

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**RETAILDATA, LLC** : DECISION  
for Revision of a Determination or for Refund of : DTA NO. 825334  
Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period June 1, 2005 :  
through May 31, 2011. :

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Petitioner, RetailData, LLC, filed an exception to the determination of the Administrative Law Judge issued on January 22, 2015. Petitioner appeared by Arnell Golden Gregory LLP (Damian M. Hovancik, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Hall).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was granted at petitioner's request, but such request was subsequently withdrawn. The six-month period for the issuance of this decision began on September 3, 2015, the date petitioner withdrew its request for oral argument.

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

***ISSUE***

Whether the receipts obtained from the sale of petitioner's information service must be excluded from sales tax because the information provided is personal and individual in nature and is not or may not be substantially incorporated in reports furnished to others.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 6, 12, 16, and 27 to more accurately reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. On April 29, 2011, the Division of Taxation (Division) mailed a letter to petitioner, RetailData, LLC (RetailData), scheduling an audit of RetailData's sales and use tax records for the period June 1, 2005 through May 31, 2011. The letter advised RetailData that it "must show **all** of your sales and use tax books and records to the auditor." The letter also included a detailed list of the records required for the audit.

2. Following the audit, RetailData was notified by the Division that it owed additional sales tax because of its failure to collect and remit sales tax on the taxable information services provided to customers in New York State. On November 4, 2011, the Division issued a notice of determination to RetailData (assessment # L-036867159) that assessed sales and use tax for the period June 1, 2005 through May 31, 2011 in the amount of \$334,952.55, plus interest, for a balance due of \$430,275.73.

3. RetailData provides a price checking service for the benefit of its clients, which consisted of grocery and retail establishments. During the period in issue, RetailData provided its information services to approximately eleven customers in New York State. However, most of the New York sales were made to Wegmans, Golub Corporation, also known as Price Chopper, and Tops Markets, LLC. At the time of the hearing, RetailData had a little over 150 customers nationwide.

4. RetailData enters into contracts to conduct customized "competitive price audits" on behalf of its clients, which largely consist of the collection of specific product information

requested by the client from grocery or retail outlets identified by the particular client. Pursuant to a direction from a client, RetailData would collect, interpret, and validate the accuracy of pricing data in competitors' stores. The pricing data pertained to a list of certain products or categories of products sold in specific grocery or retail outlets that are competitors of petitioner's client.

5. The competitive price audits represent approximately 99 percent of petitioner's business.

6. RetailData utilizes two different methods to collect data. An "open environment" is one in which the management of the store allows RetailData to openly collect data within the store. In this situation, the data collector uses a device that can scan the product UPC (universal price code), collect the price and the important attributes as directed by the client. In a "lapel environment" the data collector has to operate more discreetly. The data collectors typically use a smart phone to collect the price and the appropriate attributes of the price as directed by the client.

7. The list of retail prices that a customer requests are for those items that are commonly sold by grocery stores irrespective of the customer's own pricing strategy. A retail store may sell between 18,000 to 80,000 items depending on the size of the store.

8. RetailData's data collectors enter a retail outlet and use scanning devices to collect pricing information, including regular and sale prices and, in many cases, product attributes that are observed at the shelf in the retail outlets being audited. The attributes of the products being audited include whether a particular product or unit is being sold at a price that is a "sale price," "short-term price," "long-term price," "distress price," "coupon price" or "value pack" item. It also includes whether the item is being promoted by the store or requires a value or loyalty card in order to receive special pricing.

9. Each client specifically requests that these pricing attributes be captured by RetailData's collectors because they have significance for the client's own marketing and pricing strategies. The attributes assist the client in determining its individual pricing strategies and are described as indicators in the reports furnished to RetailData's clients.

10. Private label products are products that are sold under a specific retailer's name, as a store brand, as opposed to name brand products that are carried potentially by many retail outlets. RetailData is directed by its clients to collect pricing information on the private label products of their competitors that the clients have determined are comparable to their private label brand products.

11. RetailData collects the private label pricing information and interprets it so that the client can accurately compare the prices of the competitor's private label products to its own particular private label products. The private label linking is accomplished by working in collaboration with the client to prepare linking tables, which give RetailData the direction and parameters to collect the competitor's private label pricing information.

12. In certain cases, a retail outlet may price products in a way that is not capable of being converted into a comparable product or unit of a product that the client sells. For example, a store may require that customers buy a certain amount or number of units of a product to achieve savings. In this situation, as part of its service, RetailData converts the price of a product at the shelf into a regular or sale price so that it can be used for price comparisons by the client.

13. RetailData validates that the correct product information and the data pertaining to the products are collected as requested by the particular client. It also validates the accuracy of the actual prices collected so that it can provide meaningful pricing data to its clients. Validating the accuracy of the pricing information is done both at the store through the hand-held devices used

by the data collectors and again when the pricing information is uploaded to RetailData's computers. The device the data collector uses produces a warning if the price is not within an acceptable range as determined by RetailData's software. If the collector receives the "prompt" or warning that the prices may not be accurate, the data collector must confirm or reenter the price.

14. Once the pricing information is "uploaded," it is subject to additional validation procedures. The process of checking the accuracy of pricing information involves using RetailData's computer programs to check each individual price point to determine if there is a variance from certain historic trends in the price for the individual product. Items that fall outside the variance are reviewed by the client service manager who determines whether the pricing data is valid based on the data that is collected. If the data is considered valid, it will be included in the client's file.

15. The final data that is produced after all of the processes are completed is then transmitted to the client in each client's particular computer format. The formats are different for each client because the individual clients have their own computer programs and operating systems, which require different coding for the pricing data, which allows them to interpret and evaluate the pricing data received from RetailData.

16. A client uses its own proprietary SKU (stock keeping unit) numbers to identify certain products in its computer programs so its operating systems can interpret and evaluate the pricing data for those particular SKU numbered products. In some cases, the coding of the pricing data may require RetailData to use the client's individual SKU numbers when transmitting the pricing data.

17. RetailData does not resell the reports it provides, nor does it resell significant portions of its client's reports.

18. There have been situations where RetailData resold information from part of a report as opposed to the report itself. This occurs when a client finds that it has a gap in the data that it needs to do its analysis and asks RetailData for assistance. In those cases, RetailData has tried to assist the client's ad hoc request. This situation rarely occurs, as RetailData does not seek to sell historical pricing data from an established database. RetailData's agreements with its customers do not prevent RetailData from providing the pricing information it acquires to another customer. Based on the gross revenue of RetailData generated during the audit period, the pricing data that was resold represented less than four-tenths of one-percent of its gross revenue. In terms of the total number of price points collected by RetailData at the retail outlets for all clients during the audit period, the total number of resold price points represented slightly less than two-thirds of one percent of all price points collected by RetailData during the audit period.

19. There has never been a situation where clients have asked for the same pricing data in their separate reports, and no two price audits for different clients match. Any historical data used to validate the accuracy of the pricing data collected for a particular client is not held by RetailData to be sold to other clients for whom it conducts competitive price audits.

20. Each client has individual pricing strategies and requires specific pricing data to implement these pricing strategies. Due to each client's specific strategies and timing for implementation of its pricing strategies, the pricing data for each client is not meaningful or useful to other clients. For example, Wegmans, from which RetailData derives at least 70 percent of its New York business, does not intend to follow the lead of any of its competitors who may also be receiving pricing audits from RetailData.

21. Wegmans' representatives provide detailed written requests to RetailData, labeled Price Check Schedules, for the pricing data that they require. Before the beginning of each calendar year, a team of pricing analysts at Wegmans develops the Price Check Schedules, which contain requests for pricing data for each week of the year. Wegmans also requests pricing information with respect to its combo or key items list of 584 specific items for which RetailData is directed to provide pricing data. Price Check Schedules also contain a list of the stores at which the price audits are to be conducted. The competitor stores to be audited are named under the heading "Where to Check" on each of the Price Check Schedules. Throughout the year, the Price Check Schedules are modified to implement any new pricing strategy and new requests are provided to RetailData after such modification.

22. In order to implement their own pricing strategies, RetailData's other clients provide similar detailed requests for competitive price audits. The schedules give RetailData direction for the collection and provision of data for specific categories of products. These clients also routinely modify their requests for competitive price audits.

The Price Check Schedules provided by Wegmans were labeled as follows:

- (1) Grocery, Dairy, Frozen, Perishables, GM (general merchandise)
- (2) Special Categories and Lists (includes cosmetics, bakery and whole food items)
- (3) Health and Beauty Care products
- (4) Beer, Wine and Spirits
- (5) Club Store Category Rotation
- (6) Wegmans Combined Key Items List
- (7) Standard Bulbs (light bulbs)

23. Each of these categories is further broken down in requests for pricing data in dozens of product subcategories. For example, for the first week in 2009, Wegmans' team of pricing analysts listed 32 separate subcategories for which individual pricing data must be provided for the products that fall within the particular subcategory, such as milk, cat food and treats, kitchen

and trash bags, household cleaners, cottage cheese and dips. As reflected in the weekly changes to the product categories in the Price Check Schedules, the subcategories can be different for each week based on Wegmans' particular pricing strategy.

24. RetailData's clients request that the competitive price audits be started on a specific date and that the results be transmitted to them on specific dates. The completion of the pricing audits by the requested date is critical, as the pricing data quickly becomes stale and useless to the clients for implementation of their individual pricing strategies. When the reports are completed, they may be delivered electronically by posting to RetailData's file transfer protocol (FTC) site, the customer's FTC site or in a printed report.

25. The information provided by RetailData is pricing information that is available to the public.

26. RetailData provides detailed billing statements to its clients. If it provided any pricing for an ad hoc or special request, the charge would be separately stated on the client's bill.

27. The Administrative Law Judge generally accepted petitioner's proposed findings of fact, except he rejected proposed finding of fact 4 as argumentative and he rejected proposed findings of fact 7,13, 17, 21, 32, and 41, in whole or in part, as duplicative of other proposed findings of fact, which were accepted.

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge determined that petitioner's information service was not personal or individual in nature and was therefore subject to sales tax pursuant to Tax Law § 1105 (c) (1). Based upon his review of the relevant case law, the Administrative Law Judge concluded that the source of the information controls whether an information service will be considered personal or individual in nature and therefore excluded from sales tax. Here, the

Administrative Law Judge found that the service at issue did not qualify for the exclusion from tax under Tax Law § 1105 (c) (1) because the source of the information obtained by petitioner and provided to its clients was readily accessible to the general public. The Administrative Law Judge rejected petitioner's assertion that the relevant case law restricted a finding that information was not personal or individual in nature to situations where the source of the information was a common database, a governmental database or a published database. Instead, he concluded that those cases stood for the proposition that non-personal or non-individual information means information that is widely accessible.

As his decision with respect to the "personal and individual" issue was dispositive, the Administrative Law Judge did not address the question of whether the information in petitioner's reports may or may not be substantially incorporated in reports furnished to others.

#### ***SUMMARY OF ARGUMENTS ON EXCEPTION***

Petitioner contends that its reports are personal and individual in nature with respect to each of its clients. Petitioner notes that the data it provides to its clients is based on the client's specifications and is transmitted in client-specific formats. Petitioner notes that its data gatherers must look at various products and product attributes as selected by the client. Furthermore, petitioner notes, the data gathered by petitioner and transmitted to a client is used by that client to implement its marketing and pricing strategy. Accordingly, each report is useful only to the specific client to whom it is provided. As it argued below, petitioner asserts that as the information it sells to its clients is not derived from a common database, a governmental database, or a published database, it is distinguishable from cases wherein certain information services were determined to be taxable.

Petitioner further contends that, contrary to the Administrative Law Judge's finding, the pricing data provided by petitioner to its clients is not widely accessible. Petitioner asserts that, under the relevant case law, "widely accessible" refers to information contained in a common database or repository.

Although the determination did not reach this issue, petitioner asserts that the reports it provides to one customer are not incorporated into reports that it provides to other customers.

The Division asserts that, pursuant to the relevant case law, the source of the information determines whether an information service is personal or individual for purposes of the exclusion. Here, the Division argues, the information sold by petitioner is from a widely accessible public source and thus is not personal or individual in nature. The Division disagrees with petitioner's contention that the information must be obtained from a common, governmental or published database to fall outside the exclusion.

The Division also contends that the subject information service fails the second prong of the test for exclusion because the information provided to one client may be substantially incorporated into reports furnished to other clients. The Division contends that each report that petitioner provides to one client contains pricing information that may be provided to other clients.

### ***OPINION***

Tax Law § 1105 (c) (1) imposes tax upon the receipts from every retail sale of an information service, defined as follows:

*"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. . .*” (Emphasis added).

Tax Law § 1105 (c) (9) extends the taxation of information services to those provided by telephony or telegraphy, with the same exclusion.

It is uncontroverted that petitioner is in the business of collecting and compiling information and furnishing reports thereof to its clients. Petitioner thus provides an information service within the meaning of Tax Law § 1105 (c) (1) (*see* 20 NYCRR 527.3 [a] [2]). What is in dispute is whether the information that petitioner sells 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]). If petitioner’s information service meets these criteria, then receipts therefrom are excluded from sales tax.

Our resolution of this dispute is guided by the rule of construction that requires exclusions from taxation to be strictly interpreted in the taxpayer’s favor (*Matter of Towne-Oller and Assoc. v State Tax Commn.* 120 AD2d 873, 874 [1986]). Nevertheless, the burden of proof remains with petitioner to establish entitlement to the exclusion (*Matter of Sungard Sec. Fin. LLC*, Tax Appeals Tribunal, March 16, 2015).

The “personal or individual” component of the exclusion at issue “refers to uniquely personal information” (*Matter of Allstate Ins. Co. v State Tax Commn.*, 115 AD2d 831, 834 [1985], *affd* 67 NY2d 999 [1986]). By this notion, motor vehicle reports taken from records maintained by the Department of Motor Vehicles, to which there was unlimited public access, are not considered personal or individual in nature (*id.*). In contrast, confidential investigative character reports based on personal interviews that are used to determine the insurance risk presented by applicants for life and health insurance policies are considered “uniquely personal”

(see *Matter of New York Life Ins. Co v. State Tax Commn.*, 80 AD2d 675 [1981], *affd* 55 NY2d 758 [1981] [“It is somewhat difficult to imagine how any information could be more personal or individual”] [80 AD2d at 677]).

The pricing information that petitioner sells to its clients is obtained from products on the shelves of supermarkets that are open to the public. There is nothing “uniquely personal” about the price of an item in a supermarket. Furthermore, such information is obviously not confidential, as it is accessible to anyone who enters a store. These facts thus indicate that the information provided by petitioner to its clients is non-personal and non-individual in nature and therefore taxable. A closer comparison of the present matter and *Matter of Allstate Ins. Co. v State Tax Commn.* makes clear that this conclusion is correct.

In *Matter of Allstate*, the information service provider was in the business of obtaining motor vehicle reports of specific motorists from the Department of Motor Vehicles at its customer’s direction. Here, petitioner is in the business of obtaining the prices of specific products from supermarkets at its customer’s direction. While the specific means by which the information was collected and provided differs in the two cases, such differences are insignificant. What matters is that, in each case, an information service provider was directed by its customer to obtain and provide specific widely accessible non-personal and non-individual information and did so. In *Matter of Allstate*, the court held that the service was a taxable information service and, consistent with that holding, we reach the same conclusion here.

Petitioner’s assertion that its reports are personal and individual in nature focuses on the fact that its reports are based on its various clients’ specifications; that reports for different clients do not match; that reports must account for product attributes and private label products;

and that reports are provided to clients in a format specific to each client's computer operating system.

We disagree with petitioner that these facts are sufficient to establish that it provided personal and individual information within the meaning of Tax Law § 1105 (c) (1).

“[T]he fact that no two reports to different customers are likely to be the same and that such reports are customized in some respects to respond to the needs of the particular client is not dispositive of entitlement to the exclusion . . .” (*Rich Prods. Corp. v Chu*, 132 AD2d 175 [1987], *lv denied* 72 NY2d 802 [1988]). Accordingly, the question to be answered to determine eligibility for the exclusion is whether the information in the report is uniquely personal; it is not whether each report is the same (*see Matter of Towne-Oller and Assoc. v State Tax Commn.* 120 AD2d at 874 [“Although there is some customizing of reports for individual customers by petitioner, the service provided is not of a personal and individual character”]).<sup>1</sup> Consistent with these principles, we find that the information in the reports regarding product attributes and private label linking simply appears to be additional pricing information and thus does not change the nature of the information provided. The product attributes appear to provide additional information regarding a particular item's sale price and the private label linking apparently instructs petitioner as how to report pricing data for specific private label items. Similarly, the formatting of the reports to accommodate a specific client's computer operating system does not affect the substance of the report.

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<sup>1</sup> Additionally, we note that, although not addressed in *Matter of Allstate*, it appears clear from the description of the service therein that no two reports in that case would have contained the same information.

As it did before the Administrative Law Judge, petitioner contends that the relevant case law dictates that, in order to be subject to tax under Tax Law § 1105 (c) (1), the information that is sold must come from a common database, a government database or a published source.

The cases that have examined the issue of whether information is “personal or individual in nature” have consistently held that where “the provided service comes from a common source or a data repository that is not confidential and is widely accessible,” then it is not “personal or individual in nature” (*Matter of ADP Automotive Claims Servs., Inc. v Tax Appeals Trib.*, 188 AD2d 245, 248 [1993], *lv denied* 82 NY2d 655 [1993], citing *Rich Products Corp. v Chu* [information in reports derived from data collected by information service provider from hundreds of grocery warehouses] and *Towne-Oller and Assoc.* [information service provider obtained information contained in reports by purchasing data from wholesalers and distributors]). Additional examples of cases involving a common source or data repository include, according to petitioner, *Matter of Allstate* [information in reports taken from public records to which there was unlimited public access]) and *Matter of Twin Coast Newspapers v State Tax Commn.*, 101 AD2d 977 [1984], *appeal dismissed* 64 NY2d 874 [1985] [information in reports extracted from two weekly newspapers published by the information service provider]).

In the present matter, the relevant data sits on supermarket shelves until extracted by petitioner’s data collectors. This does not differ significantly from the situation in *Matter of Allstate*, where data resided in the electronic records of the Department of Motor Vehicles until removed by the DMV at the information service provider’s specific request. Accordingly, we find that petitioner’s service “comes from a common source or a data repository that is not confidential and is widely accessible” within the meaning of *Matter of ADP Automotive Claims Servs.* and the line of cases cited above.

Petitioner asserts that its information service is similar to the information service that was the subject of *Westwood Pharms. v Chu* (164 AD2d 462 [1990], *lv denied* 77 NY2d 807 [1991]). In that case, Westwood, a manufacturer of health and beauty products, employed A.C. Nielsen Company (Nielsen) to provide marketing information services and reports on the market performance of several of its products. Westwood used these reports for developing marketing strategies and to resolve marketing difficulties. In order to prepare the marketing information, Nielsen used a four-step process. Initially, Nielsen collected sales and marketing data. Most of this raw data was obtained from the client. Some was obtained from field investigations. None was obtained from published sources. Nielsen then converted the raw data into new data, called a “sample frame,” which constituted a distinct database for each particular client. Neilson performed this conversion using its secret analytic and statistical procedures to project and estimate market activity in particular locations. The new data or “sample frame” was not disclosed to the client or any other client. Next, Nielsen created a computer program based upon the unique and confidential directions of the client. Last, the individualized computer program would engage with the “sample frame” to create a market information report. The market report created for Westwood would not be divulged to any other client. No two reports were alike and “sample frame” information was not shared with other clients.

The Appellate Division, Fourth Department held that the reports provided by Nielsen to Westwood were nontaxable because they were personal and individual in nature and the information contained in the reports could not be substantially incorporated into reports furnished to others. In reaching this conclusion, the court noted that, “[m]ost importantly . . . the information distributed to Westwood is prepared from a ‘sample frame’” (164 AD2d at 467). As the sample frame was new data, created by Nielsen using confidential analytic and statistical

procedures, the information distributed to Westwood and other clients of Nielsen was “unique to each client” (*id.*).

*Westwood Pharms.* thus turns on the fact that the information provided to the client by Nielsen was derived from new data created by Nielsen (the “sample frame”) that was unique to each client. In the present matter, as discussed, petitioner provides its clients with pricing information taken from the shelves of supermarkets. Although the reports are customized to some extent, petitioner does not create any new information. We conclude, therefore, that *Westwood Pharms.* provides little support to petitioner’s position.

Our conclusion that the information provided by petitioner to its customers was not “personal or individual in nature” within the meaning of Tax Law § 1105 (c) (1) is sufficient to establish that the service at issue is taxable. Accordingly, we do not address the issue of whether the information in question met the second criterion necessary to merit exclusion from tax, i.e., whether such information “is not or may not be substantially incorporated in reports furnished to other persons.”

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of RetailData, LLC is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of RetailData, LLC is denied; and

4. The notice of determination, dated November 4, 2011, is sustained.

DATED: Albany, New York  
March 3, 2016

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner

/s/ James H. Tully, Jr.  
James H. Tully, Jr.  
Commissioner