

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**SUNGARD SECURITIES FINANCE LLC** : DETERMINATION  
for Revision of a Determination of for Refund : DTA NO. 824336  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period February 28, 2007 :  
through May 31, 2009. :

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Petitioner, SunGard Securities Finance LLC, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period February 28, 2007 through May 31, 2009.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 1384 Broadway, 19<sup>th</sup> Floor, New York, New York, on December 3, 2012, at 10:30 A.M., with all briefs to be submitted by August 9, 2013, which date commenced the six-month period for the issuance of this determination. Petitioners appeared by Alston & Bird, LLP (Richard C. Kariss, Esq., and Zachry T. Gladney, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

***ISSUES***

I. Whether receipts petitioner derived from providing Smart Loan services to its customers were properly subjected to sales tax per Tax Law § 1101(b)(6) as receipts derived from sales (licenses) of prewritten computer software.

II. Whether receipts petitioner derived from providing Lending Pit, Board Reporting and Performance Analytics services to its customers were properly subjected to sales tax per Tax Law § 1105(c)(1) as receipts derived from sales of a taxable information service.

***FINDINGS OF FACT***

1. Petitioner, SunGard Securities Finance LLC, is a limited liability company organized under the laws of the State of Delaware and maintaining its headquarters in Salem, New Hampshire. Petitioner timely filed New York State and local quarterly sales and use tax returns for part-quarterly filers (Form ST-10). Petitioner is a subsidiary of Sungard Data Systems, Inc., (SDS or The SunGard Group).<sup>1</sup> Petitioner is engaged in the business of providing consulting and related data processing services to customers in the financial industry. Its customers include broker-dealers, custodian banks, third-party agency lenders and other financial institutions.

2. On April, 29, 2009, the Division of Taxation (Division) notified petitioner that it would be subject to an audit of its sales and use tax returns for the sales tax quarterly periods spanning December 1, 2006 through May 31, 2009 (the period at issue).

3. Following its audit, the Division issued to petitioner a Notice of Determination (L-035461959-4) dated February 28, 2011 and assessing tax due for the period at issue in the amount of \$397,065.28 plus interest. There is no dispute that petitioner maintained and made available records that were complete and adequate for purposes of conducting an audit. It is also undisputed that the audit was conducted upon the basis of a test period and projection method, as agreed to by the parties. Finally, there is no dispute as to the computation of the dollar amounts of tax assessed as the result of the audit. Rather, the issue presented is whether the Division

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<sup>1</sup> The SunGard Group consisted of some 247 domestic and foreign subsidiaries, including petitioner, during the period at issue.

correctly concluded that the services giving rise to the receipts upon which tax was calculated were properly subject to tax.

4. The foregoing assessment involves tax determined due in the following specific component areas and amounts: Smart Loan (\$184,518.88), Lending Pit (\$163,660.73), Board Reporting (\$34,007.42) and Performance Analytics (\$8,501.86). The \$6,376.39 difference between the total of the foregoing specified component amounts (\$390,688.89) and the amount of tax assessed by the Notice of Determination (\$397,065.28) represents tax assessed on receipts from petitioner's Market Data Feed service and is not challenged or in dispute herein. Each of the component areas and amounts at issue will be discussed separately.

#### Smart Loan

5. Petitioner provides its Smart Loan service to financial industry customers. The Smart Loan service is carried out pursuant to an Application Service Provider Agreement (Service Agreement) between petitioner and each of its customers. The Service Agreement describes the Smart Loan "system services" as follows:

Smart Loan is a modular system that supports and automates securities lending and borrowing, bank loans, short sale authorizations and profit/loss analysis. The system is designed to operate with SunGard's Loanet system on a real time basis. Smart Loan supports box lending, borrowing for house needs, provides special conduit screens, provides a real time copy of the Loanet open item database, and monitors credit limits on a real time basis. Smart Loan requires the Customer to subscribe to SunGard's Loanet Full Service.

6. Petitioner describes the main function of the Smart Loan service to be the processing and maintaining of ancillary accounting ledgers regarding petitioner's customers' securities lending and borrowing transactions. The Smart Loan service commences with petitioner's receipt of data from a customer with respect to that customer's securities lending and borrowing transactions. The terms of the Service Agreement specify that in order for petitioner to meet its

time requirements to its customers, the transaction data must be transferred from the customer to petitioner by 3:00 AM.<sup>2</sup> In turn, petitioner provides data processing services and fulfills “back office” functions for its customers, including analyzing, processing and maintaining ancillary accounting ledgers regarding the customer’s securities lending and borrowing transactions and making such information available to the customer’s employees in various processed formats.

The process by which petitioner provides this service is carried out by:

- i) interfacing with the Depository Trust Company regarding the movement of collateral and securities between parties involved in securities lending transactions;
- ii) monitoring securities lending laws and guidance to ensure that the Smart Loan service complies with those laws;
- iii) providing customer help line support;
- iv) monitoring customer transactions to identify and/or resolve problems during the securities lending process;
- v) providing safeguards for customers’ information and protecting against service interruption by maintaining backup generators, air conditioners, servers and a separate disaster recovery facility;
- vi) interfacing with third-party pricing vendors to properly value the securities lending transactions;
- vii) interfacing with its customers’ third-party accounting/general ledger vendors to ensure that its customers’ accounting records are properly updated;
- viii) maintaining account of its customers’ lending transactions through ancillary accounting ledgers;
- ix) providing updates and enhancements of the Smart Loan system;

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<sup>2</sup> Petitioner’s Smart Loan service is available between the hours of 7:15 A.M. and 6:00 P.M. (*see* Finding of Fact 8), thus necessitating the requirement that customers’ data must be transferred to petitioner by 3:00 A.M. (i.e., prior to such Smart Loan daily operating or availability time period).

x) coordinating third-party telecommunications providers to route information to the proper parties; and

xi) archiving customer transaction data.

7. The foregoing functions are supported and performed by more than 25 employees, including:

-an information technology staff that monitors and services Smart Loan hardware;

-a client service group that supports customer communications;

-an operational staff that monitors the Smart Loan system;

-a communications department that monitors the high-speed connections with customers;

-a development group that includes computer programmers and system developers; and

-an administrative staff.

8. Petitioner delivers the Smart Loan service by using its employees, hardware and proprietary software to process customer data between the hours of 7:15 A.M. and 6:00 P.M., Monday through Friday. Petitioner does not deliver its Smart Loan service during its nonbusiness hours or on (SunGard) holidays, and these time-based limitations exist because petitioner's employees necessary to provide the data services are not available during such nonbusiness hours and holidays.

9. Petitioner's Smart Loan customers out-source the foregoing functions to petitioner in lieu of: a) purchasing specialized computer equipment and employing staff to maintain such equipment, b) contracting and interfacing with third parties for communications, pricing and

movement of collateral, c) developing (and maintaining) a disaster recovery facility and, d) monitoring securities lending laws and guidance.

10. A customer's fee for Smart Loan services, billed via invoices labeled "Smart Loan ASP Services,"<sup>3</sup> is based on the volume of unique services delivered to the customer and the number of the customer's personnel ("users") simultaneously receiving the Smart Loan service. More specifically, pursuant to the Service Agreement, there is a monthly fee determined by the number of simultaneous "Base System Users" plus an additional fixed monthly fee for each of several available "Optional Modules."<sup>4</sup>

11. Petitioner's customers cannot access or modify Smart Loan's proprietary data processing software. Petitioner, in its sole discretion and without notice to its customers, may modify, revise, and update the software it uses to provide the Smart Loan service.

12. The Smart Loan system incorporates a limited amount of software that petitioner uses to deliver processed data to its customers. This software is furnished to petitioner's customers for the exclusive purpose of providing a convenient means for petitioner's customers to view Smart Loan processed data. The main purpose of such software is to facilitate a secure connection between petitioner and its customers. This software cannot function independently of the Smart Loan system, is provided to customers free of charge, cannot be altered or manipulated by petitioner's customers, and has no value apart from its relationship to the Smart Loan service.

### Lending Pit

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<sup>3</sup> "ASP" refers to "Application Service Provider."

<sup>4</sup> The Base System Users fee decreases as the number of simultaneous users (SUs) increases (e.g., the monthly fee for 1 to 5 SUs is \$2,500.00 per SU, decreases to \$2,000.00 per SU in the case of 6 to 10 SUs, and decreases to \$1,500.00 per SU in the case of 11 or more SUs).

13. As part of its business, petitioner also offers a Lending Pit service to its financial industry customers. The service is delivered pursuant to a Subscription Order and Terms of Use Agreement. The Lending Pit service involves obtaining, compiling, analyzing, processing and maintaining pre-trade and post-trade data for customers to view over a secure internet connection using petitioner's proprietary web-based application. Using Lending Pit allows customers to view their own current lending data in comparison to their own historical lending data, as well as to view their own current and/or historical lending data in comparison with benchmarks formulated by petitioner using raw data from all of its customers. Lending Pit customers have the option of viewing their data in comparison to the benchmarks or in isolation.

14. Lending Pit operates by gathering, storing and processing customer-owned data using petitioner's proprietary custom software. Each Lending Pit subscriber agrees to make its data available at the close of each business day for inclusion in a database of such information, and petitioner, using its Lending Pit software, creates that database using its customers' information consisting of shares on loan, share weighted average of rebates, and a portfolio utilization percentage for each individual issue. Petitioner then allows its customers to view and analyze the database information in reports delivered via a secure internet connection using a web-based application. Data reports are formatted based on each customer's individual needs within pre-defined fields set by petitioner. The reports are based substantially on the customer's original data, which is confidential, and the individual reports are returned solely to the customer and not sold or marketed to third parties.

15. Petitioner's press release and web page written descriptions of its Lending Pit service, captioned "Market Color for Securities Lending Professionals," provides:

The securities lending market is among the fastest growing financial markets in the world, but it is also one of the least transparent. Lending Pit, from SunGard's Astec Analytics, is a browser-based market information service for securities lending professionals that provides increased transparency to the market. This service gives traders valuable rebate/fee and loan/borrow volume information for equity and fixed income issues on loan in every market.

Similarly, petitioner describes Lending Pit as:

a browser-based market information service for securities lending professionals. It is used on trading desks globally and gives traders valuable rebate/fee and loan volume information for a broad coverage of the equity and fixed income issues on loan in every market. Traders leverage this data to maximize their securities lending spreads in a market that can feature widely divergent rebate rates and fees, even for the same security on the same day. The data underlying Lending Pit is also available to Lending Pit subscribers who wish to analyze the data using in-house systems.

Petitioner's information concerning Lending Pit includes the quote claiming that "Lending Pit's securities finance analytical data is the nearest thing there is to real time data today," and answers the question "How does Lending Pit add value to my business?" by stating:

Securities lending professionals leverage the information displayed on Lending Pit to maximize their lending revenue in a market that can feature widely divergent rebate rate and fees, even for the same security on the same day. Lending Pit is a valuable tool not only because it provides this fundamental market color, but also because it is designed with a trader's time constraints in mind. Lending Pit feeds the most pertinent data directly to the traders so that they are able to gain key insights quickly and with minimal effort. This is possible because the system is designed to be very user friendly, and also because the reports featured in Lending Pit are focused directly on securities lending profitability.

16. The key features of Lending Pit include:

- database infrastructure and application design 100% built, owned and maintained by SunGard.
- data updated each morning with loans that were outstanding as of the market open.
- graphical representation for quick data interpretation.

- sub-second response time to crucial pre trade queries.
- view and download up to 15 months of historical data.
- red flag service to identify positions whose rebates differ significantly from market averages.
- user definable watch lists.
- research sectors/industries for profitable lending opportunities.

17. Customers are not required to view the database (market) benchmarks petitioner establishes, and petitioner does not impose an additional charge on its customers for viewing the benchmarks. The Lending Pit service incorporates an amount of market data from public sources for the purpose of allowing Lending Pit customers to compare their own data to the market data. Petitioner's customers are not provided access to any of the raw data used to create the benchmark comparison reports.

18. Lending Pit customer data is stored in an online data warehouse with logical separation and access for each customer. Therefore, individual customers cannot access the confidential data of other individual Lending Pit service customers. To ensure confidentiality, individual customer data is further protected through external and internal nondisclosure agreements that prevent such customer specific individual data from being included in reports furnished to other customers of the Lending Pit service.

19. Lending Pit allows customers to view and /or download up to 15 months of historical lending data. A customer can access its own data for the purpose of creating reports, but cannot access the confidential individual data of other Lending Pit customers from which the benchmarks are derived. Lending Pit customers cannot download the reports that Lending Pit creates and makes available for its customers on petitioner's servers, but rather those customers

are permitted to download only the data that is included in the reports. Customers may view any downloaded data on customer-owned software, such as Microsoft Excel.

20. Petitioner does not sell or license the software it uses to provide the Lending Pit service. It does not transfer its proprietary software to its customers, and its customers cannot download or install Lending Pit software on their own computers.

#### Board Reporting

21. As part of its business, petitioner provides Board Reporting service to its customers in the financial industry, including broker-dealers, custodian banks, third-party agency lenders and other financial institutions. Board Reporting is a component part of petitioner's Lending Pit Service. Petitioner states the main function of the Board Reporting service is to advise customers on the relative quality of their securities lending programs. As the "Board Reporting" name implies, the service provides a report to a customer's board of directors, or to a manager or management unit within a customer, concerning the customer's securities lending program.

22. Customers purchase the Board Reporting service to obtain an impartial evaluation of their lending activity. The resulting evaluation is provided by petitioner's employees who review data from the customer's securities lending programs and draw conclusions regarding whether the program is appropriate, valuable and structured within industry standards during a defined period of time. The evaluation includes reviewing the performance of the customer's securities lending program data against market performance benchmarks, as derived from the information in petitioner's Lending Pit database.

23 Petitioner delivers its Board Reporting conclusions to its customers via a written document entitled "Report to Management." The report may include advice for steps that could

be taken to improve the customer's program. The advice and guidance included in the Board Reporting Reports are developed by petitioner's professional staff. These employees are described as highly experienced business analysts trained in the metrics of the securities lending industry.

24. The Board Reporting Reports to Management are produced by petitioner on an "as needed" basis and vary depending on frequency and content according to the needs of each customer.

#### Performance Analytics

25. As part of its business, petitioner also provides Performance Analytics service to its customers in the financial industry. Petitioner's Performance Analytics service is a component of the petitioner's Board Reporting service, which is itself a component part of petitioner's Lending Pit service. Performance Analytics can be purchased independently of the Board Reporting service. Petitioner states that the main function of the Performance Analytics service is to evaluate a customer's lending program in the context of comparing that customer's results with the results of other securities lending agents using petitioner's proprietary scoring model.

26. Through the Performance Analytics service, petitioner's professional staff identify financial industry trends including:

- prevailing lending rate trends.
- trends in the volume of loans.
- trends in the stability of loans.
- trends in the distribution of loans among borrowers.

27. Petitioner delivers its Performance Analytics conclusions to its customers through a written document entitled “Earning Results and Lending Trends.” If the Performance Analytics service is purchased in conjunction with the Board Reporting service, petitioner will incorporate the Performance Analytics comparison metrics in the Board Reporting “Report to Management.”

28. Certain of the foregoing facts concerning Smart Loan and Lending Pit are taken from information set forth in an affidavit made by John Grimaldi, petitioner’s executive vice president for capital markets and investment banking. Mr. Grimaldi has over 30 years of experience in corporate securities lending and treasury operations, including the period from 1995 through 2001 when he worked for Loanet, the predecessor firm acquired by SunGard in 2001. Certain of the foregoing facts concerning Board Reporting and Performance Analytics are premised upon information set forth in an affidavit made by Timothy Smith, petitioner’s senior vice president and general manager for SunGard’s Astec Analytics.

29. Petitioner submitted proposed findings of fact numbered 1 through 73, and three proposed conclusions of law numbered 74 through 76. In accordance with State Administrative Procedure Act (SAPA) § 307(1), the following rulings are made with respect thereto:

- a) proposed facts numbered 1 through 26, 29 through 33, 35 through 40, 44 through 50, 52 through 54, 56 through 67 and 69 through 72 are supported by the record and have been substantially incorporated in the foregoing Findings of Fact.<sup>5</sup>
- b) proposed facts numbered 27, 34, 43, 51 and 73 are each rejected as setting forth an ultimate finding of fact thus constituting a conclusion of law.
- c) proposed facts 41 and 42 are rejected as being conclusory in nature.

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<sup>5</sup> Many of the proposed facts as presented by petitioner have been condensed and renumbered as incorporated in the Findings of Fact set forth above. In addition, it is noted that proposed facts numbered 8 through 10 and denominated procedural facts are undisputed and are unnecessary to resolution of the substantive issues presented in this matter.

d) proposed fact 55 has been modified to accurately reflect the record by specifying that Lending Pit displays not only a customer's own data but also displays information from the aggregate data (the database) of all customers' information (*see* Ex. F at pp. 221, 225; Findings of Fact 14, 15 and 16)..

e) proposed fact 68 has been modified to eliminate the descriptive quantity term "de minimis."

f) SAPA does not require rulings with respect to proposed conclusions of law and none have been made herein concerning petitioners' three proposed conclusions of law numbered 74 through 76.

### ***CONCLUSIONS OF LAW***

#### **Smart Loan**

A. The first question presented is whether petitioner's Smart Loan service was a direct or constructive license of computer software to petitioner's customers properly held subject to tax by the Division as the sale of tangible personal property. Specifically, the Division claims the evidence fails to show that petitioner did not license its Smart Loan computer software to its customers for use on their own computers.

B. Tax Law § 1105(a) imposes sales tax on the receipts from every "retail sale" of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A "retail sale" is "[a] sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . ." (Tax Law § 1101[b][4][i][A]). Tax Law § 1101(b)(5) defines "sale, selling or purchase" as follows:

any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

Tangible personal property includes prewritten computer software (Tax Law § 1101[b][6]).

C. The Division views petitioner's Smart Loan service as constituting a license of prewritten software by which petitioner's customers receive and use, either directly or constructively, petitioner's proprietary Smart Loan software on their own computers. The facts of this case do not support this view. Rather, by availing themselves of the Smart Loan service, petitioner's customers out-source to petitioner the expense and potential risks associated with the "back office" functions of tracking the execution of the customers' own securities lending activities including: a) reviewing such transactions for legal and regulatory compliance, b) verifying pricing and transactional accuracy of such activities, c) processing the transaction data and ensuring the updating and accuracy of accounting records in connection therewith, d) maintaining ancillary accounting ledgers, e) protecting against service interruptions, f) providing a separate disaster recovery facility, and g) making the processed data comprising the securities lending transactions engaged in by such customers available to them in a variety of formatted reports for their own analysis and use in evaluating their own securities lending transactions and programs.

D. The Service Agreement pursuant to which petitioner's customers avail themselves of the Smart Loan service describes Smart Loan as providing a "processing service." In fact, the Service Agreement specifically states that it is not an agreement of sale, and that title and all rights to petitioner's proprietary data processing system (i.e., the Smart Loan software) remain exclusively with petitioner. Under the Service Agreement, petitioner does not transfer, sell or license its system to its customers in tangible or electronic form, and petitioner's customers do not have access to petitioner's proprietary software. Smart Loan customers cannot modify the Smart Loan software in any manner. Rather, the proprietary software used by petitioner to

provide its Smart Loan service may be modified, revised and updated only by petitioner's employees, and notice to or receipt of approval from such customers is not required for such actions. Further, the Smart Loan service is available only during certain specific hours when petitioner's professional employees necessary to provide the service are available (specifically between the hours of 7:15 AM and 6:00 PM Eastern Time, and excluding SunGard Holidays). It would appear entirely inconsistent for one who purchases prewritten software, either outright or by license to use, to be limited in the hours during which it can access and use the same. In addition, the Service Agreement provides that in order to meet the foregoing time availability parameters, petitioner's customers are responsible for ensuring that customer data files are received by petitioner for processing not later than 3:00 A.M. Eastern Time (*see* Finding of Fact 6, Footnote 2). In addition to the foregoing, the fee for the Smart Loan service is based on the volume of services delivered to customers and the number of customers' representatives (Simultaneous Users) receiving the services.

E. In sum, petitioner uses its own specialized proprietary software to verify, synthesize (or process), secure, format for customer viewing, and archive its customers' own transactional data. Petitioner obtains its customers' transactional data via ancillary software furnished without additional charge by petitioner. This software cannot function independently of Smart Loan, is not capable of being altered or manipulated by a customer, and serves to provide a secure connection between petitioner and its customers for the receipt of petitioner's customers' transactional data and the return thereof, as processed, to such customers (*see* Finding of Fact 12). There is no evidence that petitioner's customers, as opposed to petitioner, utilize petitioner's Smart Loan software to perform any of the foregoing services on their own

computers, save for using the ancillary software provided by petitioner as the means by which the customers initially provide their transactional data to petitioner and thereafter access and view their own data as processed. This latter aspect is integrally related to the overall service provided by petitioner. Under all of the facts, petitioner is not selling tangible personal property in the form of prewritten computer software, by direct or constructive license, but rather is providing an information service under Tax Law § 1105(c)(1), (9), where petitioner obtains a customer's transactional data, adds to the "intelligence" contained in each customer's own original data by organizing the same in new ways, and presents the data in custom reports via petitioner's proprietary software (*see Matter of ADP Automotive Claims Services, Inc. v. Tax Appeals Tribunal* (188 AD2d 245 [1993], *lv denied* 82 NY2d 655 [1993])). In turn, this information service (or data processing service) would be excluded from tax because the reports furnished to petitioners' customers consist solely of the customers' own data and that data is not included in reports furnished to other Smart Loan customers. Accordingly, the Smart Loan service is personal and individual to the customer and petitioner does not (and cannot under its Service Agreement) furnish the information or reports as formatted to anyone else (Tax Law § 1105[c][1]). In sum, petitioner's customers furnished their own securities lending transactional data to petitioner such that the same could be processed by petitioner on its own proprietary software and provided back to the customer for review in a variety of different report formats. Petitioner performs its services during its own business hours by application of its own proprietary software program that is not licensed or otherwise transferred to, accessible or modifiable by its customers. Under these circumstances, petitioner is not making sales of

prewritten computer software and the revenues derived therefrom are not subject to tax as such.<sup>6</sup> Accordingly, the tax assessed with respect to petitioner's Smart Loan service (\$184,518.88) is cancelled.

Lending Pit–Board Reporting–Performance Analytics

F. The remaining question presented is whether petitioner's Lending Pit service, and its related Board Reporting and Performance Analytics services that are available as component parts of the Lending Pit service, were properly held subject to tax as information services and not as nontaxable business consulting and/or data processing services, or as information services excluded from tax because the information conveyed via the services is confidential information that is personal and individual in nature and is not or may not be substantially incorporated in reports furnished to other persons.

G. Tax Law § 1105(c) imposes sales tax upon the receipts from every sale, except for resale, of nine specifically enumerated services. As is relevant to this matter, Tax Law § 1105(c)(1) imposes tax upon the service of:

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. . . .

In 1990, Tax Law § 1105(c) was expanded by the addition of paragraph nine so as to impose tax upon the receipts from every sale, except for resale, of an information service that is

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<sup>6</sup> The Division's reference to the Securities and Exchange Commission Form 10-K filed by petitioner's parent, SunGard Data Systems, Inc (SDS) in support of the argument that receipts derived from petitioner's sale of the Smart Loan service resulted from the sale of computer software is unpersuasive. The undisputed fact that some of the 247 domestic and foreign subsidiaries included within the consolidated SDS Form 10-K did earn revenue from sales and licensing of software does not necessarily support a conclusion that petitioner was engaged in that business or derived revenue therefrom. On its 2007 Form 10-K, the SunGard Group reported \$293 million of revenues from licensed software and \$4.363 billion of service revenues, i.e., approximately only 10 percent of reported revenue was attributable to the licensing of software.

provided via telephony or telegraphy (Tax Law § 1105[c][9][i], as added by L 1990, ch 190, eff September 1, 1990). Section 1105(c)(9)(i) provides that “in no event (i) shall the furnishing or provision of an information service be taxed under this paragraph unless it would otherwise be subject to taxation under paragraph one of this subdivision if it were furnished by printed, mimeographed or multigraphed matter.”

H. In contrast to Tax Law § 1105(a), which imposes sales tax on all retail sales of tangible personal property, except as otherwise provided, Tax Law § 1105(c) imposes tax only on certain specifically enumerated services (*see Matter of Rochester Gas and Electric Corp.*, Tax Appeals Tribunal, January 4, 1991). Accordingly, whether a service is taxable as one of these specifically enumerated services 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 [1975], *lv denied* 37 NY2d 708 [1975]); that is, “most strongly against the government and in favor of the citizen” (*see Matter of Building Contractors Association v. Tully*, 87 AD2d 909 [1982]). This rule of construction stands in contrast to the rule with respect to exemptions from tax, i.e., construed strictly and narrowly against the taxpayer (*see Matter of International Bar Assn. v. Tax Appeals Tribunal*, 210 AD2d 819 [1994], *lv denied* 85 NY2d 806 [1995]). However, even with such a construction, proof of entitlement to the exclusion is petitioner’s burden and it must show that the service it provides is not one of those set out in Tax Law § 1105(c).

I. Regulations of the Commissioner of Taxation and Finance, at 20 NYCRR 527.3, in relevant part identify taxable information services to include “credit reports, tax or stock market advisory and analysis reports and product and marketing surveys.” (20 NYCRR 527.3[a][3].) Examples of taxable information services include a weekly newsletter showing the range of commodity prices, a monthly bound volume of current advertising rates, lists of prospective

customers' telephone numbers, and a computer service company's print-out of cases and statutes containing the word "assessment" as requested by customers (20 NYCRR 527.3[a], examples 1-4). Examples of nontaxable information services include a private detective agency's report to its client, an auto insurance damages appraisal report, and a computer services company's withholding tax payroll report to subscribers (20 NYCRR 527.3[b], examples 1-3).

J. The "furnishing of information" is such an enumerated taxable service under the law (Tax Law § 1105[c][1],[9]). However, there is a distinction between a taxable information service and the furnishing of a nontaxable service where information is merely a component of that service. In *Matter of SSOV '81 Ltd.* (Tax Appeals Tribunal, January 19, 1995), the Tribunal explained that the term "information service":

has been interpreted to mean "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" . . . . In order to determine a service's taxability, the analysis employed by the New York courts and the Tax Appeals Tribunal focuses on the service in its entirety, as opposed to reviewing the service by components or by the means in which the service is effectuated. (Citations omitted.)

In *Matter of SSOV' 81 Ltd.*, the Tribunal focused on the "primary function" of the service, which was to enable members of a dating referral service to meet others. In concluding that such primary function was not one of the enumerated taxable services set forth in Tax Law § 1105(c), the Tribunal recognized that the proper focus should be on the primary function itself and not upon whether the service might, as an incident thereof, involve the provision of information, stating that, "[t]o neglect the primary function of petitioner's business in order to dissect the service it provides into what appears to be taxable events stretches the application of Article 28 far beyond that contemplated by the Legislature."

Under the foregoing rubric, to be an information service the taxpayer's primary function and true aim must be the business of furnishing information. As the Tribunal has stated, "the mere fact [that] information is [being] transferred will not create a taxable event" (*Id.*; *see Matter of Principal Connections, LTD.*, Tax Appeals Tribunal, February 12, 2004).

K. As detailed, petitioner collects, compiles and analyzes capital markets information from its subscribing Lending Pit customers. Each customer signs an agreement by which they make their daily pre-trade and post-trade lending and borrowing data available to petitioner, acknowledge that petitioner maintains a database of the same in aggregate form, and allow petitioner to use such database of compiled collected information. Petitioner's subscribing customers in turn can access several reports presenting the information from this database. Customers can access current data as well as up to 15 months of historical data, including both their own data and the aggregate database data, and perform analysis thereon. Thus, while subscribers cannot access the individual data of other subscribing customers in isolation, they can and do access the aggregate of such data as collected, compiled and analyzed by petitioner. These circumstances establish that the primary purpose of the Lending Pit service is the sale of the service of collecting information, compiling and analyzing the same and furnishing such information, either in raw aggregate form or as analyzed by petitioner, in reports to customers (*see Matter of Audell Petroleum Corporation v. State Tax Commn.*, 69 NY2d 818 [1987]; *Matter of ADP Automotive Claims Services, Inc.; Allstate Insurance Company v. Tax Commission of the State of New York*, 115 AD2d 831 [1985], *affd* 67 NY2d 999 [1986]). As such, the Lending Pit service constitutes an information service per Tax Law §1105(c)(1), (9). In fact, petitioner's own press releases and promotional web pages describe Lending Pit service as a "browser based market information service" (*see* Finding of Fact 15). The record simply does

not bear out that petitioner's Lending Pit service provides a consulting service or is otherwise supplying information simply as a component part of some other primary service.

L. Tax Law § 1105(c)(1) provides an exclusion from tax for information services where the information provided is personal or individual in nature and is not or may not be substantially incorporated in reports furnished to other persons (*Id*; *see* 20 NYCRR 527.3[b]). Here, the information provided under the Lending Pit service is clearly not personal or individual in nature and may be incorporated into reports furnished to others. Indeed, the same information from the Lending Pit database, as gathered from all subscribers to the service, either in raw aggregate form or as analyzed by petitioner, was available to any subscriber for use and analysis. Thus, the common database of information was available for inclusion in all reports furnished to customers and the information so furnished clearly could be substantially incorporated into reports furnished to other customers (*see e.g. Matter of Rich Products Corp. v. Chu*, 132 AD2d 175 [1987], *lv denied* 72 NY2d 802 [1988]).

M. It follows from the foregoing that petitioner's receipts from the Board Reporting and Performance Analytics services are likewise properly subject to tax as derived from the provision of a taxable information service. As noted in the affidavit of Timothy Smith, each of these services is an available component part of petitioner's Lending Pit service. In fact, the data provided via the Board Reporting and Performance Analytics services consists of a customer's own data (i.e., data already in the customer's possession) coupled with data from the database consisting of all of the Lending Pit customers. Thus, it cannot be said that the information is uniquely personal or individual, or that a substantial amount of such database information is not and may not be substantially incorporated in reports furnished to others (*see Matter of Rich Products Corp. v. Chu*). Further, the record includes no information concerning the particular experience, qualifications or credentials of those employees who conduct the analysis upon

which the Board Reporting and Performance Analytics reports furnished to customers are based, but rather states only that such employees are “highly experienced business analysts trained in the metrics of the securities lending industry.” In addition, the analyses and reports are described simply as providing conclusions as to the “relative quality” of a customer’s securities lending or borrowing program, i.e., whether (in the case of Board Reporting) a customer’s securities lending or borrowing program is “appropriate, valuable and structured within industry standards,” and (in the case of Performance Analytics) provides a comparison of a customer’s earnings results with those of other securities lending agents by identifying and highlighting trends in lending rates, loan volumes, loan stability and loan distribution. No actual reports were furnished for review either on audit or as part of the record herein. Petitioner’s bare assertions and generic descriptions of such qualifications, analyses and reports fall short of establishing that petitioner was providing a nontaxable consulting service via its Board Reporting and Performance Analytics services.

N. The petition of SunGard Securities Finance LLC is hereby granted to the extent indicated in Conclusion of Law E but is otherwise denied, and the Notice of Determination dated February 28, 2011, as modified in accordance herewith, is sustained.

DATED: Albany, New York  
February 6, 2014

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE