is noted that a manual appraisal could also be computed on the basis of the worksheet by a trained appraiser who understood the relevant Audatex codes used by the preparer.

In addition to entering the foregoing information, the field appraiser is required to include various information relating to the ownership, license, and registration of the vehicle in question, as well as data relating to the nature of the accident, and information concerning the time and circumstances of the inspection itself.

In order for Audatex to compute the appraisal, the information must be transmitted to the Audatex computer. This is done orally by calling an Audatex operator and reciting all of the relevant information indicated on the worksheet over the telephone. More typically, the information is conveyed over one or more terminals located in the customers' offices. After connecting with Audatex, the data entered on the worksheet is typed on the keyboard of the terminal in response to a preprogrammed series of questions. The information so entered is transmitted to the Audatex computer center in Ann Arbor, Michigan over a network of local and interstate telephone lines. Once the computer has received all of the relevant information, it will proceed to process data, and produce a complete appraisal as to the cost of repairing the vehicle in question. This appraisal is transmitted to the customer's terminal to be printed, using the same or similar network of local and interstate telephone lines.

In preparing the estimates or appraisals, Audatex automatically supplies the relevant manufacturer's price for replacement parts, as well as the estimated labor times needed to install a particular part. This information is derived from a database containing the prices of replacement parts sold by the vehicle's manufacturer and the estimated labor time required to

install such parts. The data supplied by Audatex relating to a manufacturer's replacement part price and estimated labor time is essentially identical to that provided in the manuals.

Audatex does not supply any data of the type which can not be found in the manuals. For example, if the field appraiser believes that a replacement part is available which is manufactured by someone other than the manufacturer of the vehicle, he must enter the price of that part on the worksheet for use by Audatex following the symbol "ec", i.e., economy part. Where parts such as glass are sold at a discount from the OEM price, the field appraiser may simply note the percentage of discount and Audatex will automatically compute the cost by reference to the OEM price.

Field appraisers are not required to make any entries with regard to included operations or overlap. Audatex has been programmed to automatically recognize situations in which overlap exists and to automatically make appropriate adjustments therefor. Similarly, the Audatex software is able to automatically determine whether the replacement of a particular part is an operation including the time allowed to replace another. Audatex handles included operations by omitting any labor time with respect to such operations. The fact that the replacement of a particular part is an operation which must be performed in order to replace another is indicated on the face of the Audatex appraisal by the fact that no labor time is allowed or included with respect to the installation of that part. It is noted that the manuals do provide the adjustor with the knowledge of what is included and what is not included in a given labor operation. Therefore, the estimator can determine included operations and overlap and could presumably overrule any adjustment made by the Audatex computer.

Audatex also automatically sorts the total labor performed into one of the four categories of sheet metal, mechanical, electrical, or refinishing prior to multiplying the total adjusted labor time for each by the hourly rate applicable thereto.

A separate total is computed for the cost of the replacement parts. Included in the total is the cost of any OEM parts automatically entered by Audatex, as well as the price of any economy parts supplied by the customer. Sales tax, if indicated to be due on the worksheet, will

be automatically computed for parts purchased at the rate specified by the customer. The same is true with respect to any sales tax on the cost of labor.

The total costs of parts and labor are added together to indicate the total estimated cost of repairing the vehicle in question. The amount of any applicable deductible under the policy will then be subtracted from this figure to indicate the amount which the insurance company is responsible for paying for the repaired vehicle. The deductible will not be subtracted unless such information is transmitted to Audatex along with the balance of the data.

The information furnished to Audatex, and the appraisals prepared on the basis thereof, are regarded by Audatex as confidential, and are not furnished to any person without the express consent of the customer for whom the appraisal was prepared.

Audatex is designed to produce complete appraisals involving the damage sustained by an automobile. The term "complete appraisal" means a report containing a numerical figure deduced from substantial information provided by an inspector which has its source in a common database. The database in which this information is stored for use by Audatex computers cannot be directly accessed by customers, regardless of whether a terminal device is used in the process of transmitting the collision data on which the Audatex appraisal is based. Audatex furnishes replacement part prices and estimated labor times only in the context of furnishing a completed appraisal report relating to the particular automobile. Audatex is neither intended nor designed to be used simply as an alternative to looking up information concerning replacement parts or estimated labor times in manuals.

A witness at hearing, Mr. James Winter, a claims superintendent at the State Farm Insurance Company, stated that Audatex

> "is just another tool to do the job. It does not allow you to do the job. Any estimator we hire is trained, has to be capable of making an independent and written estimate, inclusive of eliminating overlaps and included operations. That is part of the training.
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> * * *
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> We have people who have been with us for 15 months that are still not on the system."

We make the following additional finding of fact:

> Mr. Winter also testified that the ability to automatically and accurately make the required adjustments for included operations and overlaps was a significant advantage of the Audatex system.

We modify finding of fact "31" of the Administrative Law Judge's determination to read as follows:

> In addition to producing collision damage appraisals, Audatex also makes available a management report to insurance companies. These reports contain statistics drawn from past appraisals performed on the basis of data submitted by the client's own adjustors. The management reports are used by the client to compare the relative efficiency of its various adjustors, including such factors as the extent to which the use of economy and discount parts are being specified in their appraisals.[1]

In or about October of 1985, the Division of Taxation began a field audit of petitioner at its corporate offices in Hayward, California. After inspecting sales tax returns, related worksheets for sales tax returns, sales journals, and sales invoices, it was determined that petitioner's books and records were consistent with its policy of collecting tax on its terminal rentals and printed reports while treating insurance estimates and information services as nontaxable. After extended negotiations with petitioner, the Division of Taxation determined that the insurance appraisals or reports which were generated from a common data bank were not private and personal in nature and therefore were held as taxable services.

Petitioner's sales tax returns were verified through August of 1987, with no errors being found. It was noted that petitioner had failed to file a return for August 1986, and when petitioner was notified of the missing return it immediately submitted the delinquent return with payment.

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[1] The Administrative Law Judge's finding of fact "31" has been modified to delete the following paragraph as not supported by the record:

> "The Division of Taxation offered to exempt from taxation sales of said management reports to the extent that petitioner could substantiate said sales to its customers. However, no such substantiation was ever submitted by petitioner."

Therefore, the Division took reported gross sales of petitioner, giving credit for reported taxable sales, and issued an assessment holding the alleged exempt sales as additional taxable sales and computing the additional tax due from said figure.

The effective tax rate of .075 was chosen as a statewide average since petitioner did business in many jurisdictions in the State of New York and offered no evidence with regard to where the purported exempt sales took place. This statewide average of .075 was applied to the purported exempt sales to arrive at additional tax due.

We modify finding of fact "33" of the Administrative Law Judge's determination to read as follows:

> During the two years the audit was open, the issue of whether the collision damage estimates produced by petitioner were taxable was discussed by the parties. This issue was the subject of a meeting at petitioner's offices in New Jersey between petitioner, represented by its director of corporate taxes, Thomas DeLorenzo, and the Division, represented by the auditor, Sheldon Lippman, and James Nuttal. Petitioner requested time to apply for an advisory opinion, which it subsequently chose not to pursue. Once it became apparent that no resolution would be reached, petitioner requested that an assessment be issued in order that it
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> might be able to pursue relief through its administrative remedies. At this time the Division of Taxation assessed tax against all claimed nontaxable sales thought to be comprised of receipts for the collision damage estimates sold to petitioner's customers. The rate of tax applied was .075, an agreed-upon average of the state and local tax rates used for the purpose of expediting the appeal process.[2]

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[2] The Administrative Law Judge's finding of fact "33" read as follows:

> "33. During the two years that this audit was open, there were various meetings between petitioner, represented by its director of corporate taxes, Thomas DeLorenzo, and the Division, represented by the auditor, Sheldon Lippman, and James Nuttal. The only issue discussed by the parties was whether the collision damage estimates produced by petitioner were taxable. Petitioner also requested time to apply for an advisory opinion, which it subsequently chose not pursue. Once it became apparent that no resolution would be reached, petitioner requested that an assessment be issued in order that it might be able to pursue relief through its administrative remedies. At this time the Division of Taxation assessed tax against all claimed nontaxable sales thought to be comprised of receipts for the collision damage estimates sold to petitioner's customers. The rate of tax applied was .075, an agreed-upon average of the state and local tax rates used for the purpose of expediting the appeal process. By using the average, the Division of Taxation was relieved of the responsibility of having to perform an in-depth audit of petitioner's

Petitioner and the Division executed consents extending the period of limitation for assessment of sales and use taxes for the periods between March 1, 1983 and November 30, 1984, allowing the Division until December 20, 1987 to assess said periods.

