STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **TRANS UNION CREDIT INFORMATION CO.** | : | |
| 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, 1981 through August 31, 1982. | : | DECISION DTA Nos. 806330, 806331 |
| In the Matter of the Petition | : | |
| of | : | |
| **TRANS UNION CREDIT INFORMATION CO.** | : | |
| for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1982 through May 31, 1984. | : | |

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on April 4, 1991 with respect to the petitions of Trans Union Credit Information Co., 111 West Jackson Boulevard, Chicago, Illinois 60604 for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods September 1, 1981 through August 31, 1982 and June 1, 1982 through May 31, 1984. The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel). Petitioner appeared by Denise A. Darcy, Esq.

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in reply. Oral argument, at the request of the Division of Taxation, was heard on September 5, 1991.

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

## *ISSUE*

Whether the Division of Taxation properly determined that the "SNAP" services provided by petitioner constituted a credit rating service taxable under the Administrative Code of the City of New York former § BB46-2.0(a)(1).

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On June 20, 1987, the Division of Taxation ("Division") issued to petitioner, Trans Union Credit Information Co. ("Trans Union"), two notices of determination and demands for payment of sales and use taxes due for the period September 1, 1981 through August 31, 1982 assessing tax due of $38,221.64, plus interest of $28,834.21,[1] for a total amount due of $62,055.65, and for the period June 1, 1982 through May 31, 1984 assessing tax due of $87,308.22, plus interest of $34,335.01, for a total amount due of $121,643.23.[2]

On January 21, 1988, a conciliation conference was held with respect to the matter at issue. The resulting conciliation orders dated August 26, 1988 determined tax due for the period September 1, 1981 through August 31, 1982 in the amount of $18,531.71, and for the period June 1, 1982 through May 31, 1984 in the amount of $42,331.25. Minimum interest was also assessed. At the conciliation conference an agreement was reached by the parties that the SNAP system is not taxable pursuant to Tax Law § 1105(c)(1).

Numerous consents to extend the statute of limitations were authorized by the vice-president/controller of Trans Union. The statute of limitations for the assessment of sales and use taxes due was ultimately extended for the taxable period September 1, 1981 through July 31, 1982 for determination any time on or before June 20, 1987.

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[1]The total of interest amounts listed in the body of the notice is $23,834.01. This discrepancy is not significant since a further revision is made.

[2]The parties indicated on the record that the handwritten numbers on the notice represent the assessment separate and aside from any further reduction pursuant to conciliation conference or post-hearing adjustments.

Post-hearing, the amounts asserted for all periods in question were reduced as a result of testimony given during the hearing by a representative of Federated Department Stores, Inc. and Bloomingdale's, now a separate subsidiary having been previously a division of Federated. Bloomingdale's had been previously audited and was the vendee of SNAP services provided by petitioner. Since Bloomingdale's was issued an assessment in part for such services in periods which overlap with those in issue in the instant matter, a further reduction in the assessment asserted against petitioner in the amount of $23,498.56 was computed after the hearing. The amount in controversy remains for all periods at $37,364.40, plus minimum interest.

Testimony was given by Walter Abrams, vice-president and general manager of Trans Union Credit Company, which is a division of Trans Union. Mr. Abrams described the business of Trans Union as a credit reporting business. He explained that Trans Union has a data base which is made up of consumer information obtained from subscribers. The information includes accounts payable from banks, retailers, financial companies and any other sources available to compile information on individuals with a credit rating. Trans Union sells credit reports upon inquiries by companies providing certain demographic information. A billing function is implemented on an individual request basis.

He further testified that Trans Union does not determine the credit worthiness of any consumer and does not involve itself in the decision- making process as to the extension of credit. It does not make any recommendations, but merely supplies information from its data base.

SNAP services, the taxability of which is the subject of this hearing, refers to "system for new accounts processing". Mr. Abrams indicated by his testimony that SNAP was provided as an accommodation to Bloomingdale's and Macy's, who were both customers of Trans Union. Mr. Abrams described the SNAP process as an application processing function. Trans Union's clerical personnel would input information from a credit application into the computer system. Fair Issacs Corporation, a California company, provided the hardware and software that enabled

a scoring process to take place based on the demographic information provided by the consumer to either Macy's or Bloomingdale's. Based on criteria provided by Macy's or Bloomingdale's separately, the system would determine whether or not there were enough points to go on to the next step in the credit extension process. If there were not enough points to go on further, the system would generate a decline letter for that consumer. If there were enough points, the system would automatically require the purchasing of a credit report.

After being provided with the SNAP service, Bloomingdale's and Macy's would predominantly purchase credit reports from Trans Union, provided the consumer had reached an initial scoring of a certain level. If Trans Union was unable to provide the credit report due to some insufficiency in its data base, other bureaus such as CDCBI, TRW and Chilton were consulted. In the event a credit report was purchased, Trans Union would process an automatic bill, charging sales tax on this service.

If the credit report was being processed, the system would then take the scores from the initial input and the score from the bureau report and such combination would result in a determination as to credit worthiness. Trans Union, however, had no part in the design of the system. Petitioner was unaware of what went into the determination of credit worthiness since that was considered proprietary information of Bloomingdale's and Macy's.

The billing which took place for the SNAP service was considered payment for the clerical function of data entry and, in small part, to subsidize the cost of depreciation of the program.

As explained by the testimony of Mr. Abrams, many large institutions have a scoring system similar to SNAP for two important reasons, one of which pertains to the high cost of personnel needed to determine credit worthiness. The use of a system like SNAP organizes the data so that a customer such as Macy's is able to preliminarily assess a score and automatically weed out many applications. In addition, the scoring system seems to be a more accurate way to first approach an application since it is merely statistical, and human emotion is nonexistent at this level.

The Division accepts without dispute a description of SNAP as provided by Trans Union's general accounting manager, Ned Moser, in January 15, 1987 correspondence to Keloo Wadhwani, a tax auditor of the New York State Department of Taxation and Finance. The description was as follows:

> "Consumer credit applications received by Bloomingdale's/Macy's are forwarded to Trans Union's office for processing and scoring so that action on the application can be taken. Trans Union's [sic] scores the applications according to parameters provided by Bloomingdale's/Macy's and obtains credit reports when necessary, either from its own system or from another credit bureau. The credit reports are then provided to Bloomingdale's/Macy's with specific charges on which a sales tax is accessed [sic], and credit decisions are made by Bloomingdale's/Macy's based on the scores.
>
> Approved applications are entered into the 'Snap' system so that a computer tape is produced, which will be used to generate credit cards that are mailed to consumers. Another tape is produced from which reject letters are generated declining the credit application.
>
> The service performed is charged to Bloomingdale's/Macy's on a per application processed basis. The service is not part of Trans Union's standard credit reporting service and has no value to any other customer since Bloomingdale's/Macy's (each independent of one another) specific criteria is used in scoring applications, and since Bloomingdale's/Macy's credit cards or decline letters are generated. Accordingly, the services are individual and personalized to Bloomingdale's and to Macy's and not incorporated in any reports furnished to other persons. The credit reports that are standard are charged separately with a sales tax accessed [sic]."

## ***OPINION***

The Administrative Law Judge determined that petitioner's "SNAP" service was not taxable as a "credit rating" service pursuant to former § BB46-2.0(a)(1) of the Administrative Code of the City of New York. The Administrative Law Judge found that since petitioner did not supply the criteria used to sort the credit applications or make any independent value judgments with regard to the applications, petitioner was not performing a credit rating service, but rather was providing its customers with an application processing or data processing service.

The Division argues in its exception that because the activities performed by petitioner resulted in a sorting of the applications into categories for purposes of determining credit status, petitioner is subject to the tax imposed by former § BB46-2.0(a)(1). The Division asserts that petitioner is grading or rating the credit applications provided to it and that it is immaterial that

petitioner does not establish the criteria for rating such applications or make the final determination as to which applications should be approved or rejected. The Division also alleges that the Administrative Law Judge's statement of the issue in the determination (in relevant part, the same statement of the issue as in this decision) improperly shifted the burden of proof to the Division.

Petitioner argues that it was not performing a credit rating service because it had no involvement with or knowledge of the criteria used to screen applications, nor any input into the decisions to extend or deny credit. Petitioner asserts that the statute does not impose tax on all activities of a credit reporting agency but only on specifically enumerated ones, contrasting the language of former § BB46-2.0(a)(1) with that of former § BB46-2.0(a)(2) which imposes tax on detective and protective service agencies including "all services . . . of every nature" performed by alarm or protective systems. Petitioner agrees with the Administrative Law Judge that the service it provided was a data processing or an application processing service in that it merely supplied the personnel and computer support for the processing of its customers' credit applications. Petitioner also asserts that the Administrative Law Judge properly placed the burden of proof on petitioner throughout the hearing and in the determination, and correctly found that petitioner had met its burden.

We deal first with the Division's assertion that the language used by the Administrative Law Judge in her statement of the issue in the determination improperly shifted the burden of proof to the Division. The Division alleges that "[t]he issue as stated in the Determination indicates in effect, a shifting [of] the burden of proof from the taxpayer to the Division of Taxation" (Division's brief on exception, p. 5). The general discussion of the burden of proof in the Division's brief correctly notes that under most circumstances, the burden of proof in proceedings before the Division of Tax Appeals is on the petitioner. However, the Division cites to nothing in the record of this proceeding or in the Administrative Law Judge's findings of fact and conclusions of law to support its allegation that the Administrative Law Judge improperly shifted the burden of proof to the Division in this case. The references in the brief

to petitioner's obligation to produce source documentation or to a "premature" inquiry into the quality of the Division's audit are completely incomprehensible in the context of this matter, which does not involve a challenge to the audit methodology used by the Division or the adequacy of petitioner's books and records which were found to be complete and available for audit (Exhibit "I," Audit Report). As there is, in fact, nothing in the record or in the Administrative Law Judge's findings of fact or conclusions of law that supports the Division's view that the Administrative Law Judge improperly shifted the burden of proof to it, we find the Division's allegation and argument on this point completely without basis.

On the question of whether petitioner's SNAP service is subject to tax as a credit rating service, we reverse the determination of the Administrative Law Judge.

The Administrative Code of the City of New York former § BB46-2.0(a)(1)[3] provides that a tax at the rate of 4% shall be charged on the following services:

> "Credit rating and credit reporting services, including, but not limited to, those services provided by mercantile and consumer credit rating or reporting bureaus or agencies, whether rendered in written or oral form or in any other manner, except to the extent otherwise taxable under article twenty-eight of the tax law."

Former § BB46-2.0(a)(1) taxes two services: "credit rating" and "credit reporting." As described by petitioner, credit reporting is petitioner's main business and consists of gathering credit and financial information on individuals and providing this data to its customers upon request. For each report on an individual, petitioner charges a fee and sales tax pursuant to former § BB46-2.0(a)(1). These reports make no judgments or recommendations concerning an individual's credit worthiness, but rather, simply recite the information petitioner has retrieved from its data base. Petitioner and the Division agree that the service at issue here is not a credit reporting service and do not dispute that the phrase "credit rating" as used in the statute refers to some other activity related to credit services.

We agree with the Division that the service performed by petitioner falls within the language of the statute as a credit rating service. We must in the first instance examine the

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[3]Renumbered § 11-2040(a)(1), effective September 1, 1985.

language that the Legislature used to express its intentions (McKinney's Cons Laws of NY, Book 1, Statutes § 94). By using two phrases, the Legislature clearly intended to tax two different activities. Petitioner argues that "credit reporting" refers to the activity of presenting data on an individual's credit history without making a recommendation as to credit worthiness, while "credit rating" encompasses an activity which includes a determination as to credit worthiness. However, petitioner asserts that it is the nature of the involvement in the credit decision that separates a taxable credit rating activity from a nontaxable activity. Following this interpretation, petitioner asserts that it did not perform a "credit rating" service because petitioner did not make any recommendations or independent judgments as to who should be extended or denied credit, and the criteria for scoring the applications was supplied by its customers without input from petitioner and without petitioner even knowing the criteria.

We do not agree that these factors require the conclusion that the service supplied by petitioner was not a taxable service. The activity performed by petitioner consisted of the classification of the applicants into categories, in petitioner's own words, a "scoring" of the applications for the purpose of determining whether credit would be extended. "In statutory construction, commonly used words must be given their usual and ordinary meaning, unless it is plain from the statute that a different meaning is intended (citations omitted)" (Regan v. Heimbach, 91 AD2d 71, 458 NYS2d 286, 287, lv denied 58 NY2d 610, 462 NYS2d 1027; see also, Matter of Leisure Vue v. Commissioner of Taxation & Fin., 172 AD2d 872, 568 NYS2d 175, 176). The activity performed by petitioner is clearly within the common meaning of the word "rating." "Rating" and "scoring" are both words used to mean "to evaluate" or "to grade" (Merriam-Webster's Third New International Dictionary 1884, 2036 [1986]). In order to adopt petitioner's interpretation, we would be required to read into the language of the statute, in particular, the words "credit rating," a legislative intention that the taxability of the activity

depend on the origin of the credit criteria or on who makes the final credit decision.[4] We cannot find such a limitation in the statutory language or in the available legislative history.

Petitioner argues that contrasting the language used to impose tax on protective and detective services in former § BB46-2.0(a)(2) with the language used to impose tax on credit rating and credit reporting services "compels the conclusion that former § BB46-2.0(a)(1) should be narrowly construed so as to allow taxation of credit rating and reporting only, and not taxation of application processing or other services performed by credit bureaus" (petitioner's brief, p. 12).

The tax on protective and detective services reads as follows:

> "Protective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, . . . detective agencies, armored car services and guard, patrol and watchman services of every nature, . . . but excluding protective and detective services performed by port watchmen . . . " (former § BB46-2.0[a][2], emphasis added).

While we agree that the language used in each section is different and that the tax is imposed only on "credit rating" and "credit reporting" services, we do not agree that our conclusion that petitioner's activities here fall within the term "credit rating," results in an impermissible taxation of "all" services provided by credit bureaus.

While petitioner's rating process may have been purely mechanical, since it applied criteria supplied by its customers to data supplied by the applicant, the statute says only that the tax is imposed on "credit rating" services, without limitation. It may be true that the same or similar activities (such as data entry, computer processing, or sorting into categories) performed for some other purpose (such as the rating of applications for subsidized housing or school financial aid) would not be subject to tax. However, the decision to tax one activity and not another is the prerogative of legislative bodies (Matter of Association of the Bar of the City of

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[4]Any service which made recommendations or expressed independent opinions as to the credit worthiness of an applicant (a service petitioner apparently would concede to be taxable) would need criteria or some information from its customer (such as the purpose of the credit or the customer's standards) in order to make an evaluation. It also seems likely that the customer would have some input into the ultimate credit decision. If the existence of these factors precludes the classification of a service as "credit rating," it is not clear what type of activity would be taxable under petitioner's argument.

New York v. Lewisohn, 34 NY2d 143, 356 NYS2d 555, 564; Ampco Print.-Advertisers' Offset Corp. v. City of New York, 14 NY2d 11, 247 NYS2d 865, 871-872, appeal dismissed 379 US 5). In this case, the Legislature chose to tax rating services related to credit and not other types of rating.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed to the extent that it held that SNAP services did not constitute taxable credit rating services;

3. The petitions of Trans Union Credit Information Co. are denied; and

4. The notices of determination issued to petitioner Trans Union Credit Information Co. except as modified by the Administrative Law Judge's findings of fact "2" and "4" are sustained.

DATED: Troy, New York
February 20, 1992

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

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

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