STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
RETAILDATA, LLC	:	DETERMINATION
		DTA NO. 825334
for Revision of a Determination or for Refund of	:	
of 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 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 June 1, 2005 through

May 31, 2011.

A hearing was held before Arthur S. Bray, Administrative Law Judge, in Albany, New

York, on February 13, 2014 at 10:00 A.M., with all briefs to be submitted by July 28, 2014,

which date commenced the six-month period for issuance of this determination. Petitioner

appeared by Arnell Golden Gregory LLP (Damian M. Hovancik, Esq., of counsel). The Division

of Taxation appeared by Amanda Hiller, Esq. (Michael J. Hall, Esq., of counsel).

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

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, 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. In this situation, RetailData provides, as part of its competitive pricing audits, a service that 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 numbers to identify certain products in its computer programs so their 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 or stock keeping unit 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 sightly 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 they conduct 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 customers 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. In accordance with State Administrative Procedure Act § 307(1), petitioner's proposed findings of fact have been generally accepted and incorporated herein. However, it is noted that proposed finding of fact 4 was rejected as argumentative. The following proposed findings of fact were rejected, in part or completely, as duplicative of other proposed findings of fact, which were accepted: 7,13, 17, 21, 32 and 41. Additional findings of fact were also made.

CONCLUSIONS OF LAW

A. Tax Law § 1105(c) imposes tax upon the receipts from every sale, except for resale, of ten 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. . . ."

B. Since RetailData is a business whose primary function is to collect and disseminate information, it is providing an information service within the meaning of Tax Law § 1105(c)(1) (*Matter of SSOV '81 Ltd.*,Tax Appeals Tribunal, January 19, 1995). The issue presented is whether it was erroneous for the Division to conclude that the service was subject to tax because the information provided by RetailData is personal or individual in nature and is not or may not be substantially incorporated in reports furnished to others. A resolution of this issue should be consistent with the rule that recognizes that since one is examining an exclusion rather than an exemption, the statute must be strictly construed in favor of the taxpayer (*Matter of New York Life Insurance v. State Tax Commn.*, 80 AD2d 675 [3d Dept 1981], *affd* 55 NY2d 758 [1981]).

C. Petitioner notes that at least 99 percent of its business consists of conducting competitive price audits. The pricing data is derived from field audits at retail outlets based on client specifications. Petitioner points out that "[t]he pricing data is collected, interpreted, validated for accuracy . . . and transmitted to RetailData's clients in a client-specific computer code or language formats . . . ." (Petitioner's brief, p 10.) Petitioner argues that the pricing data includes pricing attributes that are specific to each client and assist the client in determining pricing strategies. Petitioner maintains that the data produced from competitive price audits is not useful to other clients and is not and could not be sold to other clients. According to petitioner, the courts have found that information is not personal or individual in nature if the information is derived in one of three ways: the information is from a common database maintained by the vendor, from a governmental database or from published databases. Petitioner submits that none of these situations apply in this case.

D. It is the source of the information which controls whether the report will be considered "personal or individual in nature" (***Matter of ADP Collision Estimating Services, Inc.***, Tax Appeals Tribunal, August 8, 1991, ***confirmed sub nom Matter of ADP Automotive Claims Services, Inc. v. Tax Appeals Tribunal***, 188 AD2d 245 [1993], ***lv denied*** 82 NY2d 655). If the data was derived from a single data repository that itself is not confidential and is widely accessible, it will not be considered personal or individual in nature (***id***). Here, the information sold by RetailData is information compiled from a widely available public source, stores open to the pubic. Since the source of the information is derived from a widely available public source, the information sold by RetailData may not be considered personal or individual in nature (***id***).

E. RetailData has presented a great deal of evidence to establish the uniqueness of its reports. However, the fact that the customer selects the stores to be surveyed or the pricing information to report is not determinative (***see Matter of Twin Coast Newspapers v. State Tax Commn.***, 101 AD2d 977 [3d Dept 1984], ***appeal dismissed*** 64 NY2d 874 [1985]). Similarly, customizing a report in response to the specific needs of a customer does not make the report "personal or individual in nature" within the meaning of Tax Law § 1105(c)(1) (***Matter of ADP Collision Estimating Services, Inc.***).

F. Petitioner's reliance upon ***Westwood Pharmaceuticals v. Chu*** (164 AD2d 462 [1990], ***lv denied*** 77 NY2d 807 [1991] and ***Matter of New York Life Ins. Co. v. State Tax Commn.*** to support its position is misplaced. Westwood was a manufacturer of health and beauty products that 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 data was obtained from the client. Some of the raw data was obtained from field investigations. No data was obtained from published sources. Using analytic and statistical procedures to estimate market activity in particular locations, Nielsen converted the data into a different format, a "sample frame," which constituted a distinct database for the particular client. The 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. Lastly, 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 Court concluded that the reports provided by Nielsen were exempt from tax and listed a number of reasons for its decision: the information was prepared from a "sample frame," using data that was obtained from the client and confidential field investigations, and not a common data base; a separate computer program was designed to meet the requirements of each client, and the output of the computer program was held in the strictest confidence. The Court also reasoned that since the "sample frame" data was unique to each client, the reports were individual in nature and the reports could not substantially incorporated into reports furnished to other persons.

In the *New York Life Insurance* case, the petitioners were in the business of selling health and life insurance policies. In order to be knowledgeable regarding their insurance risk, petitioners solicited confidential character reports from licensed detective agencies. The detective agencies, in turn, employed field investigators who conducted field investigations in order to supply the information on the particular applicant. Petitioners were assessed sales and use tax as purchasers of information services. The assessment of sales and use tax was upheld by the State

Tax Commission. Upon review, the Appellate Division reversed the conclusion of the State Tax

Commission and found that the information, which was based upon investigations that were

tailored to the specific specifications of the petitioner company, were personal or individual and

excluded from the imposition of tax.

In *Westwood Pharmaceuticals*, the client and confidential field investigations were the main

source of the information and, in the *New York Life Insurance* case the source of the information

was field interviews by detectives. The information did not come from a broadly accessible

source in either situation. These cases cited by petitioner stand in clear contrast to the situation

presented here where the source of the information being reported is the price of items located on

grocery store shelves that are readily accessible to the general public.

G. In its brief, petitioner argues that the courts have found that an information service is not

personal or individual in nature unless the information is obtained from a common database

maintained by the vendor, from a governmental database or from a published database. Petitioner

submits that none of these situations is present here.

H. There is no question that the factors mentioned by petitioner have been considered in

determining whether the information provided personal or individual in nature (*see e.g. Matter of

Towne-Oller and Associates v. State Tax Commn.* 120 AD2d 873 [3d Dept 1986] [common

database]; *Matter of Twin Coast Newspapers v. State Tax Commn.* [common database]; *Matter

of Rich Products Corp. v. Chu*, 132 AD2d 175 [3d Dept 1987], *lv denied* 72 NY2d 802 [1988]

[published database]); *Matter of Allstate Insurance Company v. State Tax Commission*, 115

AD2d 831 [3d Dept 1985][governmental database]). However, the fallacy of petitioner's

argument is that the converse is not accurate. That is, the cases have not held that only

information gleaned from the foregoing sources is considered not of either a personal or

individual nature. To reiterate, the source of the data that is being disseminated is the price of

items on store shelves. There is no question that this source is widely accessible and may not,

therefore, be considered uniquely personal or individual in nature.

I. In view of the foregoing, the question of whether the information is not or may not be

substantially incorporated in reports furnished to others is academic and will not be addressed.

J. The petition of RetailData, LLC, is denied and the Notice of Determination, dated

November 4, 2011, is sustained together with such interest as may be lawfully due.

DATED: Albany, New York
          January 22, 2015

                                    /s/ Arthur S. Bray
                                    ADMINISTRATIVE LAW JUDGE