Subsequently, on December 16, 1985, the Division issued to ADP a Notice of Determination and Demand for Payment of Sales and Use Taxes Due setting forth a total tax due of $35,556.56 and interest of $11,404.83 for a total amount due of $46,961.39 for the period September 1, 1982 through February 28, 1983. Additionally, on October 1, 1987, the Division issued to ADP a Notice of Determination and Demand for Payment of Sales and Use Taxes Due setting forth tax due in the sum of $33,123.75 with interest of $1,715.26 for a total amount due of $34,839.01 for the period September 1, 1986 through November 30, 1986. Finally, on October 1, 1987, the Division issued ADP a Notice of Determination and Demand for Payment of Sales and Use Tax Due for the period March 1, 1983 through August 31, 1986, setting forth total tax due of $328,823.29 and interest of $79,155.52 for a total amount due of $407,978.81.

At hearing, Mr. Walter Hoffman from the Division of Taxation testified that he participated in the drafting of the regulations at 20 NYCRR 527.3(b)(2) and that "Example 2" contained therein was meant to apply to body shops and other establishments which performed "complete" appraisals, i.e., all steps from inspection through calculation, not merely the calculation.

To the extent that they were not irrelevant or conclusory in nature, petitioner's proposed findings of fact have been incorporated herein.

OPINION

The Administrative Law Judge held that petitioner's preparation of reports estimating the cost of repairing damage to motor vehicles and management reports for its customers was the provision of information services which were not "personal or individual in nature" within the

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> records which would have prolonged the audit for an undetermined amount of time, a result not desired by petitioner."

This finding has been modified to more accurately reflect the record.

meaning of the exclusion from tax contained in Tax Law § 1105(c)(1). In so concluding, the Administrative Law Judge determined that petitioner's reports did not reflect an "entire appraisal or estimate but only a numerical figure deduced from substantial information provided by the appraiser/inspector/estimator (employed by petitioner's customer) which has its source in a common database." With regard to the management report, the Administrative Law Judge found that petitioner had failed to prove that these reports were not subject to tax.

The Administrative Law Judge concluded that Example 2 of 20 NYCRR 527.3(b)(2) "is applicable only to damage appraisals performed by body shops or other persons or establishments which performed the entire appraisal process from inspection through calculation of damages." Therefore, the Administrative Law Judge rejected petitioner's contention that Example 2 should apply in this case.

In addition, the Administrative Law Judge upheld the methodology used by the Division of Taxation (hereinafter the "Division") to calculate the tax due for petitioner's sales in the various jurisdictions of New York State finding that petitioner had agreed to the use of an average rate.

Petitioner argues that it provided a nontaxable information service because the estimates of the cost of repairing damage to motor vehicles and the management reports prepared by it met the criteria for exclusion contained in Tax Law § 1105(c)(1) in that they were personal or individual in nature and were not substantially incorporated in reports furnished to other persons. Petitioner asserts that each appraisal dealt with the particular damage sustained by a specific vehicle and was based upon specific information and instructions relating to the vehicle provided by the customer for whom the report was prepared.

In addition, petitioner argues that since petitioner's service consisted of more than mere access to a database, in that it rendered a report on the basis of a particular set of facts furnished by the customer, it was unlikely that the information contained in one report would be substantially incorporated in any other report.

Petitioner asserts that the issue of whether the reports produced by petitioner were appraisals within the contemplation of Example 2 of 20 NYCRR 527.3(b)(2) is entirely irrelevant to the question of whether such reports were personal or individual in nature and, thus, excluded from tax. Petitioner asserts that section 1105(c)(1) of the Tax Law provides no special exclusion or exemption for "appraisals" as such and that the only purpose of Example 2 is simply to serve as an illustration of a report which is individual in nature and which will not be substantially incorporated in a report furnished to another person (Petitioner's brief on exception, p. 26). Petitioner asserts that the only relevant questions relating to Example 2 are: (a) the principle which that example is intended to illustrate, i.e., the kind of report which is personal or individual, and (b) how that principle applies to the petitioner's reports at issue in this case (Petitioner's brief on exception, p. 27). Petitioner asserts that the Administrative Law Judge's conclusion as to the applicability of Example 2 to the facts in this case has no apparent relationship to the principle which the example is intended to illustrate or to whether petitioner's reports were personal or individual in nature.

In addition, petitioner argues that even if tax can properly be imposed on its services, petitioner should not be held liable for the tax it failed to collect because it reasonably relied on the regulations and rulings of the Division which supported petitioner's position that its services were not subject to tax.

Lastly, petitioner takes exception to the Administrative Law Judge's conclusion that petitioner consented to the use of the average tax rate and argues that the use of the rate is not justified because the Division failed to examine petitioner's records which would have precisely established where in New York State petitioner's services were rendered so that the correct tax rate for that jurisdiction could be applied.

The Division agrees with the Administrative Law Judge that petitioner provides a taxable information service. The Division maintains that since the reports provided by petitioner to its customers had as their source a common, readily accessible database, they were not personal and individual in nature and were capable of being substantially incorporated in reports

furnished to others. In addition, the Division asserts that the Administrative Law Judge was correct in concluding that petitioner had agreed to the use of an average tax rate to calculate additional tax due if the services were determined to be taxable.

We uphold the determination of the Administrative Law Judge.

We first address the principal issue in the case of whether petitioner's furnishing of automobile damage repair reports to its customers was a taxable information service. Tax Law § 1105(c)(1) imposes tax on the receipts from the service of furnishing information unless the information service provided falls within the exclusionary portion of the statute. It is uncontroverted that petitioner sells information to its customers. The issue is whether such information is personal or individual within the meaning of section 1105(c)(1). The relevant language provides an exclusion for:

> "(1) . . . 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]).

We find it helpful to review in chronological order the court decisions interpreting the "personal or individual" exclusion language of section 1105(c)(1).

In Matter of New York Life Ins. Co. v. State Tax Commn. and Matter of Metropolitan Life Ins. Co. v. State Tax Commn. (80 AD2d 675, 436 NYS2d 380, affd 55 NY2d 758, 447 NYS2d 245), the petitioner insurance companies engaged detective agencies to investigate and provide written reports regarding applicants for insurance. Copies of the reports were retained by the detective agencies. The former State Tax Commission held that these services did not meet the criteria for exclusion because the information kept on file by the detective agencies could be substantially incorporated into reports furnished to other persons or to the petitioners in subsequent reports. The Appellate Division held that the services provided were personal and individual within the meaning of the exclusionary language of the statute. The court found that there was no evidence that the previously gathered information was being used in future reports and that the State Tax Commission's interpretation of the phrase "substantially incorporated" to include the mere possibility of such use was too restrictive.

In Matter of Twin Coast Newspapers v. State Tax Commn. (101 AD2d 977, 477 NYS2d 718, appeal dismissed 64 NY2d 874, 487 NYS2d 553), the petitioner prepared reports for a specific customer based upon the customer's description of the information in which it was interested. Although each report might be different, all the information was extracted from the same two sources and information contained on one report might be duplicated in another report depending on the customer's request. The court held that the reports were not exempt from tax as newspapers or as personal information services. The decision of the Appellate Division said:

> "Nor are we persuaded by petitioner's contention that ISIS and EXIT [the reports] are exempt as information of a personal or individual nature (Tax Law, § 1105, subd [c], par [1]) because they are compiled for specific subscribers. Petitioner admits the information is merely a distillation from the import and export bulletins in which the same information is contained and available to everyone. Although each subscriber selects the statistics he desires, the information furnished is not of the uniquely personal nature contemplated by the exemption (cf., Matter of New York Life Ins. Co. v. State Tax Commn., [citation omitted])".

In Matter of Towne-Oller & Assoc. v. State Tax Commn. (120 AD2d 873, 502 NYS2d 544), the petitioner provided marketing reports which were created from data which the petitioner purchased from wholesalers and distributors of the products involved. The petitioner charged its customers a subscription fee which varied based upon the number of categories of reports requested by the customer. Some of the reports were tailored to meet a customer's specific requirements. In holding the petitioner's activities to be a taxable information service, the court distinguished the reports from those in Matter of New York Life Ins. Co. v. State Tax Commn. (supra), finding that:

> "Although there is some customizing of reports for individual customers by petitioner, the service provided is not of a personal and individual character. The service is furnished on a monthly basis and the reports furnished contain general information as well. All the information is gleaned from one general source."

The court again addressed this issue in an appeal on an action for a declaratory judgment in which the plaintiffs sought a declaration that there was no sales and use tax on transactions for the purchase of copies of certain motor vehicle reports (Matter of Allstate Ins. Co. v. Tax Commn. of the State of New York, 115 AD2d 831, 495 NYS2d 789, affd 67 NY2d 999, 502

NYS2d 1004). The plaintiff Hooper Holmes obtained motor vehicle reports from the Department of Motor Vehicles (hereinafter "DMV") on behalf of various automobile liability insurance carriers including the plaintiff Allstate. Holmes would receive requests for information on named motorists and would then provide the DMV with a computer tape containing all the names. The DMV would feed the tape into its computer system and deliver to Holmes either a printout or a computer tape containing whatever information the DMV's records contained on the named motorists. Holmes would then convert the information supplied by the DMV to a printed or computer format and deliver the requested information to its customers. In reversing an order of the Supreme Court, Special Term, which had granted the petitioners' motion for summary judgment, the Appellate Division found that declaratory relief was not appropriate because the issue was not one of pure statutory analysis as to whether the tax applied, but required application of the statutory language to unresolved questions of fact. The court disagreed with Special Term that the statute requires that a vendor collect, compile or analyze information in order for it to provide a taxable information service and held that a service may still be taxable even if all of the information is derived from a single source. In discussing whether the transactions fell within the exclusion in Tax Law § 1105(c)(1), the court indicated that it was unpersuaded that the information was personal or individual in nature and stated that:

> "This exclusion (Tax Law § 1105[c][1]) refers to uniquely personal information and does not apply to information filed with a governmental agency as a public record to which there is unlimited public access (citations omitted)."

As the court had determined that issues of fact existed which required resolution through the administrative process, the assessments for the tax periods at issue were the subject of proceedings before the Division of Tax Appeals.

While Allstate was pending before the Division of Tax Appeals, the Appellate Division rendered a decision in Matter of Rich Prods. Corp. v. Chu (132 AD2d 175, 521 NYS2d 865, lv denied 72 NY2d 802, 530 NYS2d 554). The petitioner was a manufacturer and distributor of

dairy and dessert products. In furtherance of its marketing strategies and research, the petitioner purchased the services of Selling Areas Marketing, Inc. (hereinafter "SAMI"). SAMI collected data on the movement of grocery products from various warehouses to identified markets throughout the United States. This information was categorized and processed through SAMI's computer system. A SAMI customer (for example, Rich Products), with the assistance of a SAMI sales representative, would develop a program of data retrieval designed to answer specific informational requests concerning one or more of its products in comparison with one or more of its competitors. SAMI prohibited the disclosure of reports prepared for one customer to any other customer or the inclusion of any part of a previously issued report in reports furnished to its other customers. The court found that these facts, that no two reports to different customers were likely to be the same and that the reports were customized in some respects to respond to the needs of a particular customer, were not dispositive of entitlement to the exclusion particularly where the information contained in the reports was derived from a single data repository which itself was not confidential and was widely accessible. The court said that to rule otherwise would be inconsistent with its previous holding that the exclusion did not necessarily apply to information furnished in response to specific client requests (citing, Matter of Towne-Oller & Assoc. v. State Tax Commn., supra; Matter of Allstate Ins. Co. v. Tax Commn. of State of New York, supra; Matter of Twin Coast Newspapers v. State Tax Commn., supra). The court also concluded that since a common database was used for all reports, it was reasonable to infer that the information on comparative sales performances and market share of competing products in major markets would substantially overlap in the reports furnished by SAMI to the petitioner and SAMI's other customers. This likelihood of "substantial incorporation" in reports to others was, in the court's view, enough to disqualify the sales in question from the exclusion without a need to address whether the information was personal or individual in nature.

In Matter of Hooper Holmes, Inc. (Tax Appeals Tribunal, July 21, 1988), this Tribunal, relying on the Appellate Division decision and the intervening decision in Matter of Rich Prods. Corp. v. Chu (supra), held that the petitioner's services were not within the exclusion of Tax Law § 1105(c)(1). The Tribunal found that the fact that the information contained in the reports was widely accessible and derived from a single source precluded the service from being within the "personal or individual" exclusion.

The decisions of the Tribunal in Matter of Hooper Holmes, Inc. (supra) and in a similar matter, Matter of Equifax Servs. (Tax Appeals Tribunal, July 21, 1988) were upheld by the Appellate Division in Matter of Hooper Holmes v. Wetzler and Matter of Equifax Servs. v. Tax Appeals Tribunal (75 NY2d 706, 552 NYS2d 929).

Most recently, in Westwood Pharmaceuticals v. Chu (164 AD2d 462, 564 NYS2d 1020, lv denied 77 NY2d 807, 569 NYS2d 610), the Appellate Division, Fourth Department held in an appeal of a declaratory judgment action that certain marketing reports prepared for plaintiff were personal or individual in nature and not substantially incorporated in reports prepared for others. The court found that the services provided were entirely customized and personal to the client (the plaintiff) and, therefore, distinguishable from the services found to be taxable. In Westwood, the raw data was primarily supplied by the plaintiff or by the service from field investigations. No data was available from published sources. In addition, the service used a confidential analytic and statistical procedure to convert the raw data into a "sample frame" or computer program which constituted a separate and distinct database for each client of the service. The "sample frame" or computer program was tailored to fit each client's specific needs, was not disclosed to the client (the plaintiff), and was not incorporated into any report prepared for another client.

Applying the principles of these cases to the arguments presented by petitioner in the case before us, we conclude that the services provided by petitioner do not meet the criteria for exclusion. Petitioner argues that the reports were "personal and individual" in nature because they related to the cost of repairing the damage sustained by a particular vehicle.

It is clear that it is the source of the information which controls whether the report prepared will meet the criteria of "personal and individual" (see, Matter of Rich Prods. Corp. v. Chu, supra; Matter of Allstate Ins. Co. v. Tax Commn. of State of New York, supra; Matter of Towne-Oller & Assoc. v. State Tax Commn., supra). In this case, there is no dispute that the information in petitioner's database comes from sources which are widely accessible (i.e., the "crash manuals"). The information provided by petitioner is not of a uniquely personal nature (cf., Matter of New York Life Ins. Co. v. State Tax Commn., supra [which involved confidential reports based on investigations of particular individuals]). In fact, the testimony of petitioner's witness was that the information provided by petitioner could have been, and regularly was, independently obtained by its employees. In addition, the customizing of a report using information supplied by the customer or in response to specific requirements of a customer does not make the report "personal and individual" within the meaning of the exclusion (Matter of Rich Prods. Corp. v. Chu, supra; Matter of Towne-Oller & Assoc. v. State Tax Commn., supra; Matter of Twin Coast Newspapers v. State Tax Commn., supra). Also, petitioner's argument, that the information was not substantially incorporated in other reports, is unpersuasive. Given the nature of the information, i.e., prices for car parts and time calculations for repairing specific damage, the evidence here establishes that it was extremely likely that the same information was incorporated into more than one report. In this regard, the facts in this case are remarkably similar to those in Rich Products and the holding in that case must, therefore, control.

Finally, we agree with petitioner's assertion that the issue addressed by the Administrative Law Judge, i.e, whether petitioner's reports are "appraisals" within Example 2 of 20 NYCRR 527.3(b)(2) is not determinative. The Commissioner's regulation 20 NYCRR 527.3(b)(2) provides as follows:

> "The sales tax does not apply to the receipts from the sale of information which is personal or individual in nature and which is not or may not be substantially incorporated into reports furnished to other persons by the person who has collected, compiled or analyzed such information.
>
> ***

> "Example 2: Automobile insurance damage appraisals performed for insurance companies are individual reports, the fees for which are not subject to sales tax."

Petitioner correctly points out that Example 2 is simply an illustration of a report which is personal or individual in nature and that the only relevant questions relating to the example are the principle which it is intended to illustrate and how that principle applies to petitioner's reports (Petitioner's brief on exception, p. 27). As we have already concluded, case law since the promulgation of the regulation makes it clear that petitioner's reports are not personal or individual within the meaning of section 1105(c)(1).

Petitioner also argues that, in view of the language of the regulation, petitioner cannot be held responsible for failing to collect tax on its reports. We do not agree. Reliance on this regulation cannot create a tax exclusion or exemption not provided by Tax Law § 1105(c)(1) and, therefore, cannot excuse the failure to collect tax on a taxable service (see, Matter of Manhattan Cable Television v. State Tax Commn., 137 AD2d 925, 524 NYS2d 889, appeal denied 72 NY2d 808). In any case, no proof of reliance on the regulation was presented by petitioner here.

Petitioner also argues that previous rulings by the Division support its conclusion that petitioner's services were not subject to tax, or alternatively, in light of such rulings on which petitioner relied, it is inappropriate to find petitioner liable for tax.

Petitioner argues that the decision of the former State Tax Commission in Matter of Automatic Data Processing (State Tax Commn., May 8, 1985) requires a finding that its services are not subject to tax. In that case the Commission found that certain reports pertaining to the stock portfolios of clients of the petitioner's customers (brokerage houses and money managers) were unique because they were based on the particular status, history, value and performance of the client's holdings and, therefore, were not subject to tax even though some information, such as the price of a particular stock, may have appeared in more than one report. Petitioner has not established that its reports are so similar to those in Matter of Automatic Data Processing, that the same result is mandated on the basis that similarly situated taxpayers should

be treated equally (see, Matter of Balan Print., Tax Appeals Tribunal, April 17, 1991) or that it relied on the Commission decision during the audit period. In addition, this decision predates most of the court decisions which focus on the nature of the information supplied by the service, rather than the format of the final report, in interpreting the meaning of the exclusionary language of the statute. Therefore, it cannot control the outcome of the matter before us.

Petitioner, citing Matter of Automatic Data Processing, also appears to argue alternatively that it does not provide an information service, but rather a "data processing" service. Petitioner's argument in this regard is not supported by the facts, as petitioner's service closely resembles other types of services which have been found to be information services (see cases cited above), and does not in the least resemble the data processing service in the Commission decision which was an automated system for processing orders to buy and sell securities.

With regard to the management reports prepared by petitioner for its customers, petitioner did not meet its burden to establish that these reports were not subject to tax. The Division assessed tax on petitioner's gross receipts based on the Division's assertion that all of petitioner's activities were subject to tax. Petitioner failed to substantiate its claim that these management reports were personal or individual in nature or the part of the assessment attributable to these reports.

We next address petitioner's argument that the Division was not justified in using an average tax rate to estimate petitioner's sales to jurisdictions within New York State with an additional sales tax. We agree with the Administrative Law Judge that the credible evidence supports a conclusion that petitioner agreed to the use of an average State rate. The Division's witness testified that this methodology was agreed to by petitioner. Petitioner introduced no evidence to contradict the statements made by this witness.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner ADP Collision Estimating Services, Inc. is denied;

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

3. The petition of ADP Collision Estimating Services, Inc. is denied; and

4. The notices of determination issued to petitioner ADP Collision Estimating Services, Inc. are sustained.

DATED: Troy, New York
August 8, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner