

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
WEGMANS FOOD MARKETS, INC. :
for Revision of a Determination or Refund of Sales and : **DETERMINATION**
Use Taxes under Articles 28 and 29 of the Tax Law for the : **DTA NO. 825347**
Period June 1, 2007 through February 28, 2010. :

Petitioner, Wegmans Food Markets Inc., 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, 2007 through February 28, 2010.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, in Albany, New York, on February 14, 2014 at 10:30 A.M., with all briefs due by July 21, 2014, which date began the six-month period for the issuance of this determination. Upon notice to the parties, this period was extended three months pursuant to 20 NYCRR 3000.15(e)(1). Petitioner appeared by Gulotta Law Group, P.C. (Anthony C. Gulotta, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Hall).

ISSUE

Whether petitioner's purchases of pricing information were personal or individual in nature making them eligible for an exclusion from tax on information services provided for in Tax Law § 1105(c)(1).

FINDINGS OF FACT

Petitioner submitted 65 proposed findings of fact, which have been incorporated substantially into the facts below, except proposed findings 29 and 33, which are conclusory in

nature; 54, which has been modified to more accurately reflect the record; and 56 through 64 which are irrelevant.

1. For the period in issue, Wegmans Food Markets, Inc. (Wegmans) was a grocery store chain operating in several states with 50 locations within New York State.

2. From June 1, 2007 through February 28, 2010 (audit period), Wegmans purchased competitive price audits (CPAs) from RetailData Services (RetailData), to reveal how its competitors priced specific items. Such reports accounted for in excess of 99 percent of petitioner's purchases from RetailData during the audit period.

3. The information provided by RetailData in its CPAs was an important step in Wegmans' determination of its own prices in accordance with its pricing strategies.

4. CPAs were either directed or undirected audits. A directed audit gathered prices for specific products as requested by Wegmans or any other RetailData customer. An undirected audit reported on all items in an entire store or in a discrete category selected by Wegmans.

5. Petitioner's pricing team, consisting of pricing managers and several pricing analysts, create specific pricing strategies within different departments and for different items, which are consistent with the company's goals and are used to price items throughout Wegmans' store locations. The pricing team was mindful of the differences between the typical shopping cart in its stores and its competitors, accounted for by location, target markets, store environments, types of inventory and pricing images.

6. Based on petitioner's pricing strategy, the pricing team created schedules of requested audits for entire calendar years, which were provided to RetailData to direct the scope of its CPA requests. Exemplifying this methodology, petitioner's schedule of requested audits for 2009

contained a combined key item list of 552 items representing items it believed were most important to its customer base.

7. The pricing strategy was created by petitioner consistent with its goals and values and refined within its stores and departments. The strategy was unique and confidential and was not shared with the public or its competitors.

8. Petitioner was aware that different grocery stores employ different pricing strategies, and even though confidential, general trends such as high-low pricing and everyday low pricing can be observed. Petitioner's trend was generally trying to maintain a consistent low price image focused around its key item list and groups of items based on the typical shopping lists of its customers, which it believed was substantially dissimilar from those of its competitors.

9. The combined key item list created by petitioner instructed RetailData to complete a directed CPA by specifically identifying items by UPC number, description, brand and size, and excluding all items not listed. Petitioner could customize the manner in which RetailData recorded the prices, having it use various indicators for short-term prices, long-term sales and bonus packs.

10. Up to 40 items on the key item list can change weekly based on customers' buying habits, the marketplace, seasonality, the cost of items, and any additional relevant considerations the pricing team deems important.

11. Undirected CPAs were requested according to the schedule of requested audits under the category headings, which include week numbers, price check start dates, price check complete dates, transmit by dates, department headings, groupings of items, competitor locations, specialty categories and lists, club store rotations by month, and locations and codes.

12. During the audit period, the week numbers on the schedule represented the frequency with which petitioner purchased CPAs from RetailData. For the year 2009, 52 weeks were listed on the schedule, representing each week of the calendar year.

13. On the schedule, the row entitled “RDS Price Checks Start On” represented the date RetailData was to begin the CPA, the row entitled “RDS Price Checks Complete By” represented the date RetailData was to finish the CPA, and the row entitled “RDS Transmit By” represented the date by which RetailData must have the CPA report delivered to petitioner in the proper format.

14. Generally, RetailData had six days to conduct the CPA and two days to transmit the pricing information to petitioner. Pricing information that was delivered to petitioner even a day or two late was considered stale, thereby losing its value to petitioner, and such an audit would be canceled.

15. Groups of items under the category headings indicated to RetailData the items for which it needed to gather pricing information. Because groups of items indicated undirected CPAs, RetailData collected pricing information about every item within petitioner’s specified groups.

16. Based on the pricing team’s pricing strategies, audits on different groups of items were requested in different frequencies, for different time periods and for different stores.

17. Under the heading “Where to Check,” RetailData conducted audits based on the store locations petitioner specified under the different weeks. If a competitor’s code was listed under the week, RetailData was required to conduct an audit of that store on that week.

18. Petitioner's request schedule also included special categories and lists, including cosmetics, bakery, nature's top items, health and beauty care, beer, wine and spirits and club category rotations.

19. The request schedule was created, formatted and customized entirely by petitioner's pricing team according to its pricing strategy. Each date, week number, item, item grouping, product category and store location was specifically chosen by petitioner to acquire information to enforce its pricing strategy.

20. Petitioner was able to add, delete or modify anything on its schedule of requested audits at any time before RetailData began a CPA.

21. Confidentiality was important to both petitioner and RetailData and it was specifically provided for in the contract between them. In a representative contract, dated May 24, 1995, the parties agreed as follows:

Confidentiality. RDS recognizes and acknowledges the competitive value and proprietary nature of any confidential information supplied to RDS by Wegman's. RDS will therefore handle all such information in a professional manner and agrees that any confidential information will be used solely to carry out its obligation hereunder and shall not be disclosed to any third party without Wegman's prior written consent. Following the termination of this Agreement, RDS will promptly return to Wegman's, upon request, all copies of such confidential information, in whatever form, including all copies maintained electronically or on magnetic disc or CD-Rom.

Wegman's recognizes and acknowledges the proprietary nature to RDS of the data it receives from RDS and Wegman's agrees not to sell, exchange, convey or release in any manner the content of received services to any other person (except in comparative advertisements in general circulation newspapers).

22. Petitioner's order schedules and key item lists were confidential to prevent competitors from discovering what products it was monitoring. If petitioner's order schedule or key item list was made public, it would have revealed specific information concerning petitioner's pricing strategies and resulted in a loss of competitive advantage in the market.

23. Although there was a remote possibility that information collected during CPAs could have overlapped, one customer's pricing information was never incorporated into another's CPA report, i.e., CPA reports were not provided to two distinct customers. It would have been highly unlikely for two of RetailData's customers to select the same parameters for an entire CPA because combinations of item selections, time requirements, collection methodology, indicators, and formatting requirements made the permutations infinite. Further, the same factors made it impracticable from a business standpoint for RetailData to reuse data collected in two separate CPAs created for different customers.

24. In reality, if petitioner and another of RetailData's customers requested the same item, for the same location, on the same date, according to the same specifications, RetailData would still gather the information in two separate work orders. The data would have been collected in two independent observations and recorded the information at two separate intervals.

25. RetailData offered a service called snag-a-price, which allowed petitioner to either purchase historical data maintained by RetailData or retrieve its own old data without charge if accessed from an area within snag-a-price called "my data only." Since the data within snag-a-price is not current, does not specify location of the price point and cannot be customized according to petitioner's needs, it is without appreciable value to petitioner. A company like Tops, which is a high-low marketer, may place more value on an historical database since current prices are not its primary concern, and use of the broader historical database maintained by RetailData in its snag-a-price service, may provide older information collected on CPAs conducted for other companies.

26. In 2008, petitioner spent 1.5 million dollars in purchases of services from RetailData, whereas it only spent \$3.61 on purchases of snag-a-price services. Brian Colling, the current

pricing manager at Wegmans, explained that it was unlikely that Wegmans would have requested a snag-a-price other than petitioner's own historical data because it would have an interest only in products it carries, which would be available in the "my data only" database free of charge. Therefore, he believed the snag-a-price expense of \$3.61 was most likely a bookkeeping error or a mistaken attempt to retrieve information.

27. Out of the total number of jobs RetailData conducts, snag-a-price represented one tenth of one percent of its business. The primary value in RetailData's business model was the CPAs it conducts for its customers, accounting for more than 99 percent of its business.

28. When RetailData received an audit request from a customer, it packaged it into a "work component." Each customer's CPA request was packaged into one or more work components, which were conducted separately and independently for each client.

29. RetailData collected pricing information for petitioner by employing data collectors who downloaded a version of petitioner's request schedule to a portable device and physically traveled to a location specified by petitioner to conduct a CPA. In each of RetailData's collection methods the price of an item, the pack, and the indicator was manually input by a data collector after physically observing the item.

30. RetailData gathered pricing information in two ways: in an open environment (with permission of store management) using Motorola scanners and manually inputting relevant pricing information; and in closed environments (without store management permission) using smart phones to discretely input pricing information.

31. RetailData only gathered information for petitioner after petitioner made a request for it and said request was not limited by information in a database. The only limitation placed on petitioner's request was the scope of observable information at a competitor's store.

32. Petitioner maintained pricing databases within its stores, which contain private and confidential pricing information, to which no one outside of Wegmans had access. Conversely, Wegmans did not have access to its competitor's pricing databases.

33. RetailData did not have access to petitioner's pricing database or any database maintained by any of petitioner's competitors. All of its pricing information was collected during CPAs.

34. Once RetailData collected the pricing information as requested by petitioner, RetailData ran the information through a verification process, which utilized its own proprietary software program, developed using a statistical model that used 15 weeks of historical pricing information. RetailData established acceptable pricing variances based on discussions with its individual customers.

35. Prices that fell outside of a customer's specified variance tolerance were reviewed manually by the RetailData client service manager. A verification determination was made based on factors such as RetailData's historical database, similar store or chain information or item cost fluctuations.

36. RetailData's statistical model also notified data collectors in the field if a price entered fell outside of the variance so that they could attempt to validate the pricing information while still on site.

37. Price points accepted as accurate were placed into petitioner's reports. Prices that were not accepted were generally deleted and never transmitted to petitioner.

38. Once RetailData validated the pricing information, it placed the information into reports according to petitioner's specifications, allowing petitioner to view the data in petitioner's competitive online pricing system for pricing analysts (COPSPA).

39. COPSPA was a proprietary computer software program created by petitioner to examine pricing information in a way that allowed its pricing team to analyze the data and store pricing according to its pricing strategy. Through COPSPA, pricing analysts were able to compare competitors' prices, sales and packaging to petitioner's own pricing and cost information.

40. The pricing reports prepared by RetailData and delivered to petitioner contained only information specifically requested in petitioner's schedule of requested audits. The reports did not contain information collected as part of CPAs performed for other clients of RetailData.

41. Once the report was delivered by RetailData into petitioner's COPSPA system, the information was analyzed by a pricing analyst. After comparing the information with its own, petitioner determined its prices in accordance with its pricing strategy.

42. The Division of Taxation (Division) conducted a field audit of petitioner's sales and use tax liability for the audit period and reviewed expense purchase records, capital purchase records and sales records. Based on the audit, the Division determined that additional sales and use tax was due and issued a Statement of Proposed Audit Change, dated August 4, 2011, which asserted additional tax due of \$2,005,693.22 plus interest. It is noted that the purchases of information services were not taxed in a prior audit.

43. The Division issued to petitioner a Notice of Determination, dated August 25, 2011, which asserted additional tax due of \$1,947,366.42 plus interest. The Notice of Determination noted credits and payments made equal to the full amount of tax and interest due, leaving a balance due of \$0.00. The payments were made subsequent to the issuance of the statement of proposed audit change and prior to the issuance of the Notice of Determination.

44. After a conference in the Bureau of Conciliation and Mediation Services (BCMS), an order was issued, dated November 2, 2012, which modified the additional tax due to \$1,700,771.74 plus interest. However, the amount of tax determined to be due on the purchases of information services, \$227,270.01, plus interest, was not part of the adjustment made by BCMS, and is the amount of tax in issue herein, constituting petitioner's refund claim.

SUMMARY OF THE PARTIES' POSITIONS

45. Petitioner argues that its purchases from RetailData are excluded from the tax imposed on information services by Tax Law § 1105(c)(1) since the information in the reports is personal and individual in nature and was not and may not have been incorporated in reports furnished to others.

46. Petitioner maintains that the facts demonstrate that the pricing information received by petitioner was personal and individual because the information provided by RetailData was dictated by the schedule of requested audits and the combined key item lists, which were created and customized by petitioner to suit its needs and the resulting pricing reports were, therefore, individual and personal in nature. Further, the reports were individual in nature because they were requested and formatted based on unique and proprietary pricing strategies.

47. Petitioner contends that the information included in the reports it purchased was not and may not have been included in reports furnished to others because RetailData conducted CPAs separately for all its clients, and information was not actually incorporated into reports for others. Further, due to the confidentiality of the requests and the quickness with which the pricing information becomes stale, the information RetailData compiled may not have been incorporated substantially into the reports furnished to others.

48. Petitioner argues that the information RetailData provided was not taken from a common database, rather, upon request, it was collected by physically travelling to specific store locations and manually recording the pricing information.

49. Petitioner points out that if there is any doubt as to whether petitioner is eligible for the exclusion from tax under Tax Law § 1105(c)(1), then the statute must be strictly construed in favor of the taxpayer.

50. The Division contends that petitioner does not qualify for the exclusion provided for in Tax Law § 1105(c)(1). The Division believes the purchase of information services by petitioner from RetailData was taxable because it was neither personal nor individual in nature and the information was and may have been substantially incorporated into reports furnished to others.

51. The Division urges that it is the source of the information that determines whether the information is personal or individual in nature and here the source was prices of products taken from store shelves, which the Division maintains was not personal or individual in nature. The Division notes that the second half of the requirement for the exclusion mandates that the information is not or may not be substantially incorporated into reports furnished to others. The Division argues that since a substantial portion of the information could have been furnished to others, the sale of such information was taxable.

52. The Division contends that the substantial incorporation requirement is a test of potentiality, where the critical examination focuses on whether the vendor of the information may sell the same information from the same source to more than one customer. The Division deduces that since a substantial portion of shelf pricing may be provided to more than one customer, the sale is subject to tax.

CONCLUSIONS OF LAW

A. Tax Law § 1105(c)(1) provides that the receipts from every sale, except for resale, of the following services are subject to sales tax:

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, and excluding the services of advertising or other agents

The Division's regulation at 20 NYCRR 527.3, provides as follows:

(a) *Imposition.* (1) Section 1105(c)(1) of the Tax Law imposes a tax on the receipts from the service of furnishing information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any manner such as by tapes, discs, electronic readouts or displays.

(2) The collecting, compiling or analyzing information of any kind or nature and the furnishing reports thereof to other persons is an information service.

(3) Among the services which are information services are credit reports, tax or stock market advisory and analysis reports and product and marketing surveys.

* * *

(b) *Exclusions.* (1) Sales tax does not apply to receipts from sales of information services which are for resale as such.

(2) The sales tax does not apply to the receipts from the sale of information which is personal or individual in nature and which is not or may not be substantially incorporated into reports furnished to other persons by the person who has collected, compiled or analyzed such information.

B. It is uncontested that the written reports sold by RetailData to petitioner constituted the sale of information services. The issue before this forum is whether the pricing reports fell within the exclusion from the tax in Tax Law § 1105(c)(1) for furnishing information that was personal or individual in nature and which was not or may not have been substantially

incorporated in reports furnished to others. For the reasons stated below, it is determined that said reports do not qualify for the exclusion, which exclusion generally must be strictly construed in the taxpayer's favor (*Matter of Towne-Oller & Assoc. v. State Tax Commn.*, 120 AD2d 873 [1986], citing *Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193 [1975]).

C. The cases interpreting the two elements necessary to qualify for the exclusion, i.e., that the services were personal and individual in nature and not substantially incorporated into reports furnished to others, have consistently scrutinized the provision of information generated from common databases. In *Matter of Twin Coast Newspapers v. State Tax Commn.* (101 AD2d 977 [1984], *appeal dismissed* 64 NY2d 874 [1985]), the court found information, which was a mere distillation of widely available import and export bulletins, not to be of the uniquely personal nature contemplated by the exemption (like the confidential investigation reports on life insurance applicants in *Matter of New York Life Ins. Co. v. State Tax Commn.* [80 AD2d 675 (1981), *affd* 55 NY2d 758 (1981)]).

In *Matter of Towne-Oller*, the court stated that even though reports generated from a common database were somewhat customized for individual customers, the service provided was not of a personal and individual character. There, the information in market reports was gleaned from one general source and the reports contained general information (*see also Matter of Rich Products Corp. v. Chu*, 132 AD2d 175 [1987] [where the court held that, although no two reports were likely to be the same and that the reports were customized in some respects to each client, those factors are not dispositive of entitlement to the exclusion where the information contained in the reports was derived from a single data repository that was not confidential and was widely accessible]).

The foregoing cases speak directly to the facts in the instant matter, where the data in the reports was culled from one general source, competitors' stores, and the reports contained general information, i.e., current prices, that was widely accessible and not confidential. Although there was some customizing of the information, driven by petitioner's specific instructions for each pricing audit, it did not transform the general information to something personal or individual in nature. The restrictions placed on pricing requests such as to perform a directed or undirected audit, specific key item lists, location, long and short term sale pricing and bonus packaging pricing were merely filters used by petitioner to receive the same general information, which then could be transformed by its pricing team into usable pricing strategies.

The courts have been careful to distinguish between general information and that which was highly individualized. In *Matter of Westwood Pharmaceuticals v. Chu* (164 AD2d 462 [1990], *lv denied* 77 NY2d 807 [1991]), the court found that the reports in issue did not provide the same general information to several subscribers. Most importantly, the court found that there was no common database used for different customers, and the database or "sample frame" developed for each customer was held in strict confidence. The description of the production of the service made it clear that the information generated for Westwood was not the mere culling of general information or extraction of information verbatim from a common database that was then included in a report to it. On the contrary, it was highly individualized information, held in confidence and not incorporated into the reports furnished to other clients (*cf. Matter of ADP Automotive Claims Svc. v. Tax Appeals Tribunal*, 188 AD2d 245 [1993] [where information culled from common database and somewhat customized to respond to the raw data supplied by the client was not eligible for the exclusion]).

RetailData's software, used to verify the accuracy of the pricing information it includes in its reports and its formatting of the report data in a manner readable by petitioner (COPSPA) may somewhat customize the report, but it did nothing to make the pricing information contained in the report any less general, less accessible or more confidential. The value to petitioner was received in the form of fresh prices that its pricing team could use to help formulate a pricing strategy. That transformation was performed entirely by petitioner. The focus in this matter should not be lost. It is that the information transmitted in the reports was general in nature, not confidential and extracted from a common source, and thus not personal or individual in nature.

Although petitioner has gone to great lengths to demonstrate that the information it received in the pricing reports it purchased from RetailData was personal and individual in nature, it began and ended as the prices of products taken from store shelves. As such, it was not confidential or personal and individual in nature and was widely accessible, thus failing to qualify for the exclusion provided for in Tax Law § 1105(c)(1).

This is not to discount the importance the information plays in petitioner's pricing strategies, which, no doubt, are complex and highly confidential. Petitioner and RetailData took steps to protect the requests for the pricing reports and the reports themselves from competitors, which might have been able to discern a strategy based on what products were the subject of analysis. However, neither the marketing strategies nor the steps taken to protect them change the nature of the information in the reports, and the information itself remains widely accessible and not confidential.

D. Although the likelihood that a pricing report produced for petitioner could be identical to one produced for another client of RetailData is de minimis or even mathematically impossible as in *Rich Products*, this is not sufficient to demonstrate eligibility for the exclusion. The fact

that the reports were generated from a widely accessible common source that was not confidential has been consistently held by the Appellate Division not to be personal or individual in nature. (*ADP Automotive Claims Servs.*)

It is noted that the word “database” has been used by the courts interchangeably with “repository,” “common source,” “data repository” and possibly other terms that reference a specific pool of information from which information is extracted to create reports that are then sold. The term “database” does not appear in Tax Law § 1105(c)(1) and it is not deemed a term of art for purposes of the statute or the exclusion.

E. Finally, petitioner contends that the Division’s failure to find the purchase of the pricing reports taxable on an earlier audit is evidence of the Division’s confusion on the issue - stopping short of requesting that the Division be estopped from changing its policy. Regardless of which relief petitioner seeks, it is settled that taxing authorities may take into account a variety of factors in determining the application of the Tax Law to specific transactions and may alter interpretations of the Tax Law prospectively (*Matter of National Elevator Indus. v. New York State Tax Commn.*, 49 NY2d 538 [1980]; *Matter of AGL Welding Supply Co., Inc.*, Tax Appeals Tribunal, May 11, 1995).

F. The petition of Wegmans Food Markets Inc. is denied.

DATED: Albany, New York
February 19, 2015

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE