

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
DYNAMIC LOGIC, INC. : **DECISION**
(BY KANTAR LLC, AS SUCCESSOR-IN-INTEREST) : **DTA NO. 828619**
: :
for Revision of a Determination or for Refund of New York :
State Sales and Use Taxes Under Articles 28 and 29 of the :
Tax Law for the period September 1, 2011 through :
August 31, 2014. :

Petitioner, Dynamic Logic, Inc. (by Kantar LLC, as successor-in-interest), filed an exception to the determination of the Administrative Law Judge issued on January 14, 2021. Petitioner appeared by Mayer Brown LLP (Amy F. Nogid, Esq., and Leah Robinson, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard by teleconference on August 26, 2021, which date began the six-month period for the issuance of this decision.

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

ISSUES

- I. Whether petitioner's services are information services under Tax Law § 1105 (c) (1).
- II. If so, whether such services are properly excluded from sales tax under the same provision.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 2, 4, 6, 15 and 17 to reflect the record more accurately. We have added additional findings of fact, numbered 20, 21 and 22 to reflect the record more fully. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

1. Petitioner, Dynamic Logic, Inc. (Dynamic Logic) was a Delaware corporation authorized to do business in New York State. Millward Brown acquired Dynamic Logic in 2005. On December 31, 2013, Dynamic Logic became Dynamic Logic, LLC, a Delaware limited liability company. On December 31, 2016, Dynamic Logic, LLC, merged into Kantar LLC, a Delaware limited liability company.

2. Dynamic Logic provides services to its clients that measure advertising effectiveness. As part of its services, Dynamic Logic also provides advice and recommendations to improve advertising effectiveness. As explained by Jean Robinson, petitioner's president during the period at issue, Dynamic Logic measures advertising effectiveness by surveying consumers or internet users who have seen a particular advertisement that it is testing and those who have not seen the ad. Dynamic Logic's research analysts compare and analyze the results so that Dynamic Logic can inform its clients as to how well the ad performed and what they can do to improve performance.

3. During the period at issue, the services Dynamic Logic offered its clients included AdIndex, CrossMedia, Dynamic Tracking, FanIndex, Link, and Digital Tracking (collectively

referred to as services).¹

4. A copy of a client agreement (contract) between petitioner and a client, which is illustrative of petitioner's contracts during the period at issue, was included in the joint stipulation entered into by the parties. AdIndex is described in the contract as follows:

“Adindex is a research solution that uses a control/exposed methodology to measure the effectiveness of digital advertising at communicating brand messaging. One AdIndex study will measure one specific digital campaign with one or more creatives on a site or network of sites. It includes the use of ADSCOUT tracking technology as well as the survey technology and related online results. The basic AdIndex study consists of one standard survey, two or more flexible survey questions, and two cells (Control, Exposed) with a total of 600-800 respondents. Dynamic Logic provides the account management for overseeing the study and recruitment of respondents.

ADSCOUT is a patented technology which is used as an advertising tracking mechanism. The technology sends a cookie to the viewer's computer when the tested creative is delivered to their browser. The AdIndex software will recognize this cookie when the survey process begins, and will, correspondingly, divide the viewers into 2 survey categories: Exposed and Control.”

The AdIndex reports include a comparison of the client's specific advertising campaign results to industry-specific Dynamic Logic MarketNorms benchmarking data, which allows clients to understand how the effectiveness of their campaign compares in relation to industry peers (*see* finding of fact 17).

The contract's Exhibit B: Rate Cards lists what Dynamic Logic includes in its AdIndex studies. Included in the list is a “Frequency, Media, Creative Analysis” that would “Identif[y] optimal frequency, site and creative format” and “Conclusions and Recommendations” that would “Refine future advertising.”

5. The contract lists different levels of AdIndex that a client may purchase, including:

¹ The services are referred to in some of Dynamic Logic's documents as “Solutions.”

“AdIndex Dash: An AdIndex Dash includes a 5-7 question survey. The main deliverable is delivered online. A Scorecard-type PowerPoint report can be purchased for an additional fee. Analysis time by Dynamic Logic is not included in this study level.

AdIndex Vertical Enhancement (“AV”): An AV includes a 15-17 question survey with up to 4 flexible questions, including 1 multi-select/complex question and industry-specific questions. Analyst will prepare study findings in a Management Presentation and present the findings to Client in up to two conference calls.

AdIndex – Brand Focus: An AdIndex – Brand Focus includes a longer survey (up to 21 questions) with up to 4 flexible questions, and a pre-analysis call with a Dynamic Logic research analyst once all data are available. Analyst will prepare study findings in a Management Presentation and present the findings to Client in up to two conference calls. Brand Focus will include, in addition to the analysis of an AV, deeper audience analysis, enhanced creative analysis and competitive analysis.

AdIndex – Media Focus: An AdIndex – Media Focus includes a longer survey (up to 21 questions) with up to 4 flexible questions, and a pre-analysis call with a Dynamic Logic research analyst once all data are available. Analyst will prepare study findings in a Management Presentation and present the findings to Client in up to two conference calls. Media Focus will include, in addition to the analysis of an AV, enhanced creative analysis, creative analysis by site, enhanced media analysis and enhanced frequency analysis, where relevant.

AdIndex Premium: An AdIndex Premium includes a longer survey (up to 21 questions) with up to 4 flexible questions, including up to 2 multi-select/complex questions, and a pre-analysis call with a Dynamic Logic research analyst once all data are available. Analyst will prepare study findings in a Management Presentation and present the findings to Client in up to two conference calls. The AdIndex Premium Management Presentation will include all the features of the Brand and Media Focus combined.

AdIndex for Mobile: AdIndex for Mobile is a research solution that uses a control/exposed methodology to measure the effectiveness of mobile advertising. One AdIndex study will measure on specific mobile campaign with one or more creatives on a site or network of sites. It includes the survey technology and related analysis. The basic AdIndex for Mobile study consists of one standard survey of 10-12 questions and two cells (Control, Exposed) with a total of 200-600 respondents, and a Management Presentation with an analysis of the findings.”

6. Cross Media is described in Dynamic Logic’s contract as:

“a research solution that uses a combination of electronic tracking and survey responses to determine the opportunity to see online and offline advertising within a campaign. When a campaign includes digital media, the study includes the use of the ADSCOUT tracking technology as well as the survey technology.

CrossMedia research is based on comparisons of respondent groups that have exposure opportunity to different combinations of media. The combinations in a particular study will depend upon the media included in the campaign and the design and timing of the media plan. CrossMedia studies examine how media fit individually and synergistically into the marketing mix based on the impact of each medium to provide a measure of the return on objectives and inform future media allocation.

The approach uses surveys administered to groups of consumers who have seen the media on the plan in various combinations. This analysis is done by surveying respondents within the advertising target base using a combination of recruitment techniques and examining media behavior for each respondent and comparing the media exposed groups to similar respondents recruited prior to the campaign start to identify changes in brand metrics that can be attributed to the campaign we are measuring.

Branding metrics are calculated among the sample in each group and analysis of the resulting aggregate metrics provides an evaluation of the overall branding impact of the campaign on the total online and offline market. Analysis of media combinations provides an understanding of the synergy and cost effectiveness across media for driving changes in branding.

All CrossMedia studies include technical, operational and research support. Operational support is provided by Dynamic Logic account managers in planning the project specifications, generating tracking codes, consulting on trafficking the creative into various ad serving systems, and monitoring recruitment. Research support includes initial consultation on the scope of project, survey creation and review, results analysis, and final report development.”

The contract further provides that the deliverables for the CrossMedia Management

Presentation for each CrossMedia study includes:

“an approximately 30 slide Power Point presentation, which may include the following metrics: background and methodology; key findings; overall results; frequency of exposure analyses; segmentation analyses, including in market and category usage; demographic profiles; and conclusions. The CrossMedia management presentation is presented in a call with an analyst.”

The contract's Exhibit B: Rate Cards further describes CrossMedia studies as "including two different media" to "inform media allocation decisions for further integrated ad campaigns." Additional media may be included in the study for additional fees. The contract's Exhibit B also indicates that CrossMedia deliverables will include "Recommendations: Provides suggested improvements in media and creative strategy."

7. Link is described in Dynamic Logic's contract as:

"Link and LinkSelect for Digital are copy testing solutions for digital advertising which is used during the planning stage of the advertising cycle. It is designed to provide feedback on creative executions before an online advertising campaign is launched. It offers diagnostic and evaluative insights into which ad works best for the target audience. Dynamic Logic provides the survey design, account management for overseeing the study and recruitment of respondents and analysis of the results."

All LinkSelect for Digital studies include a survey and metrics related to the impact of the creative on branding, communication, and persuasion metrics. LinkSelect for Digital Standard includes a call with a Dynamic Logic analyst to review the results of the study. LinkSelect for Digital Premium includes a ten-page PowerPoint and a call with a Dynamic Logic analyst to review the results of the study.

8. Digital Tacking is described in the contract as:

"a research solution that uses a continuous sampling methodology to track pre-defined brand health metrics over time in a longitudinal fashion. Digital tracking is customized to meet advertiser learning needs and typically is intended to monitor overall brand health and advertising trends within the 'digital foot-print' of the tested brand."

Digital Tracking can include the use of Dynamic Logic's ADSCOUT text code tracking technology as well as its survey technology. Dynamic Logic provides the account management for overseeing the study and recruitment of respondents as well as research support for designing and programming the survey and analyzing results.

9. The contract in the record does not include a description of FanIndex or Dynamic Tracking. Attached to the joint stipulation are marketing materials entitled “Marketing Evaluation & Optimization Solutions; An Overview for Agencies,” which describe FanIndex as a service to “quickly gauge the brand value of a fan page & align fan attitude with fan behavior” with the use of surveys. There is no description of Dynamic Tracking in the record.

10. Pursuant to the contract, Dynamic Logic’s obligations to the client are “(i) to conduct advertising effectiveness studies through use of the Solutions according to the survey criteria selected by Client, (ii) to use commercially reasonable efforts to make the Solutions available on a 24/7 basis, and (iii) to provide training in the proper use of the Solutions.”

11. Dynamic Logic has a proprietary interest in the AdIndex, Digital Tracking, CrossMedia and other study methodologies. During the contract period, a client is granted a limited right to use Dynamic Logic’s ADSCOUT text code to set cookies in connection with the use of Dynamic Logic’s services. Dynamic Logic is the exclusive owner of the software, databases and other aspects and technologies related to its services.

12. The AdIndex study involves tracking technology as well as survey technology. The tracking technology sends a “cookie” to a viewer’s computer when the advertisement being studied is displayed. The campaign creatives (i.e., advertisements) being studied must have Dynamic Logic tags applied to them prior to launch. The tags “cookie” respondents as exposed to the creative and enable survey sampling. A cookie is embedded code on a website that requests a website to create a text file to store data about a user’s personal settings. Cookies allow a website to obtain a text file based on the user’s visit to that website. The client must obtain permission from the website to place the cookies and send survey invitations.

13. Dynamic Logic is not an advertiser or an advertising agency. Its clients are responsible for soliciting advertisers and trafficking of the advertising.

14. Dynamic Logic's clients must obtain all necessary licenses, rights, consents, waivers, and permissions from the websites to allow Dynamic Logic to measure the advertising and operate its services on the client's behalf, and to use the data provided to or collected by it. As explained by Ms. Robinson, an individual "can't just randomly go on the internet and drop a cookie. You need the cooperation of the advertiser or their agency and the website to do that."

15. Dynamic Logic's clients grant Dynamic Logic the rights to copy, distribute, resell, modify, and otherwise use the data it collects from end users through the performance of its services for clients and may use the data in connection with Dynamic Logic's MarketNorms database (*see* finding of fact 17). However, Dynamic Logic may not disclose the data in a manner that identifies the client or its affiliates. CrossMedia studies do not include any MarketNorms data. Dynamic Logic does not include any data it collects as part of a CrossMedia study in the MarketNorms database. Petitioner has been unable to create a database that could be used for benchmarking purposes out of the CrossMedia data. With respect to AdIndex, only responses from the standardized questions included in AdIndex studies are included in the MarketNorms database. None of the AdIndex customized survey question responses and none of the insights, recommendations or final studies are included in the MarketNorms database.

16. Dynamic Logic's clients may furnish the data and information collected through Dynamic Logic's services in the client's own reports to the public and its clients.

17. MarketNorms is a database of anonymized and aggregated results from standard questions contained in AdIndex studies that can be used for benchmarking purposes. There are about eight such standard questions and they are related to the respondents' age, gender, income,

and brand awareness. MarketNorms uses those responses to calculate a normative score that is used as a benchmark to compare results. The normative score allows clients to understand how the effectiveness of their advertising campaign compares in relation to industry peers. The MarketNorms database is not publicly available. It is a separate product or service that clients may purchase by subscription.² Petitioner’s marketing materials refer to MarketNorms as the “[w]orld’s largest digital advertising effectiveness database” and note that it includes data from “6,700+ AdIndex online branding campaigns” and “9.7 million survey respondents.”

Additionally, AdIndex clients receive a comparison of the client’s specific advertising campaign to the MarketNorms benchmarking data. The MarketNorms data will generally appear on one or two slides of a 25 to 30 slide AdIndex study. While the MarketNorms data is a component of an AdIndex study, AdIndex recommendations and insights could be given without such data.

18. On January 21, 2014, the Division of Taxation (Division) commenced a sales and use tax audit of petitioner. As a result of its audit, the Division issued to petitioner a notice of determination (L-046139583), dated March 20, 2017, assessing sales tax due in the amount of \$3,516,354.78, plus interest, for the period September 1, 2011 through August 31, 2014.

19. Subsequent to the hearing, the parties reached an agreement regarding certain computational issues in relation to the amount of tax determined due. As a result of the agreement, the adjusted amount of tax asserted due by the Division was recalculated to \$2,743,882.31. The adjusted amount of tax determined due was attributed to the following services:

<u>Service</u>	<u>Asserted Adjusted Tax Due</u>
AdIndex	\$1,986,856.49

² During the sales tax audit, petitioner agreed with the Division that its MarketNorms sales were subject to sales tax as an information service.

CrossMedia	\$480,468.31
Dynamic Tracking	\$90,994.75
FanIndex	\$5,825.55
Link	\$103,749.93
Digital Tracking	\$29,098.73
Other	\$46,888.55
Total Tax at Issue	\$2,743,882.31

20. Dynamic Logic presents deliverables (reports) to its clients in the form of PowerPoint presentations. Every AdIndex and CrossMedia deliverable includes advice and recommendations to improve the effectiveness of the client's ad campaign.

21. Dynamic Logic trains its research analysts to write reports in such a way as to use the survey data to find and tell the "story" of the data. This means to present a narrative alongside the many charts, tables and graphs describing the important findings of the research and to provide insights as to the implications of those results. Dynamic Logic also directs its analysts to include recommendations in the reports. Analysts are trained to draw recommendations from the data by suggesting what to do if ad campaign goals were met and what to do if they were not. With respect to ads themselves, analysts are directed to focus on whether the ads were tailored to campaign goals.

22. The record contains three examples of AdIndex deliverables and one example of a CrossMedia deliverable described as follows:

a) Exhibit 10 attached to the joint stipulation of facts and exhibits (joint stipulation) is an AdIndex report on a digital ad campaign for a bank, titled "AdIndex Advertising Research

provided for [Client].” This report contains the “key findings” of the research in two pages of text near the beginning of the report, followed by about 53 pages of quantitative information set forth in tables, charts, and graphs. The quantitative information is usually accompanied by text that highlights the significance of the data appearing on that page. A few of the pages contain recommendations and advice regarding future campaigns. These recommendations appear to be suggestions drawn directly from the data.

b) Exhibit 11 attached to the joint stipulation is an AdIndex report on a digital ad campaign for a skin cream, titled “AdIndex Advertising Research provided for [Client].” This report has a page of “key findings” followed by about 21 pages of quantitative information set forth in tables, charts, and graphs. Such quantitative information is usually accompanied by text that highlights the significance of the data appearing on that page. In addition, most of the pages containing quantitative information also contain a sentence of advice based on the data. This report also contains several pages of advice regarding the client’s ads outside the context of the research.

c) Exhibit 12 attached to the joint stipulation is an AdIndex Dash report on a digital advertising campaign for tourism in a particular locale, titled “Advertising Effectiveness Research for [Client].” This report has a page of “key findings and recommendations” followed by nine pages of quantitative information set forth in tables, charts, and graphs. Such quantitative information is usually accompanied by text that highlights the significance of the data appearing on that page. Recommendations based on the data also appear on a few of the pages depicting various subsets of data. This report also contains a page with insights and advice regarding the client’s ads.

d) Exhibit 16 attached to the joint stipulation is a report of a CrossMedia study for a cable television network, titled “[Name of network’s program] Campaign Research.” The report contains 21 pages of quantitative information set forth in tables, charts, and graphs. Such quantitative information is usually accompanied by text that highlights the significance of the data appearing on that page. The report includes a page of “Campaign Insights & Recommendations” that provide recommendations drawn directly from the data. There are no other pages containing recommendations or advice.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge observed that the service of furnishing information is subject to sales tax pursuant to Tax Law § 1105 (c) (1), unless excluded as provided therein. The Administrative Law Judge found that the furnishing of information must be the service provider’s primary function for such a service to be taxable. The Administrative Law Judge determined that petitioner’s primary function through its various services is to collect information regarding the effectiveness of its clients’ advertising by conducting surveys, analyzing that information, and furnishing that information and analysis to its clients through reports. The Administrative Law Judge observed that petitioner would have nothing to report to its clients without the collected information. The Administrative Law Judge concluded that petitioner’s services were information services under Tax Law § 1105 (c) (1).

Next, the Administrative Law Judge addressed whether petitioner’s information services qualified for the statutory exclusion from tax. That is, whether the information furnished by petitioner is: 1) personal or individual in nature and 2) whether such information is not or may not be substantially incorporated in reports furnished to others. The Administrative Law Judge determined that the information furnished by petitioner to its clients was personal and individual

in nature because the source of the information was not publicly available, as it was obtainable only through the permission of advertisers and websites and by using petitioner's tracking and survey technology. The Administrative Law Judge also determined that petitioner's information service may be substantially incorporated in reports furnished to others. Specifically, the Administrative Law Judge found that petitioner's contracts with its clients provide that petitioner has the right to use the data that it collects through its performance of services in connection with its MarketNorms database, so long as it does not do so in a manner that would identify the client. The Administrative Law Judge thus concluded that the information furnished by petitioner may be substantially incorporated in reports furnished to others and was not, therefore, excluded from tax.

ARGUMENTS ON EXCEPTION

Petitioner seeks to contrast, generally, an information service, which it describes as the provision of quantitative information, and a non-taxable consulting service, which it describes as advice and guidance. Petitioner contends that its services fall into the latter category.

Petitioner asserts that the Administrative Law Judge erred by focusing on one sentence in the contract rather than the totality of the evidence. Petitioner argues that such evidence shows that the primary function of its services is to provide advice and recommendations for clients to improve their future advertising campaigns. Petitioner thus contends that its services were not information services within the meaning of Tax Law § 1105(c)(1).

In support of its argument, petitioner points to project-specific portions of the contract, i.e., the rate card section, indicating that petitioner will provide recommendations to improve media coverage and creative strategy; testimony suggesting that its clients' primary purpose in engaging petitioner was direction and advice; marketing materials referring to petitioner's

services as providing “actionable insights” and “key recommendations;” training materials (report writing guidelines) directing petitioner’s research analysts to provide recommendations to clients; final deliverables (PowerPoint presentations) containing insights and recommendations; and evidence showing that clients wanted and took petitioner’s advice and recommendations and changed their ad campaigns.

Alternatively, if it provides an information service under the Tax Law, petitioner contends that such service qualifies for the statutory exclusion from sales tax. As the Administrative Law Judge found that petitioner’s services met the first requirement for exclusion, petitioner’s argument focuses on the second requirement, i.e., that the information furnished is not or may not be substantially incorporated in reports furnished to other persons. Petitioner asserts that the information furnished here are the reports themselves, which are never provided to third parties, and not the underlying data, as the Administrative Law Judge determined. Petitioner also asserts error in the Administrative Law Judge’s conclusion that, because petitioner retains the right to use the data it collects in the performance of its services, information obtained through such services *may be* substantially incorporated into reports furnished to others and thereby defeats the exclusion. Petitioner argues that this interpretation renders superfluous the statute’s use of the term “substantially,” contrary to the rules of statutory construction. Finally, petitioner asserts that, in any event, no CrossMedia data was ever incorporated into reports furnished to third parties and only a de minimis amount of AdIndex survey data was ever so incorporated.

Petitioner acknowledges that the record contains little information regarding services other than AdIndex and CrossMedia.

In response, the Division agrees with the determination’s conclusion that petitioner

provided an information service. The Division contends that petitioner's expertise is in performing market surveys and that it offers little of value to its customers without the information obtained through its surveys. The Division argues that petitioner's customers hire petitioner to evaluate the effectiveness of their advertising campaigns; that petitioner has no demonstrated expertise with respect to running or improving such a campaign; that petitioner's customers are advertising campaign experts; and that petitioner's research analysts have social science, and not advertising, backgrounds. The Division asserts that, the addition of recommendations to petitioner's reports notwithstanding, the primary function of petitioner's services is the provision of information.

The Division also agrees with the determination's conclusion that the information obtained by petitioner through its surveys can be substantially incorporated into reports furnished to persons other than the customer. The Division notes that petitioner's contract with its customers gives it the right to use the data it obtains through its surveys. The Division further contends that petitioner can and does provide information to other customers through subscriptions to its MarketNorms database.

The Division also contends in its brief, contrary to the determination, that the information provided by petitioner is not personal or individual in nature. In reply, petitioner objects to any consideration of this argument. Petitioner asserts that, as the Division failed to timely file an exception in this matter, it lost its right to require the Tribunal to review any part of the determination.

OPINION

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

“The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons. . . .”

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

The Division’s regulations include “product and marketing surveys” among examples of information services listed therein (20 NYCRR 527.3 [a] [3]).

Because retail sales of services are not subject to sales tax unless specifically included among the services listed in Tax Law § 1105 (c), whether a given service may be taxable is properly construed pursuant to the rule applicable when determining whether a transaction is subject to taxation at all (*see Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 196 [1975], *rearg denied* 37 NY2d 708 [1975]), *lv denied* 338 NE2d 330 [1975]; that is, construed most strongly against the government and in favor of the citizen (*see Matter of Building Contrs. Assn. v Tully*, 87 AD2d 909 [3d Dept 1982]). “The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax” (*Matter of Grace v New York State Tax Commn.*, 37 NY2d at 196 [internal quotation and citation omitted]).

Even with this construction, the burden to prove that the services at issue were not information services within the meaning of the statute remains with petitioner (*Matter of Exxon Mobil Corp.*, Tax Appeals Tribunal, May 23, 2013).

“[I]t is the sale of the service of furnishing information by a business whose function it is to collect and disseminate information, which is taxable under Tax Law § 1105 (c) (1) . . . and

not the mere sale of information” (*Matter of Audell Petroleum Corp. v New York State Tax Commn.*, 69 NY2d 818, 819-820 [1987]). Accordingly, a service’s primary function controls whether it is subject to sales tax under Tax Law § 1105 (c) (1) (*Matter of SSOV ’81 Ltd.*, Tax Appeals Tribunal, January 19, 1995). To determine such a primary function, we focus on “the service in its entirety, as opposed to reviewing the service by components or by the means in which the service is effectuated” (*id.*). If a service’s primary function is the collection and dissemination of information, then the service may be subject to tax under Tax Law § 1105 (c) (1) (*id.*).

Petitioner’s AdIndex service begins with the development of survey questions followed by the gathering of information or data through surveys. The use of tracking technology to create exposed and control groups is a significant feature of the service. The data obtained through the surveys is then cleaned and weighted for accuracy, and a research analyst prepares a PowerPoint presentation by which the gathered data is reported to the client. As petitioner correctly notes, the report is not a “data dump,” but presents, rather, certain “cuts” or subsets of data considered significant by the research analyst in evaluating the ad campaign’s effectiveness. Such data is presented in graphs, tables, and charts. A review of the reports in evidence shows that these graphic data presentations are their predominant feature. Text calling attention to the significance of various points of data generally accompanies the data cuts. Petitioner refers to such text as insights (or actionable insights). A witness for petitioner explained that insights are pulled from the data to explain what happened during the ad campaign (*see* Tr 147:16-23, 148:8-15, 150:5-9). The insights thus analyze the data.

Petitioner’s CrossMedia service is substantially similar to AdIndex for purposes of determining whether it is an information service under Tax Law § 1105 (c) (1).

As so far described, the AdIndex and CrossMedia services consist entirely of the evaluation of advertising campaigns through the collection and analysis of information and thus plainly fall within the statutory definition of an information service (*see Matter of ADP Automotive Claims Servs. v Tax Appeals Trib.*, 188 AD2d 245, 248 [3rd Dept 1993], *lv denied* 82 NY2d 655 [1993] [report with intelligence and analysis that customer did not previously have is an information service]).

As petitioner notes, these services also include recommendations (or advice) for future improvement. Unlike the evaluation of advertising campaigns, this component of petitioner's services does not involve the furnishing of information via collection and analysis. Even so, the record shows that this component is subordinate to the services' evaluation function. A review of the reports in the record shows that most of the recommendations therein are drawn directly from the data. In other words, without the data there would be no basis for most of the recommendations. Consistently, petitioner's training materials for its research analysts (AdIndex Report Writing Guidelines) indicate that petitioner considers the recommendations to be ancillary to the data and the analysis. Specifically, the report writing guidelines state: "We should base most of our recommendations off the data we developed the story from. Suggest what to do if the goal were met or if they weren't" (exhibit 13, p 22). The same materials also state: "Bottom Line - AdIndex is ad research" (*id.*). We note also that three of the four reports in evidence contain very few recommendations (*see* finding of fact 22). This, too, is consistent with our finding that recommendations are subordinate to data collection and analysis.

Petitioner's marketing materials in the record also show an emphasis on the data collection and analysis portion of petitioner's services. While such materials do say that AdIndex will provide "key recommendations," such materials most prominently feature

AdIndex's advertising effectiveness, describing AdIndex at the top of the document as "the most trusted solution for evaluating digital advertising effectiveness" (exhibit 2, p 177). Additionally, in a document titled "AdIndex Process Overview," petitioner describes itself as "Experts in Marketing Effectiveness Research" (exhibit 9, p 21).

Additionally, petitioner's standard contract is consistent with our finding that the recommendation component is subordinate to the evaluation component. Although, as petitioner notes, the service-specific portions of the contract promise recommendations as part of both AdIndex and CrossMedia services, these same parts of the contract make more promises related to petitioner's evaluation of the client's advertising campaign. Further, the contract generally commits petitioner to providing "advertising effectiveness studies" (*see* finding of fact 10) and describes both AdIndex and CrossMedia as "research solutions" (*see* findings of fact 4 and 6).

We acknowledge petitioner's witness testimony suggesting that its clients' primary purpose in hiring petitioner was advice. We also acknowledge evidence in the record indicating that at least some of petitioner's clients wanted and took petitioner's advice and recommendations. We find, however, that such anecdotal evidence is outweighed by the evidence discussed above.

Accordingly, considering the AdIndex and CrossMedia services in their entirety, we find that their primary function is the collection and dissemination of information. We find, therefore, that these services were information services for purposes of Tax Law § 1105 (c) (1).

As to whether the AdIndex and CrossMedia information services qualify for the statutory exclusion from sales tax, we note again that the statute excludes information that 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]). As an exclusion from tax, we construe its

language against petitioner in accordance with the rule that an exemption or exclusion must clearly appear and the party claiming it must point to statutory language plainly giving it (*Matter of Wegmans Food Mkts., Inc. v Tax Appeals Trib. of State of N.Y.*, 33 NY3d 587, 592 [2019] [citations omitted]).

As noted, the Administrative Law Judge concluded that the information furnished by petitioner to its clients was personal and individual in nature. Although it did not file an exception, the Division argues in its brief that this conclusion was in error. As petitioner correctly notes, however, by its failure to file an exception in the present matter, “the Division waived its right to require the Tribunal to review any portion of the Administrative Law Judge’s determination” (*Matter of Klein’s Bailey Foods, Inc.*, Tax Appeals Tribunal, August 4, 1988). Indeed, we have long and consistently held that cross-exceptions are not permitted under our Rules of Practice and Procedure (*see e.g., Matter of IT USA, Inc.*, Tax Appeals Tribunal, April 16, 2014; *Matter of Dean Witter Reynolds, Inc.*, Tax Appeals Tribunal, August 24, 2006; *Matter of Caleri*, Tax Appeals Tribunal, August 11, 1988). Accordingly, we do not review the Administrative Law Judge’s conclusion on this point and thus do not address the Division’s objection thereto.

As to whether the information furnished by petitioner “is not or may not be substantially incorporated in reports furnished to other persons,” we disagree with petitioner’s contention that the statute’s exclusion language refers only the actual reports that are provided to customers and not to the underlying data. As noted, petitioner thus contends that, as it never provided the reports to third parties, it meets this requirement for exclusion. “[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” (*Matter of Rich Prods. Corp. v Chu*, 132 AD2d 175, 177-178 [3d Dept 1987], *lv denied* 72 NY2d 802, [1988]). Accordingly, the court in *Rich Prods. Corp.* found that evidence indicating that some of the information, or comprehensive data, contained in the reports at issue was also contained in reports provided to third parties supported a finding that information in those reports is or may be substantially incorporated in reports furnished to others (*id.* at 178). Consistent with *Rich Prods. Corp.*, petitioner does not qualify for the exclusion simply because it does not provide the reports themselves to third parties.

Some of the information collected by petitioner and furnished to its clients in the provision of its AdIndex services is shared with third parties. That is, every AdIndex survey includes about eight standard questions related to demographic information and standard brand metrics (*see* finding of fact 17). Such information is aggregated and anonymized and becomes part of the MarketNorms database (*id.*). MarketNorms information is included in AdIndex reports (*id.*). Additionally, access to the MarketNorms database is a separate service that clients may purchase from petitioner (*id.*). Such third-party access to an information service provider’s aggregated data constitutes the furnishing of information to other persons for purposes of the statutory exclusion (*see Matter of Sungard Securities Finance LLC*, Tax Appeals Tribunal, March 16, 2015). We disagree with petitioner’s argument that only a de minimis amount of information is provided to third parties and that, accordingly, such information is not “substantially incorporated” into reports furnished to others. Petitioner’s argument is refuted by the fact that it sells access to such information as a separate product. Petitioner and its MarketNorms customers thus consider such information to have value. Accordingly, receipts from petitioner’s AdIndex service are not excluded from sales tax.

CrossMedia differs from AdIndex in that the data obtained through CrossMedia surveys

does not go into the MarketNorms database (*see* finding of fact 15). Accordingly, information collected and analyzed via the CrossMedia service is not furnished to third parties. Indeed, petitioner has been unable to create a database out of the CrossMedia data that could be used for benchmarking purposes (*id.*). The Administrative Law Judge determined, however, that because petitioner has the right to use the data it collects in the performance of its services (*id.*), such information *may be* substantially incorporated into reports furnished to others within the meaning of Tax Law § 1105 (c) (1). We disagree. The possibility that information could be furnished to third parties in the future if the service provider develops a means to do so does not disqualify an information service from the statutory exclusion under the “substantially incorporated” component (*see Matter of New York Life Ins. Co. v State Tax Commn.*, 80 AD2d 675, 677 [3rd Dept 1981], *affd* 55 NY2d 758 [1981]). Accordingly, given the Administrative Law Judge’s conclusion that the information provided by petitioner was personal and individual in nature, receipts from petitioner’s CrossMedia service are properly excluded from sales tax.

Finally, we note the paucity of evidence pertaining to services other than AdIndex and CrossMedia. Indeed, in its reply brief, petitioner acknowledges that “little information was provided” with respect to such other services. Accordingly, we find that petitioner has failed to show that the Division’s assertion of tax due on these other services was improper and the portion of the assessment attributable thereto must be sustained (*see* finding of fact 19).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Dynamic Logic, Inc. (by Kantar LLC, as successor-in-interest), is granted to the extent indicated in paragraph 4 below, but is otherwise denied;
2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph 4 below, but is otherwise affirmed;

3. The petition of Dynamic Logic, Inc. (by Kantar LLC, as successor-in-interest), is granted to the extent indicated in paragraph 4 below, but is otherwise denied; and

4. The notice of determination dated March 20, 2017, as recomputed in accordance with finding of fact 19, is further modified to exclude the “Asserted Adjusted Tax Due” attributable to CrossMedia from the “Total Tax at Issue” as indicated therein, but is otherwise sustained.

DATED: Albany, New York
January 20, 2022

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner