STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARKETSHARE PARTNERS, LLC	:	DETERMINATION DTA NO. 828562
for Revision of a Determination or for Refund of a Sales and Use Tax under Articles 28 and 29 of the Tax Law for the period March 1, 2010 through November 30, 2015.	:	

Petitioner, MarketShare Partners, 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 March 1, 2010 through November 30, 2015.

A hearing was held on November 20, 2019 in New York, New York, at 9:15 a.m., with all briefs to be submitted by May 29, 2020, which date began the six-month period for issuance of this determination. Petitioner appeared by Reed Smith LLP (R. Gregory Roberts, Esq. and Jeremy P. Gove, Esq.). The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie Scalzo, Esq., of counsel). After due consideration of the documents and arguments submitted, James P. Connolly, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation erred in determining that petitioner's sales were subject to sales and use tax as either the sale of an information service or as the sale of prewritten computer software.

FINDINGS OF FACT

1. Petitioner, MarketShare Partners, LLC, founded in 2005, is a marketing analytics firm headquartered in Los Angeles, California, with offices in New York City. During the period March 1, 2010 through November 30, 2015 (the audit period), petitioner was not registered with New York State as a person required to collect sales tax and thus did not collect New York State sales and use tax or file sales and use tax returns.

2. In 2015, petitioner was purchased by Neustar, Inc. (Neustar), a publicly-traded company. A press release issued by Neustar, dated November 5, 2015, upon its agreement to purchase petitioner, described petitioner as follows:

> "Combining advanced analytics technology, scientific leadership and deep domain expertise, MarketShare enables large companies to measure, predict and dramatically improve Marketing's impact on revenue. Widely considered the market leader, MarketShare's clients use its analytics and tools to direct tens of billions of marketing investment dollars globally."

The press release further described petitioner as "a fast-growing marketing analytics technology provider," and explained that "[u]tilizing sales, marketing, macroeconomic, and its customers' proprietary data, MarketShare quantifies the sales impact for leading brands."

3. On its New York State partnership return (form IT-204) for 2011, petitioner listed its principal business activity as "[c]onsulting."

4. During the audit period petitioner had four lines of business: sales to brand owners (advertisers), sales to media companies, sales to advertising agencies, and the sales of white paper research services.

5. By a letter dated March 10, 2016, the Division of Taxation (Division) commenced a sales tax field audit of petitioner. The audit was done in detail and there is no dispute about audit methodology in this case. Determining that all four lines of business were subject to sales tax,

the Division issued to petitioner a statement of proposed audit change, dated November 11, 2016, which proposed to assess $427,114.27 in sales tax due, plus interest, for the audit period. In response, petitioner sent the Division's auditor an undated memorandum (audit memorandum) objecting to the proposed assessment, along with the statement of work (SOW) portion of two contracts for its advertiser service and two contracts for its media company service during the audit period. The memorandum stated in pertinent part:

> "As supported by the attached SOWs, MarketShare's customers have indicated that the primary goal and objective of the projects is the extensive experience and expertise brought by MarketShare's personnel in developing and updating customized analytic models and scenarios to enable them to optimize advertising and revenue factors, not the access to MarketShare's platform or application containing such models and scenarios."

By letter dated June 29, 2017, the Division's auditor countered that the company's "primary service" included two taxable elements, information services and prewritten software, but that the service "may also include nontaxable elements, such as consultant services; software customization and configuration, training and software support services." After further discussions did not lead to an agreement, the Division issued to petitioner notice of determination number L-047339013, dated October 10, 2017, asserting the aforesaid amount of tax, plus interest.[1]

6. At the hearing, the Division presented the testimony of the auditor, Phillippe Plummer. Mr. Plummer testified that, in his view, petitioner was a software as a service (SaaS) provider, which was providing a taxable information service through its software. Mr. Plummer testified that he opted to not impose penalty on petitioner, on the ground that it was in the "big data" industry, which was a "young industry," dealing with a "complicated" sales tax issue.

[1] Almost all the sales tax found due on audit resulted from petitioner's sales, except for a small portion (around $1,000.00), which derived from its capital asset purchases, the correctness of which petitioner conceded at the hearing.

7. In its hearing brief, the Division clarified that it considered all of petitioner's products to be taxable information services, except its advertising agency product, which it claims is the taxable sale of prewritten computer software.

8. At the hearing, petitioner presented a single witness, Joe Koudsi, its current general manager. With one exception, petitioner also presented each of the contracts found taxable on audit. Because the parties disagree over how to characterize petitioner's services under its advertiser, media company, and white paper contracts, Mr. Koudsi's testimony and petitioner's contracts are analyzed in detail below.

9. Mr. Koudsi joined the company in 2011 and was a data management engineer and then a product manager for petitioner's internal software tools during the remainder of the audit period. According to Mr. Koudsi, petitioner had about 260 employees during the audit period, most of whom had advanced degrees, including many with Ph.Ds. Among the types of professionals petitioner employed were data management engineers, statisticians, data strategists, marketing consultants, and simulation optimization scientists. Mr. Koudsi described petitioner's four lines of business in detail.

Advertiser Service

10. Mr. Koudsi depicted petitioner's advertiser service as a "strategic marketing analytics consulting service, effectively helping advertisers define their marketing strategy," which it provided to some of the most prominent advertisers in the world. According to Mr. Koudsi, the service "seeks to answer a client's most difficult marketing questions," including "how can I improve the effectiveness of my marketing, how should I be thinking about my marketing strategy, how should I be allocating my marketing budgets across different channels, product lines, and geographic" regions. Petitioner's advertising clients tend to be long-standing, and, in

many cases, petitioner's employees work on the same account for many years. In staffing an engagement, petitioner tries to find those of its employees with relevant industry experience. Mr. Koudsi asserted that petitioner's advertiser customers hire petitioner "to provide strategic guidance and recommendations purely based on the expertise of the individuals that we employed." Consistent with that view of the importance of its employees' expertise, petitioner sometimes loses customers due to turnover in its workforce because the customers like to work with the same team for the length of the contract.

11. Petitioner's advertiser service typically has four stages: goal alignment, data collection and processing, development of models, and providing insights to the client. Mr. Koudsi testified about each of these stages at length.

12. The goal alignment stage requires petitioner to meet with the client's key stakeholders to reach a consensus on the set of marketing questions to be answered. Petitioner also ascertains what internal data the client has available. This stage generally lasts two to four weeks. Petitioner uses data strategists, data management engineers, marketing consultants and statisticians during this stage.

13. The data collection stage requires petitioner to collect, process, and validate the data to be used in its models. Mr. Koudsi testified that some of the data comes from the client, and some derives from third parties. Most of the third-party data is customer-specific, such as Google query data (how often is the brand name being mentioned in Google searches) and data from a company named Crimson Hexagon measuring "social sentiment" about the brand on social media (how frequently the brand is mentioned on social media and the nature of the sentiment expressed). When asked on direct examination at the hearing whether the company ever obtained "kind of 'publicly available data'," Mr. Koudsi responded that "it's actually a very,

very small percentage of the total number of sources of data we collect. The bulk of data we collect comes directly from our customers." Mr. Koudsi did not elaborate on how he or petitioner measured the relative amounts of data collected from the customer versus the data from third parties. This "publicly available" data is needed to measure factors that might affect demand for the customer's product in order to isolate the effect of the customer's marketing decisions. For example, in the case of a car manufacturer client, petitioner might get data concerning the relationship between the price of gasoline and the sales of SUVs, in order to avoid misattributing a drop in demand for SUVs to a client's marketing decisions, when it was really attributable to a rise in the price of gasoline. One category of data that petitioner supplies is "macroeconomic" data. Mr. Koudsi testified that there are "thousands" of macroeconomic factors that might be relevant, depending on the customer's query. Petitioner acquires the macroeconomic data used in its models from "Moody's." On cross-examination, Mr. Koudsi testified that he did not know if other persons could acquire macroeconomic data from Moody's, but agreed that Moody's did not collect the data specifically for petitioner.

14. Petitioner's audit memorandum (***see*** finding of fact 5) describes the data collection stage as follows:

> "MarketShare collects, processes and validates data from a variety of sources to be used later in developing its models and scenarios . . . . Such data may be collected from the customer, from MarketShare business partners or from other third party sources. MarketShare has built a portfolio of partnerships with media firms, technology companies and other data providers to supplement and amplify client data and analytics capabilities. This allows MarketShare to offer proprietary industry specific data gained across literally billions of market observations and measurements."

15. Petitioner makes a separate database of the information it collects from each client and does not mix the information it receives from one client with that of another. To prepare the raw data it collects for the modeling stage, petitioner must process it by applying aggregations,

transformations (e.g., adjusting the data to account for the usual time lag between the appearance of an advertisement and its effect on the demand for the brand being advertised), and extrapolating data where data is missing. Petitioner validates the data by sharing the transformed data with the client to confirm that there are no anomalies in the data. This stage generally lasts 8 to 12 weeks and is overseen by petitioner's data strategists, data management engineers, and statisticians.

16. During the modeling phase, petitioner's statisticians and data engineers will analyze the data to try to spot trends, correlations, and variables that might be multicollinear. Petitioner's modelers and statisticians build the models by loading the data collected onto petitioner's internal proprietary software platform. Petitioner's data management engineers work with modelers to review and spot issues with the data, and work with the consultants to refine the models and receive feedback. Petitioner uses nonlinear regression models, which essentially are equations, with one side of the equation being the output variable, such as unit sales or revenue, and the other side being the variables bearing on that outcome variable, e.g., the marketing inputs the customer has used, such as page search clicks. Some variables will have coefficients, which are numerical reflections of the relationships between variables. An example of a coefficient is the relationship between an expenditure on advertising on a media company's platform and the sales of the product being advertised. Petitioner retains ownership of the coefficients it develops for its advertiser customers. The models are not standard -- a unique one must be built for each client because each client's marketing questions are different and its data is different. Even if the clients are competitors in the same industry, the models would still be different. The data underlying the models are periodically refreshed, which results in the model's predictions being

refreshed, and the coefficients sometimes being changed. Typically, the models are rebuilt every year based on changes to the client's marketing strategies.

17. Mr. Koudsi described the fourth stage as the presentation of insights that petitioner has obtained through its modeling process. Petitioner's clients do not receive the models developed by petitioner and, in any event, the models would not be understandable to the client. Instead, petitioner's findings are shared with clients in two ways, according to Mr. Koudsi. First, petitioner presents its findings through meetings with the client's stakeholders, including sometimes company executives, in which petitioner makes specific recommendations, based on the conclusions it draws from the model it created for the customer. According to Mr. Koudsi, the presentations culminate with a very specific, "start, stop, continue" slide, i.e., a slide that shows "here are the things you should start doing, here are the things you should stop doing, here are the things you should continue." The "insights" meeting for any two customers will not be the same because the customers are asking different questions and the models' results will be different.

The second way petitioner gives its insights to its customers is through providing the customer with access to software. The software allows the customer to view reports created by petitioner and to run "what if" scenarios, in which the client can change inputs, such as the amount spent on marketing, to see what effect the change would have on revenue. The core functionality of the software is simulation optimization, which reflects each client's model, and thus this portion of the software must be custom written for each customer. This core functionality is then given to an engineer who attaches a user interface. Clients do not receive any right or interest in the software code, nor is the software downloaded to the client's server. Instead, the software is hosted on a server in Virginia for users in the Northeast and clients

access the software through their browsers. Mr. Koudsi testified that the ability to run these "what if" scenarios is quite popular with clients, but "for the most part" clients do not do so. He explained that it takes "hours and hours" just to input one scenario, and that only rarely would a customer have the expertise necessary to interpret the results. Instead, petitioner's clients "work with our consultants to [run scenarios]." In the case of one of petitioner's advertiser customers, Estee Lauder Inc. (EL), he doubted that anyone at the company ever even logged into petitioner's software product. He did not explain the basis of his knowledge of EL's use of the software.

18. Petitioner's audit memorandum describe the software aspect of petitioner's service as follows:

> "MarketShare uses the platform to perform its analytic and technical services to [*sic*] the customer, but also allows access to the custom models in scenarios contained on the platform to certain users designated by the customer. For many customers, the models and scenarios developed by MarketShare result in a customized web-based software application, tailored specifically to each customer's respective business needs and requirements (under the umbrella of MarketShare's DecisionCloud software). The customer user can access such application via the Internet on an ongoing basis to continually optimize its sales capabilities and business drivers, by either requesting further assistance from MarketShare's expert personnel or themselves testing the models, running simulations or generating reports on their own. MarketShare continues to develop innovative features and functional enhancements to allow for optimized decision-making and ease of use by customers."

19. At the hearing, petitioner introduced three examples of its contracts with advertisers. All the agreements contemplated that petitioner would collect data, build models, make presentations, and provide the advertiser with remote access to software. Under two of the contracts, petitioner is referred to as a "software-as-a-service (SaaS)" provider. The agreements do not detail the source of the data used in the models, other than to say that some of the data would be purchased by petitioner (sometimes referred to as "syndicated data"), and some would

come from the customer. Except as detailed below, petitioner is paid a flat monthly charge for its advertiser service. While the agreements have many commonalities, they nevertheless are substantially customized, as detailed below. As Mr. Koudsi testified, the bulk of each agreement consisted of standard "boilerplate" provisions, while the section actually describing petitioner's duties under the contract was usually a SOW section.

20. Petitioner's "Master Services and Software License Agreement" with EL was in effect for the period April 29, 2013 to April 28, 2014. The "Goals and Objectives" section of the contract's Approved Proposal 1 attachment provides:

> "EL seeks to evolve its advertising and promotion ("A&P") measurement practices to the next level and is engaging Consultant in developing processes, models and tools to enable EL to optimize A&P spend and allocation, and shall include the utilization of EL Transactional Data (defined below) to run A&P resource optimization simulations in Consultant's proprietary software (the "Project"). The Project will measure and improve the effectiveness of EL's A&P by:
>
> - Assessing the success of its A&P and public relations ("PR") activities to-date;
>
> - Evaluating the relative impacts of its various A&P and PR tactical options;
>
> - Further aligning its A&P and PR analytics findings with its strategic A&P and PR decision making; and
>
> - Enhance [*sic*] future A&P and PR planning.
>
> Consultant will leverage its experience in retail and beauty products to quantify the drivers of demand and address each of these needs.
>
> Consultant will accurately measure the pathways of demand generation and the interaction among the drivers of sales; all while controlling for seasonal, macroeconomic, and competitor factors. Consultant will then deliver resource optimization recommendations, the tools that will allow continuous goal-driven optimization and the foundation for management adoption of the insights, tools and techniques."

21. Under the contract petitioner is required to perform, among others, the following tasks:

> (i) "work with key EL stakeholders to understand the current A&P analytics tools, process and integration frameworks," identify the best approach to improve internal analysis capabilities, and develop a prioritized list of key questions to answer;
>
> (ii) "work with EL managers to gather required data for subsequent econometric models;"
>
> (iii) create models, "work iteratively with EL managers to validate, analyze, and interpret model insights," and "provide management presentations to socialize findings, implications, and recommendations:"
>
> (iv) provide guidance on creating goals-based scenarios and optimizations "to identify the best path to achieving business goals and objectives;"
>
> (v) develop stakeholder presentations at each stage of deliverables;
>
> (vi) provide a report that will include "Optimal A&P allocation by tactical element," "Optimal media spend levels," "Marketing vehicle effectiveness including direct and indirect effects," and "Insights and recommendations."
>
> (vii) "[c]onfigure and deploy Optimizer simulation tool" and "provide training for EL analyst users on how to run simulations and optimizations."

22. The contract contemplated two phases. In the first phase, petitioner was to provide immediate guidance for EL's 2013 marketing activities by, among other things, "[d]evelop[ing] initial simulations using [petitioner's] benchmark database assumptions and assist[ing] EL managers in tuning 2013 A&P plans," and determining which marketing questions would require some form of "in-market experiment to answer." One of the "deliverables" for this phase is "[i]nitial [h]igh [l]evel [s]imulations," which are to use petitioner's "database of normative observations." In the second phase, petitioner would build model databases, and initial models, and provide "Web access to [its] Optimizer^{tm} platform permitting EL staff to run multiple complex 'what if' and optimization scenarios on demand as needed." Under the contract's

timeline section, petitioner is to provide "additional simulation support for future planning." One of the "Assumptions and Dependencies" listed in Approved Proposal 1 is that petitioner would provide "on-going user support" limited to 20 call-hours per month for the first 90 days and 10 call-hours per month thereafter. Under the contract, petitioner is required to use "commercially reasonable efforts to maintain a 99.99% uptime guarantee" for its software platform. The last presentation of petitioner's conclusions was scheduled for August 2013 and the second phase was expected to be completed by October 2013. The contract provided for "two data refreshes," but stated that "model rebuilds" would be outside its scope.

23. The contract provides that petitioner will be reimbursed at cost for any third-party data acquisition incurred based on written proposals approved by EL, "which may include but is not limited to competitive media and marketing activities, social media, and category trends." The contract elsewhere notes that the data stacks used to make the models "may contain third-party research data such as macroeconomic data, Google query volume data, competitive spend, weather, social media, associate/customer NPS/Satisfaction scores, etc." Under the contract, petitioner gives EL a "[c]onsolidated view of data received" to allow the company to validate the data, but does not give EL a right to access the data stacks themselves.

24. Petitioner's agreement with Squarespace, Inc. (Squarespace), entitled "Squarespace-MarketShare Statement of Work," is a four-year agreement, starting June 30, 2015, with an opt-out for the client after a 12 month "evaluation period." Under the contract, petitioner was paid the same flat amount each month. The contract described the customer's "goals and objectives" as follows:

> "Squarespace wants to take its marketing measurement and attribution to the next level by engaging MarketShare to develop models that will enable the optimization of marketing spend. MarketShare will leverage its strategic

> approach and extensive experience to quantify the drivers of Squarespace demand.
>
> By achieving a complete view of Squarespace's business ecosystem, MarketShare will accurately measure the pathways of demand generation and the interaction among the drivers of sales; all while controlling for seasonal economic and competitive factors. MarketShare will then deliver marketing optimization recommendations, the tools that will allow continuous goal-driven optimization, and the foundation for company-wide adoption measurement."

25. Under the contract's SOW, petitioner must:

> (i) align itself with the customer's goals by interviewing stakeholders ("the first step in this engagement will be uncovering all the business questions needed to be answered") and assess the available data, including any "gaps;"
>
> (ii) build a comprehensive database and make a data validation presentation;
>
> (iii) build the models and make a "preliminary insights presentation;"
>
> (iv) refine the models and make a final findings presentation, and make "optimization recommendations" (the contract specifies that the "MarketShare team" will make up to five simulations/optimizations for "management review . . . and discussion);"
>
> (v) configure, deploy, and provide training on "MarketShare DecisionCloud Strategy app;"
>
> (vi) provide quarterly data refreshes and model updates every six months "to re-fit model coefficients to changing market dynamics;" and
>
> (vii) provide ongoing user support for the software consisting of unlimited support calls for the first 90 days and 10 per month thereafter and one day of on-site training quarterly and "web training" as required.

26. The contract describes the DecisionCloud software as "web-based software which allows simulation of all modeled variables in any combination." The contract's "Vendor Master: Terms and Conditions" exhibit provides that petitioner grants Squarespace "a nonexclusive, royalty-free, worldwide right and license, with the right to sublicense, during the relevant SOW term . . . to access, use, display and perform the SaaS Services." Also attached to the contract is

a "SaaS Services Addendum," which requires petitioner to keep its software available at a level of 99.99% for each calendar month during the term of the agreement.

27. The SOW provides that "Squarespace or one of its third party partners . . . will provide all required data except those items which MarketShare agrees to provide." The contract states that any information that petitioner provides will be billed to the customer at cost, but does not elaborate on what data petitioner is agreeing to provide. The SOW further provides that the alignment, data collection, modeling, and software deployment work will be done within 16 to 32 weeks of the contract's effective date, after which petitioner will supply data refreshes as discussed above, "[q]uarterly business reviews & further insights," and "[t]echnology support," for the remainder of the contract.

28. Petitioner's "Software License and Services Agreement" with Moet Hennessy USA (MH) commenced January 1, 2015. Under the contract, petitioner is paid a set fee for a four-month "Proof of Concept" (POC) period and then a lower fixed monthly amount for the following 36 months. The MH contract differs from the EL and Squarespace contracts in a number of ways, including that it does not have a goals and objectives section, does not make clear at what point in the engagement petitioner is to provide access to its software platform, and in general is less detailed. The "Description of Services" section of the contract's SOW required petitioner to provide:

> (i) "Stakeholder alignment," which involves having "discussions with key stakeholders about business objectives, priorities and expectations as well as data collection and validation;
>
> (ii) custom models and optimizations based on those models;
>
> (iii) "executive level business reviews to share business insights and recommendations" and to "discuss recent performance, changing business needs, further optimizations and execution towards achieving target ROIs" at the end of the POC period and twice yearly thereafter;

> (iv) "Decision support software" for up to 20 internal and partner/agency users, "for 24X7 decision-making and reporting capabilities," along with training for users;
>
> (v) "data refreshes" every six months after the POC period "to enable reviews of performance to date (e.g., planned vs. actual reporting)";
>
> (vi) ongoing software enhancements – "as a Software as a Service (SaaS) provider, we are continually releasing functionality enhancements throughout the year"; and
>
> (vii) ongoing support and guidance "to enable customer success."

The contract's timeline section requires petitioner's "team" to work with the customer "to assemble and validate data while establishing repeatable processes for ongoing data updates," "share preliminary results," and to build "'what if' scenarios (predictive outcomes)."

29. A "Service Level Agreement" (SLA) attached to the contract includes a list of "[k]ey assumptions underlying the scope of work, fees, and timelines described herein," which includes the following:

> "MarketShare's proposal assumes that Customer or one of its third party partners will provide data for sales, media spending, competitive media spending and pricing, events (sales, external), direct marketing, industry trends, customer satisfaction or engagement. MarketShare is providing data for Google query volume, macroeconomic factors, and weather." Customer will provide all other data required or reimburse MarketShare for any additional data (at cost) that MarketShare is required to procure based upon written estimates approved in advance."

Mr. Koudsi testified that he was not sure that the third-party information that petitioner routinely obtained that related to a specific client and that it used in its models would also be available to any member of the general public. He agreed that, depending on the customer, petitioner would obtain Google query volume for a customer's competitor and incorporate that into its models because it was relevant to "account for demand."

30. The MH contract grants a non-exclusive license to access and use petitioner's "Decision support software," not further described, for up to 20 authorized employee users. The SLA requires petitioner to, among other things, ensure that the software will be operational and available to MH "24 hours per day, 7 days a week at least 95% of the time in any calendar quarter, except for Excusable Downtime," while providing, when reasonably possible, at least 24 hours' advance notice to MH prior to any scheduled maintenance.

31. Under the MH contract, petitioner retains the right to use and disclose aggregate data and information (including analyses thereof) from MH's use of the licensed software, provided it is non-identifiable information. Mr. Koudsi testified that petitioner "leverage[s]" its advertisers' data to "power the software" it sells to its advertising agency customers, as the "aggregate coefficients" are used to "inform[] the algorithms" found in the software in order to simulate a market response.

32. Petitioner's invoices to EL describe its service as "Advertising and promotion measurement practices project." Petitioner's invoices to MH describe petitioner's service in pertinent part as "MarketShare software licensing." Petitioner's invoice to Squarespace describes its product as "MarketShare DecisionCloud: STRATEGY application."

Media Company Service

33. Mr. Koudsi testified that the service petitioner sold to its media company customers was very similar to that which it sold to its advertiser customers. In his view, petitioner's media company clients want more than a model; they want "guidance and best practices, etc.," just as was the case for petitioner's advertiser customers. The only difference is that, instead of helping the media companies advertise their own brands, petitioner helps the media companies "demonstrate the value of their platforms to prospective advertisers." Petitioner accomplishes

this by showing the level of sales that a given expenditure on the media customer's platform will produce and determining how a given marketing budget should be distributed across the media company's various properties to maximize sales for companies in that industry. According to Mr. Koudsi, the media companies hire petitioner because of its reputation for providing marketing advice to many brands – "they rely on us as a trusted third party, foremost experts in [the] space, to provide insight to advertisers on behalf of the media companies, as to how well those media companies perform, and how the different properties that media company owned . . . performed for the specific advertisers."

34. Petitioner's product for media companies has the same phases and is supported by the same personnel as its product for advertisers. After the alignment stage, petitioner collects data, which it processes and validates, and then develops models, customized to the client, based on the data. Using the models, petitioner develops insights and recommendations, which it shares with the media company customer through presentations with management and the provision of software. The customers have no access to the code underlying the software developed by petitioner; instead the code is maintained on a server in Northern Virginia (for customers in the Northeast), which the media company customer accesses through its browser and login credentials.

35. The data petitioner accumulates for a media company client is loaded into a database, which is used to make a model for the company. Each database is unique to that client and not reused for other clients. Mr. Koudsi testified that the "bulk of the data" used in the models for the media companies is collected directly from the media company, but that petitioner also uses data from third-party sources. He did not provide any details as to how he was able to quantify the amount of each type of data in order to compare them.

36. Petitioner's "Master Services Agreement" with Discovery Communications LLC (Discovery), is dated June 19, 2015, and has a six-month initial term, with Discovery having the option to extend it for a year. The "Description of Services" section of the contract's SOW requires customer alignment, data assessment and collection, the provision of a "Cloud-Based Software Platform," and "Professional Services," the last of which is further described to include "applying business context to the modeling process, distilling key insights, support[ing] sales process as well as enabling adoption of insights and analytics-driven decision-making within Discovery."

37. Immediately following the Description of Services section on the first page of the SOW is a section entitled "Software Application." Pursuant to this section, petitioner's software platform is to "host the analytics, process the data, and integrate with Discovery's end-user software." The contract describes petitioner's DecisionCloud software as "an enterprise-grade software solution that provides marketing and ad sales decision support analytics with 24X7 access[, which] will be setup with the custom models we build for Discovery." The contract then describes five types of simulation and optimization scenarios that the software will allow the customer to run. Attached to the agreement is a three-page "Service Level Agreement," which specifies that the software must be "operational and available to Customer 24 hours per day, 7 days per week at least 99% of the time in any calendar quarter, except for Excusable Downtime." Under the contract, petitioner charges a flat monthly charge, a one-time set up fee, and a separate fee for the necessary third-party information, billed at cost, which was expected to be $30,000.00 per sub-category (e.g., mid-size conventional auto).

38. The "Solution Scope" section of the SOW notes that an "additional parameter" is "Scenario Deep Dives," described as "[u]p to 5 budget allocation scenarios . . . analyzed and

presented by MarketShare (Client is able to run unlimited scenarios in the software with MarketShare support post deployment)." Petitioner is also to make a presentation at the data-collection stage "showing the trends of the data to be modeled," and up to four "on-site or webcast presentations of the preliminary and final model recommendations." The SOW's timeline section states that the alignment, modeling and software deployment stages were expected to take six weeks. According to the timeline, after deployment of the software, the customer would receive "[o]ngoing software support," during which phase petitioner's "key activity" would be "[d]evelop[ing] sales narrative."

39. The contract details that the models were to cover two marketing subcategories (mid-size conventional auto and large pickup). The models are to include "marketing spend, macroeconomic indicators, competitor marketing information, social media volume and polarity" information, while the contract notes that "[a]dditional exogenous variables are likely to be evaluated." Mr. Koudsi testified that petitioner would buy the "competitor marketing information" from a third-party.

Petitioner is obligated to refresh the data underlying the models annually.

40. Petitioner introduced six of its invoices to Discovery, all six of which referred to petitioner's "DecisionCloud: Benchmark" software, while the first, dated June 30, 2014, also referred to a "one time setup fee."

41. Petitioner's "Master Services Agreement" with Bloomberg L.P., was a three-year agreement commencing on March 30, 2015. The "Description of Service" section of that contract's SOW states that petitioner must provide:

> (i) "Data Services," including "confirming all data sources for both Bloomberg-provided and MarketShare provided data,"
>
> (ii) "Custom-built models,"

> (iii) "[a] "Cloud-based Software platform," which requirement describes petitioner as a "Software as a Service" provider;
>
> (iv) an "Output Report/Dashboard to be designed in collaboration with Bloomberg," and
>
> (v) "Professional Services, includ[ing] . . . applying business context to the modeling process, distilling key insights, attending key prospect sales meetings, as well as enabling adoption of insights and analytics-driven decision making within the Bloomberg Media Group's organization." The contract specifies that petitioner's staff will accompany petitioner on five "sales meetings" and "provide weekly office hours during the life of the contract to answer questions about the tool or analysis from the Bloomberg research and sales team."

42. The contract's "Application" section lists capabilities that the software must have, which is similar to the list in the Discovery contract, except that the Bloomberg contract provides that "MarketShare will work with Bloomberg to co-develop a new output report/dashboard based on a mutually agreed upon set of requirements for exclusive use by Bloomberg." Petitioner is obligated to refresh the data underlying the models annually. The contract limits Bloomberg to 20 users, and requires petitioner to provide "ongoing software and support" after the deployment of the software.

43. The contract further provides that petitioner is to prepare up to five simulations for "management review and presentation," "model review sessions, key statistics and final results presentation."

44. The model is to include "Ad Category media and direct marketing spend, macroeconomic indicators, competitor marketing information, social media volume and polarity" and that "[a]dditional exogenous variables are likely to be evaluated." Under the contract, petitioner is to be paid a flat monthly fee, except that petitioner will charge Bloomberg at cost for the third-party data it uses in its models, which, the contract states, is not expected to exceed $30,000.00 for the luxury car subcategory that was the subject of the contract. Finally,

specifying one of petitioner's employees by name, the contract provides that the person "will continue to be involved in the delivery of the Service under this SOW, and will not be replaced without prior consultation with and agreement from Bloomberg."

45. Petitioner introduced three of its invoices to Bloomberg, all of which referred exclusively to petitioner's "DecisionCloud: Benchmark" software license in the invoice's description box.

46. Petitioner's "Master Services Agreement" with Turner Broadcasting System, Inc. (Turner), is dated November 7, 2014 and has three SOWs attached pertaining to the audit period. The first, titled "Advertising Category Index Insights -- Phase One," is dated November 19, 2014 and runs from November 17, 2014 until March 15, 2015. The SOW's "Materials" section provides that petitioner is to develop a custom model and user interface for Turner's use of "[MarketShare's] software platform" and details eight "capabilities" the software is to have, including the following:

> "Compare Scenarios: allows users to compare the results of customer scenarios to baseline scenarios and compare customer scenarios with each other.
>
> * * *
>
> Edit spend: allows users to edit the brand's historical annual spend (last period) and current period planned annual spend across touch points (media spend channels) for Turner and non-Turner marketing drivers."
>
> Playbooks: calculate the most effective marketing allocation for a specified budget scenario, given editable constraints."

47. Among the services required of petitioner under the contract are the following:

> (i) data services ("establishing parameter, structure and processes for the collection, processing and validation of all key data . . . for both Turner-provided and [MarketShare]-provided data");
>
> (ii) "custom-built category models;"

(iii) "SaaS platform hosting the models, processing the data, and integrating with the Turner user interface," with a sixty-day license to use after acceptance;

(iv) "[p]rofessional services, including . . . aligning on analytic priorities based on business needs voiced by key stakeholders, applying business context to the modeling process, distilling key insights, as well as enabling adoption of insights and analytics-driven decision making by Turner;"

(v) the development of a "case study," using the model results.

48. The contract notes that petitioner will "collect and transform syndicated data and incorporate into the modeling dataset." The contract describes the information to be included in the models as follows: "Ad Category media and direct marketing spend, PR, macroeconomic indicators, competitor marketing information, social media volume and polarity. Additional exogenous variables are likely to be evaluated." The timeline section indicates that petitioner's "key activity" for the alignment stage is "purchase required data."

49. The second attached SOW is a four-page agreement signed by the parties on March 17, 2015. It is similar to the first SOW, including requiring multiple presentations, with one described as a "final results presentation," but it requires petitioner to provide a more elaborate model, attend "key prospect sales meetings," and to provide ongoing "software access and support," after the deployment and integration of the software. Under this SOW petitioner was to be paid a flat fee to provide these services through June 30, 2015, after which, if Turner wished to "continue the software license," petitioner would provide "ongoing access, support and data refreshes" for a specified monthly flat amount, pursuant to the parties' entering into a separate SOW. The third SOW, a two-page agreement dated June 4, 2015, was in effect from June 30, 2015 through December 31, 2015. It requires petitioner to provide a "model rebuild" using the same model structure as used in the prior SOW, and to provide a "Cloud-based

Software Platform hosting the models, processing the data and integrating with the End-User Software" for a one-time fee. It does not make any mention of petitioner providing "professional services" and does not mention petitioner attending sales meetings or making any presentations.

50. Petitioner's introduced three of its invoices to Turner. The description box on its invoices dated November 19, 2014 and June 30, 2015 both referred to Turner's software license with petitioner. The description box for the invoice dated March 30, 2015 referred to "Advertising Category Index Insights – Phase 2" and "Bill for Services listed in SOW including one (1) category level demand model and extension of software license."

Advertising Agency Product

51. Mr. Koudsi testified that the product petitioner sells to advertising agencies is a "software platform that . . . is purely . . . a software offering that they use . . . on behalf of their clients . . . to figure out how to optimally allocate the budgets that [the agencies] are given from their clients, big advertisers." He also testified, however, that petitioner uses the coefficients it derives from the models it builds for its advertiser customers (***see*** finding of fact 11) to inform the algorithms for the software petitioner sells to its advertising agency customers and that the coefficients were "a big selling prop of ours."

52. Petitioner introduced its agreements with three companies, all with New York addresses, that Mr. Koudsi identified as advertising agencies, Euro RSCG New York, Inc. (RSCG), McCann Worldgroup (McCann), and Havas Worldwide New York Inc. (Havas). [2] (Petitioner's contract with a fourth advertising agency, Ogilvy, LLC, is dealt with separately below.) All three contracts refer to "Licensed Software," a term defined in the McCann and RSCG contracts to mean "the software tools specified in a Schedule as being licensed under this

[2] Petitioner introduced only a portion of its agreement with Havas, a "Schedule No. 3 to Software Access Agreement for Havas Worldwide New York, Inc.," effective September 25, 2012.

Agreement, to the extent the software tools (a) are generally made available to [MarketShare Partner]'s advertising agency customers or (b) developed or customized for Customer in accordance with this agreement for use as part of the software tools." The RSCG contract, entered into June 23, 2011, and the Havas contract only describe the software as petitioner's "Planner" software. Petitioner's contract with McCann, entered into on October 25, 2010, involves software referred to as "Compass Customized," which it describes as follows in part:

- "Screenshots and presentations provided to Customer of custom Compass tool
- A maximum of 15 scenarios run for Customer's Clients
- Sales and market share (basic) outputs: calculated based on inputs from Clients
- Customized "How To" output with Customer branding and content"

The McCann contract obligates petitioner to supply ID numbers to its customer's authorized users and allow those users to set up passwords. Under all three contracts petitioner also agrees to provide limited related services, such as training, but not model-building. Petitioner's fee under the RSCG and Havas contracts is, respectively, $50,000.00 and $75,000.00 for 12-month contract periods, while its charge under the McCann contract is $30,000.00 for an initial 30-day trial period. Petitioner introduced its invoices to RSCG, Havas, and McCann that the auditor found taxable. All refer exclusively to software licenses.

53. Petitioner introduced a "Software Access Agreement" with Ogilvy, LLC, entered into on November 19, 2014. This agreement is substantially the same as petitioner's contract with RSCG, inasmuch as it grants the customer a license agreement to use petitioner's "Planner" software for a specified number of the customer's employees and requires petitioner to perform substantially the same related services. However, this agreement does not appear relevant to this proceeding, as the audit workpaper listing the invoices found taxable on audit does not include any invoices for Ogilvy in 2014 or 2015. The workpaper lists two invoices for Ogilvy, one dated November 5, 2010 and the second dated December 14, 2010. Petitioner introduced two Ogilvy

invoices that match those entries on the auditor's workpaper. The invoice dated November 5, 2010 is for "Professional Services Rendered: (per Software Access Agreement dated September 1, 2010." The December 14, 2010 invoice bears the following description: "RapidROI for Caesar's Entertainment SOW#3 dated 12/1/2010 for Acquire and Load Data, Econometric Modeling, and Analysis of Models & Report Generation." The mismatch between the date of the contract and the invoices found taxable was pointed out by the Division's representative at hearing, but petitioner did not offer to introduce the correct contract or explain its inability to produce it. Mr. Koudsi testified that he did not know what RapidROI was.

White Paper Sales

54. Mr. Koudsi testified that petitioner's white paper service "consisted of petitioner preparing a customized analysis of an issue of interest to a customer." He claimed that "for the most part it is very similar to what we do for advertisers and media companies," except "sometimes the white paper may have a specific set of questions that may vary from what typical advertisers may ask." He testified that, similar to petitioner's advertiser and media company services, its white paper service requires petitioner to align its goals with those of the customer, "collect data typically, build models, and synthesize insights from these models." The insights are delivered to the customer through meetings and by publishing the white paper.

55. Petitioner placed into the record two examples of its white paper contracts. The first was the SOW portion of its contract with Clear Channel Outdoor (CCO), dated May 1, 2010, which required petitioner to develop a white paper relating to:

> "the effectiveness of Out of Home, its relationship with offline and online media (and their synergies) on marketing outcomes. White paper will include archetypical case situations for each of the following industry categories:
>
> - CPG
> - Automotive
> - Entertainment (focusing on movies)

- Retail.

The white paper will have the following outline:

- Summary: Overall perspectives on the value and use of Out of Home
- Archetypes:
  - ♦ category insights stemming from academic literature and public MSP work where available will be referenced; will highlight the impact of Out of Home offline, online media and references to any measured synergies between media & marketing types
  - ♦ examples of what ideal investment scenarios would look like for an advertiser in each of the categories to highlight how to appropriately invest in the medium given the brand's objectives and characteristics.
- Managerial Impact: Pragmatic and insightful action items for managers."

The SOW does not require petitioner to collect any data from the customer or to purchase any data.

56. The second example is the SOW portion of a "Professional Services Agreement" dated March 23, 2010, with Fox Broadcasting. The SOW's description of the requirements for the white paper is similar to that of the CCO contract, as petitioner is to develop a white paper showing the "impact of broadcast and cable TV, online display media and references to search on outcomes and any measured synergies between media types" for specified industry categories, including "business archetypes" for each category. Three of the industry categories are the same as those in the CCO contract – "automotive," "[e]ntertainment (focusing on movies)," and "retail." The contract's bulleted outline of the contents of the white papers is similar to that of the CCO contract, except it asks for "References to data, studies or books, etc." and does not include any bullet similar to the next to last bulleted paragraph quoted above ("examples of what ideal investment scenarios would look like . . ."). The agreement does not require petitioner to collect any data from the customer or build any models.

57. The Division's auditor, Mr. Plummer, testified that he concluded that one white paper invoice billed during the audit period was not taxable because he thought it "talked about

consulting," but that he concluded that the contracts for the Fox and CCO white papers were taxable because he could not tell how much of the white papers were data versus how much was interpretations of the data. Mr. Koudsi did not testify as to petitioner's specific activities under either contract and he did not specify whether petitioner ever re-uses parts of one white paper in preparing another. Petitioner did not introduce examples of the white papers prepared under the contracts into the record.

58. Petitioner submitted 84 proposed findings of fact. Pursuant to State Administrative Procedure Act (SAPA) § 307 (1), the following rulings are made on those proposed findings:

> Proposed findings of fact numbered 1 through 7, 9, 10, 15 through 21, 23, 25, 27, 30 through 32, 34, 37, 40 through 42, 44, 45, 47, 50, 52, 53, 58, 59, 61, 66, 67,75, 76, 79, and 80 are supported by the record, and have been consolidated, condensed, combined, renumbered, and substantially incorporated herein.
>
> Proposed findings of fact 8, 11, 39, and 78 are rejected as not substantiated by the record as a whole.
>
> Proposed finding of fact 12 through 14 are modified to remove the characterization of the product petitioner sells to advertising agencies in order to better reflect the record, which shows that petitioner transferred some information to its customers in providing that service, and as modified, are substantially incorporated herein.
>
> Proposed finding of fact 22 is modified by changing the word "typically" to "in many cases" in order to better reflect the record and, as modified, is substantially incorporated herein.
>
> Proposed findings of fact 26, 28, 29, 33, 36, 51, 54 through 59, 62, 68, and 71 are modified to avoid stating legal conclusions and/or to better reflect the record, and, as modified, are substantially incorporated herein.
>
> Proposed finding of fact 24, to the extent of the clause before the first comma, is accepted as supported by the record and is substantially incorporated herein, but the remainder is rejected as supported only by conclusory opinion testimony in which the witness is purporting to read the mind of customers.
>
> Proposed findings of fact 70, 72, and 73 are rejected as they consist largely of quotations of conclusory opinion testimony in which the witness is purporting to read the mind of customers.

Proposed findings of fact 63 through 65 are rejected as overly-broad.

Proposed findings of fact 35, 46, 48, 49, 60, and 69 are rejected as being redundant with other proposed finding of fact already accepted;

Proposed finding of fact 38 is modified by striking "client-specific" as inaccurate and irrelevant, and by adding that petitioner uses the aggregated coefficients derived from its engagements with advertisers in its engagements with advertising agencies, and, as modified, is substantially incorporated herein.

Proposed finding of fact 43 is modified to remove the inference that only petitioner's professional staff use the models to gain marketing insights in order to better reflect the record and, as modified, is substantially incorporated herein.

Proposed finding of fact 74 is modified to reflect that the Agency Platform, in addition to providing access to software, also provides customers with information, and, as modified, is substantially incorporated herein.

Proposed finding of fact 77 is rejected as not supported by the transcript pages cited.

Proposed findings of fact 81 through 84 relate to undisputed procedural facts that need not be set forth in the determination.

CONCLUSIONS OF LAW

A. Tax Law § 1105 (a) imposes sales tax on the retail sale of tangible personal property, which is defined to include "pre-written computer software" (prewritten software) (***see*** Tax Law §§ 1101 [b] [6]; 1105 [a]). Tax Law § 1101 (b) (14) defines prewritten software as software designed and developed by the author or other creator to the specifications of a specific purchaser. Tax Law § 1105 (c) imposes sales and use tax on certain enumerated services, including the service of "[t]he 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" (Tax Law § 1105 [c] [1]). That section excludes from tax the sale 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" (***id.)***. Section 1105 (c) (9) imposes a sales tax on receipts from the service of furnishing information by means of telephony or telegraphy or telephone or telegraph service. At issue here is the application of the sales and use tax to petitioner's four category of sales. The taxability of each category will be analyzed separately below.

Advertiser Service

B. Petitioner's contracts with advertisers and media companies all grant the customers a license to use software. Petitioner also performs a multitude of services for those customers. Despite the presence of licenses to use software in these contracts, the Division and petitioner agree that the sales under these contracts should be treated as services for sales tax purposes. This determination will, accordingly, likewise assume that those sales are to be treated as services, and not the sale of tangible personal property.

C. The parties disagree as to the nature of the advertiser service. The Division argues that the function of petitioner's advertiser service is the dissemination of information that does not qualify for the personal or individual exclusion and therefore is taxable. Petitioner, in contrast, claims that its advertiser service is a non-taxable consulting service. Petitioner concedes that information is provided as part of the advertiser service, but argues that its main purpose was to provide its customers with advice and recommendations about how to apply analytic marketing to resolve the customer's toughest marketing questions, and, thus, is a consulting service and not a taxable information service.

D. The Tax Appeals Tribunal's decision in ***Matter of SSOV '81 Ltd. d/b/a People Resources*** (Tax Appeals Tribunal, January 19, 1995) is a good starting point for analyzing these competing claims. In that case, a company (SSOV) operated a club that sought to allow

members to meet other members providing certain information to the members to allow them to choose members to meet, acting as the neutral party to pass on invitations from one member to another, and taking certain other steps to facilitate the relationship. In analyzing the Division's argument that the company's membership fee should be subject to sales tax as an information service because of the company's role of providing members' profiles to other members, the Tribunal reviewed other leading sales taxability cases, concluding that "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" (***id.***, citing ***Matter of Building Contractors Association v Tully***, 87 AD2d 909 [3d Dept 1982], and ***Matter of Woolworth Co.***, Tax Appeals Tribunal, December 1, 1994). It summarized the proper analysis for determining a service's taxability as follows:

> "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**."
>
> * * *
>
> To neglect the primary function of petitioners' business in order to dissect the service it provides into what appear to be taxable events stretches the application of Article 28 far beyond that contemplated by the Legislature (emphasis added)."

Applying these principles, and viewing the service as a whole, the Tribunal determined that the primary purpose of SSOV's service was "fostering relationships" and not simply providing information to members, citing SSOV's role in passing on invitations, and in counseling members as to how to present themselves in their videotaped interview.

In ***Matter of Principal Connections*** (Tax Appeals Tribunal, February 12, 2004), the Tribunal applied a primary function analysis in a case involving a company that provided a real estate referral business that maintained a listing of apartments for rent in New York that, for a subscription fee, could be searched by apartment brokers and prospective renters, while

providing a variety of other services. In considering petitioner's argument that it merely facilitated rental agreements between apartment owners and renters by allowing them to find each other, the Tribunal noted that petitioner obtained some of its listings from public sources, such as newspapers, instead of exclusively from subscribing brokers, and that, with regard to listings from such public sources, petitioner could not perform any referral functions, nor could it do anything to facilitate the relationship. Thus, because petitioner's business aimed to provide "as broad a base of information as possible on available apartments in New York City," and did not take steps to facilitate rental relationships apart from providing information, its primary purpose was providing information to subscribers, and its service qualified as an information service. Accordingly, ***Principal Connections*** underscores the need, in determining a service's primary function, to look beyond the labels and descriptions of a service, to carefully examine a company's functions in determining the primary purpose of its service.

E. The dissemination of information is certainly a very important part of petitioner's advertiser service. Petitioner collects data, builds models based on that data, and then disseminates information and recommendations derived from those models to the customer. The first way petitioner does this dissemination is by making presentations and providing reports to the customers. For example, under the EL contract, petitioner is to provide an "initial simulation" using its benchmark database and, later, a report that is to include "optimal media spend levels, marketing vehicle effectiveness, including direct and indirect effects." Under the Squarespace agreement, petitioner is to make a final findings presentation, and provide up to five simulations/optimizations.

The second way petitioner makes information available to its advertiser customers is through its online platform, where the customer can access petitioner's reports and which the

customers can use to create "what if" scenarios and optimizations, or to access scenarios created for them by petitioner. The EL and MH contracts make clear that access to petitioner's software platform, embodying petitioner's models, was a key part of petitioner's advertiser service. Both contracts refer to petitioner providing the customer with the "tools" to do analytic marketing, while the MH contract refers to petitioner as a "SaaS provider." Moreover, the software element is mentioned in the title of each of the advertiser contracts, while the invoices for two of the three contracts for the service refer to the service as a software license (***see*** finding of fact 32). More substantively, the contracts carefully delineate how many users each customer can have, the training that petitioner must give on the software, its continuing availability to handle technical questions, and its "uptime guarantees" (***see*** findings of fact 22, 26, and 30).

In its hearing brief, petitioner attempts to downplay the importance of the software petitioner provided to its advertiser and media company customers, describing it as having limited functionality and claiming that those customers tended not to use the software. These points are rejected. Mr. Koudsi testified only that the software was limited compared to petitioner's internal, model building, software, which is not relevant, given that the customers only needed the software to run scenarios. The brief's contention that advertiser users could use the software only to manipulate a single variable – the marketing budget – is belied by the Squarespace and EL contracts (***see*** findings of fact and 22 and 26) and is hard to reconcile with petitioner's description of its software in its audit memorandum (***see*** finding of fact 18). Mr. Koudsi did testify that "he doubted" that EL ever logged on to use the software, but that testimony is not sufficient to establish that EL did not in fact use the software, as Mr. Koudsi did not explain the basis of his "doubt[]." More generally, even if, as a practical matter, petitioner's employees provided considerable help to the advertisers in running and interpreting scenarios,

that does not diminish the importance petitioner's advertiser customers placed on the availability of the software platform, which is evident by the manner in which contracts carefully specify the software's functionality, and petitioner's software maintenance and training obligations.

Nevertheless, review of Mr. Koudsi's testimony and the contracts as a whole leaves little doubt that petitioner's services under the advertiser contracts go well beyond just providing access to the software and the information available through the software. Mr. Koudsi testified that petitioner's advertiser service was a "strategic marketing analytics consulting service, effectively helping advertisers define their marketing strategy," that relies on petitioner's highly-trained consultants, data science experts and other professionals, with industry experience, to generate insights and recommendations as how the client could improve its marketing and advertising effectiveness. The engagements include a presentation providing management with a very specific, "start, stop, continue" slide, i.e., a slide that shows "here are the things you should start doing, here are the things you should stop doing, here are the things you should continue."

A close review of petitioner's contracts with advertisers supports this view of petitioner's advertiser service. Those contracts spell out petitioner's duty to gather data, develop models, and provide the advertiser customers with access to those models for purposes of making analytic marketing decisions, but the contracts also show that petitioner's duties encompass broader functions, including providing the advertisers with guidance as to how to adopt analytic marketing as their marketing strategy, and advising them with regard to how to make particular analytic marketing decisions based on analytic marketing. Indeed, the point is made explicit in the "Objectives" portion of the EL contract:

> "EL seeks to evolve its advertising and promotion ("A&P") measurement practices to the next level and is engaging Consultant [petitioner] in developing processes, models and tools to enable EL to optimize A&P spend and allocation.
>
> * * *

> Consultant will then deliver resource optimization recommendations, the tools that will allow continuous goal-driven optimization and the foundation for management adoption of the insights, tools, and techniques."

Squarespace's contract includes similar language (***see*** finding of fact 24). Such language makes clear that, prior to working with petitioner, the two companies were not doing the analytic marketing in which petitioner specializes, that they considered this type of marketing more sophisticated – "the next level"— and that they wanted petitioner to help them adopt, or at least try out, that type of marketing strategy, while giving them advice and recommendations with regard to specific marketing decisions. Of course, they also wanted petitioner to supply them with the "tools" to do analytic marketing, presumably a reference to the software into which petitioner's models are integrated.

It is understandable that petitioner's customers would be looking to petitioner for advice and guidance with regard to analytic marketing. As the auditor recognized, petitioner is a "big data company, working in a new industry," which, according to a November 5, 2015 Neustar press release, requires the processing of "pedabytes of data." As the press release states, petitioner is a leading company in that field. Mr. Koudsi testified that, to build models based on that data, to be able to attribute marketing expenditures to changes in the demand for a customer's product, petitioner employs many individuals with specialized educations, including data scientists and optimization specialists. The contracts make clear that petitioner's advertiser customers are looking to petitioner to help them make the jump to this new, data-intensive type of marketing.

Significantly, under all three advertiser contracts, and consistent with Mr. Koudsi's testimony, petitioner's engagements start with a series of meetings at which petitioner works with the customers to come to a consensus as to a priority list of marketing questions for

petitioner to answer through its modeling process. The fact that its customers would choose to have petitioner work with them to develop the set of questions that petitioner is then to resolve seems puzzling if the customers just want petitioner to give them the information necessary to do analytic marketing themselves; it is not at all puzzling, however, if it is assumed that the customers need petitioner's help even to know what marketing questions can be resolved through analytic marketing.

Another salient characteristic of the three contracts is the number of presentations petitioner has to make to the customer, and the fact that petitioner is to present "insights and recommendations" at many of them. Thus, under the EL contract, even prior to giving the company access to its software, petitioner is to develop "preliminary simulations . . . and assist EL's managers in tuning 2013 A&P plans." More generally, petitioner is to make presentations "at each stage of deliverables," including "[l]earning [s]essions . . . to [s]hare [i]nsights and model outputs," and "[m]anagement presentation of the findings and recommendations as well as a written project report."

The Squarespace contract is no different. Prior to deploying any software for Squarespace, petitioner is to develop a model and make a "preliminary insights presentation," after which it is to further refine the model and make a "[f]inal findings presentation and initial optimization recommendations." The meetings at which petitioner is expected to provide insights and recommendations do not end with the deployment of the software, as petitioner is to provide "[q]uarterly business reviews & further insights" on an ongoing basis.

Similarly, while the MH contract is less detailed, a review of it also reveals that petitioner's duties involve far more than collecting data to build models, and then giving the customer access to those models through its presentations, reports and its online platform. Even

before petitioner deploys its software for the customer's use, petitioner must: (i) build "forward-looking optimizations to provide recommendations on how to alter marketing investments to achieve business goals"; and (ii) provide "a 1st business review – the insights review meeting," which is described as a "executive level business review[]," at which petitioner would "share business insights and recommendations tailored to [MH's] objectives and priorities." Even after deploying the software, petitioner's "service team" is to provide "ongoing support and guidance to enable customer success." If the customers only wanted access to the software or the final marketing recommendations, there would be no need to have so many meetings; but if the goal of the customers was to allow petitioner to demonstrate how its data-intensive approach could be used to make better marketing decisions and to teach the thinking process behind that approach, then the abundance of meetings makes sense.

In sum, while there is no doubt that the information petitioner gave its advertiser customers through its web platform is a very important part of its advertiser service, on balance, the information is still just one component of a larger service of providing the customer with the advice and guidance necessary to allow the customer to make the transition to analytic marketing.

F. That raises the question of whether a service principally consisting of the giving of advice and guidance qualifies as an information service. The examples in the Division's regulations give very little sense that the "information service" term was meant to cover a service of providing advice and guidance, developed with a specific customer in mind, after collaboration with the customer (***see*** 20 NYCRR 527.3 [a] [3] [examples of information services include credit reports, tax or stock market advisory and analysis reports, product and marketing surveys, 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 a specified word]). Moreover, services recognized in case law as being information services have usually involved a service that provides quantitative information, and not guidance or advice (***see e.g. Matter of Wegmans Food Markets, Inc. v Tax Appeals Tribunal of State***, 33 NY3d 587 [2019] [pricing data from rival grocery stores]; ***Matter of ADP Automotive Claims Servs. v Tax Appeals Trib.***, 188 AD2d 245 [3d Dept 1993], ***lv denied*** 82 NY2d 655 [1993] [service provided estimates for cars damaged in accidents]; ***Rich Prods. Corp. v Chu***, 132 AD2d 175 [3d Dept 1987] [service providing data regarding wholesaler sales of consumer products in a given market]; ***Towne-Oller & Assocs., Inc. v State Tax Commn***, 120 AD2d 873 [1986] [marketing data]; ***Allstate Ins. Co. v Tax Commn of State of N.Y.***, 115 AD2d 831 [3d Dept 1985], ***affd sub nom. Allstate Ins. Co. v Tax Commn***, 67 NY2d 999 [1986] [motor vehicle reports derived from accident reports and traffic infractions filed with the department of motor vehicles]; ***Twin Coast Newspapers, Inc. v State Tax Commn***, 101 AD2d 977 [3d Dept 1984], ***appeal dismissed*** 64 NY2d 874 [1985] [export-import statistical data]).

Thus, it is not surprising that, in a number of advisory opinions, the Division has treated services requiring the seller to provide advice and guidance as a nontaxable consulting service (***see*** TSB-A-90[33]S, June 29, 1990 [the services of a behavioral scientist, who, after interviewing the customer's employees, developed strategies for training those employees and prepared written reports with recommendations, found to be a nontaxable consulting service; TSB-A-03[11]S, March 25, 2003 [a strategic management consulting service that offered competitive market assessments, best practice reviews, and technology strategy assessments, found to be a nontaxable service]; TSB-A-96[10]S [a charge for petitioner's consultation with a

client regarding the enhancement of the client's image and/or for improving internal communications among the client's workforce found to be a consulting service and thus not subject to sales tax]). Consistent with those advisory opinions, and the precept that Tax Law provisions that impose tax are to be interpreted "against the government and in favor of the citizen" (***Matter of Grace v New York State Tax Commn***, 37 NY2d 193, 195 [1975]), ***rearg denied*** 37 NY2d 816 [1975], ***lv denied*** 338 NE2d 330 [1975]), petitioner's advertiser service is determined not to qualify as an information service.

G. Petitioner also argues that even if its advertiser service should be found to be an information service, it qualifies for the exclusion in Tax Law § 1105 (c) (1) for "furnishing information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons" (personal or individual exclusion). This issue is mooted by the determination above that petitioner's advertiser service is not an information service. Nevertheless, for the sake of completeness, the issue will be addressed herein.

The Court of Appeals recently addressed the scope of the personal or individual exclusion in ***Wegmans***. The issue there was whether the personal or individual exclusion applied to RetailData's service of collecting pricing data from rival grocery stores specified by its client, Wegmans. After noting that, as the taxpayer, Wegmans had the burden of proving the applicability of the exclusion, the Court of Appeals upheld a decision of the Tax Appeals Tribunal that the exclusion did not apply, holding that "[t]he Tribunal rationally concluded that the information RetailData furnished to Wegmans was not personal or individual in nature because it was collected from prices on supermarket shelves, which are publicly available, widely-accessible, and not confidential" (33 NY3d at 595). Petitioner distinguishes ***Wegmans***

on the ground that, with regard to its advertiser service, "only a de minimis amount of information is pulled from published sources and none of that information is or can be included in reports furnished to others." There are a number of flaws with this argument.

Petitioner failed to prove that only a de minimis portion of the data used in an advertiser customer's model came from public sources. Mr. Koudsi testified that "the bulk" of the information came from the customer and that "publicly available data" comprised "usually a very, very small percentage of the total number of *sources* of data we collect [emphasis added]." The fact that "the bulk" of the data used in any customer's model came from the advertiser customer does not prove that only a "de minimis" amount of the data in the models came from public sources. Nor is that point proven by the fact that only a few of the sources used by petitioner were "publicly available data" since any one public source could make up a large percentage of the total amount of data used in the models.

Petitioner also did not provide clear and convincing proof that the bulk of the data came from the customer. Mr. Koudsi never explained the basis of that conclusion, i.e., how he was able to quantify the amount of data from each source. He could have established this point by comparing the number of gigabytes of data from the customer used in the model with the number of gigabytes of data coming from public sources, which he did not do. In fact, Mr. Koudsi did not specify the nature of the data petitioner collected from its advertiser customers or why it necessarily would be more than the third-party data. The advertiser contracts are relatively open-ended in detailing the data petitioner was to obtain from third parties (***see*** findings of fact 23, 27, and 29). In both the EL and MH contracts, petitioner committed to obtaining the macroeconomic data needed for the models. It is not clear how much data that term encompasses, as Mr. Koudsi testified that there are "thousands" of macroeconomic factors that

might be relevant, depending on the customer's query.[3] Moreover, in describing the advertiser service in its audit memorandum, petitioner touted the "partnerships" it has formed with "media firms, technology companies and other data providers to supplement and amplify client data and analytics capabilities." This suggests that the data petitioner obtains from third parties is not a de minimis aspect of the analytic marketing service it sells advertisers and media companies.

According to petitioner, this case is controlled by ***Westwood Pharms. v Chu*** (164 AD2d 462 [4th Dept 1990], ***lv denied*** 77 NY2d 807 [1991]) (***Westwood***), rather than ***Wegmans***. In ***Westwood***, Westwood engaged A.C. Nielsen Company (Nielsen) to provide marketing information pertaining to several of its products in order to develop new marketing strategies. Nielsen combined customer data along with "raw data from field investigations at retail outlets" into a "sample frame" unique for each client. The Appellate Division noted that "[n]o raw data is acquired from published sources readily available to any interested party" and "[m]ost of the raw data is provided by the particular client" (***id.*** at 464). Nielsen then analyzed the sample frame with a computer program, the results of which it provided to the customer. The Appellate Division held that the personal or individual exclusion applied because (i) the raw data in the sample frame was not from one general source and "much" of it came from the customer, and (ii) the sample frame was placed in a unique database for each client and the resulting data and the sample frame were not shared with other clients (***id.*** at 467).

Petitioner's reliance on ***Westwood*** is misplaced. Unlike the petitioner therein,

[3] Case law is not clear on the proportion of the data used in an information service that can come from a "widely accessible" source before the personal or individual exclusion will be found inapplicable. Arguably, the use of the word "substantially" in the phrase "and which is not or may not be *substantially* incorporated in reports furnished to other persons" (emphasis added) in the personal or individual exclusion leads to the inference that, if any substantial part of the data comes from a widely-accessible source, the exclusion does not apply. It is not necessary to resolve that question in this matter, however, given petitioner's failure to establish how much of the data used in its models comes from a widely accessible source.

petitioner did not show that none of the raw data in the database it compiles for each customer came from "published sources readily available to any interested party." As discussed above, the record is clear that the models incorporated data petitioner purchased from third parties and petitioner presented no evidence that such data was not available for purchase by any member of the public. If anything, the fact that Mr. Koudsi admitted that petitioner was able to purchase data regarding its customers' rivals indicates that at least some of the third-party data was widely available.[4]

In sum, ***Westwood*** is distinguishable and petitioner has failed to show the applicability of the personal or individual exclusion to its advertiser service (***see Wegmans***). Accordingly, assuming, ***arguendo***, that petitioner's advertiser service is an information service, it is taxable, as petitioner's alternative argument that the service qualifies for the personal or individual exclusion is rejected.

Media Company Service

H. Mr. Koudsi testified that petitioner's media company service functioned very similarly to its advertiser service, with the same four phases of customer alignment, data collection and validation, model building, and presentations of insights. The only exception he noted is that an important aspect of the media company service, not present in the advertiser service, was that petitioner's media company customers look to petitioner to show their clients "how well those media companies perform, and how the different properties that the media

[4] It is true that the Fourth Department in ***Westwood*** drew attention to the fact that Nielsen put its raw data into a separate database for each client (164 AD2d at 467). This should not be read to mean, however, that, regardless of the amount of publicly available data that is provided as part of an information service, the service will qualify for the personal or individual exclusion merely because the seller used a separate database for each customer. Such a rule would create a loophole in the information service tax, raising the possibility, for example, that the export-import statistical information found to constitute an information service in ***Twin Coast*** could be rendered nontaxable merely by the seller first transferring the statistical information to a database created for the customer and only subsequently transferring the information from the database to the customer.

company owns performed for the specific advertisers." For the most part the similarity between the two services is borne out by review of petitioner's media company contracts. Indeed, in their briefs, neither party distinguishes between petitioner's advertiser service and its media company service. Accordingly, much of the analysis set forth above concerning the primary function of the advertiser service is also applicable to petitioner's media company service. In a nutshell, while providing customers with information through its software and its presentations is obviously a significant aspect of petitioner's media company service (***see*** findings of fact 36, 37, 41, 42, and 44 through 48), petitioner's duties under the media company contracts go well beyond providing its customers with information; rather, those contracts require petitioner also to guide the companies' adoption of analytic marketing as a marketing strategy by (i) helping them identify the proper question to analyze and to establish the necessary internal practices, and (ii) applying its expertise in analytic marketing to use the customer's model to give the company insights and recommendations into marketing issues.

Petitioner's role in helping its media company customers adopt analytic marketing as a marketing strategy is explicit, as all three contracts give it the responsibility of "enabling adoption of insights and analytics-driven decision-making within" the company. Consistent with that duty, petitioner works the company to refine the marketing question to be answered. Thus, under the Bloomberg contract, during the goal alignment stage, petitioner is to work with the customer to "confirm[] . . . initial category," (i.e., model categories) and the "final[] scope" of the analysis. Similarly, under the first Turner SOW, petitioner is to, among other things, "[c]onfirm[] . . . initial [c]ategories" and "finalize scope of analysis." Under the Discovery contract, in the goal alignment stage, petitioner is to assess the customer's current marketing tools and processes, and help it "identify the best approach to improve internal analysis

capabilities." In other words, rather than just providing the information requested by the customer, petitioner helps its media company customers determine exactly what models should be developed and identify how analytic marketing can be used to improve their marketing function.

In the data collection stage, under the Bloomberg and Discovery contracts, petitioner does not simply tell the customer what information the customer must supply; rather, petitioner is to establish "parameters, structure, and processes for the collection, processing and validation of all key data for use in modeling and post-modeling analysis." Thus, as Mr. Koudsi testified, getting the internal data, and validating it, is not a ministerial task; rather, petitioner's experts must help the media company customers identify, collect, and validate the internal data, and one of the purposes of this contract is to set up an internal system for doing that in the future. Moreover, under all three media company contracts, during the data collection stage, petitioner makes presentations giving its "[d]ata insights." Since such a presentation comes before petitioner has built any model for the customer, it appears that the function of this presentation is to allow petitioner to perform its overall duty of "enabling adoption of insights and analytics-driven decision-making within" the media company.

Mr. Koudsi testified that petitioner's media company clients want more than a model; they want "guidance and best practices, etc.," just as was the case for petitioner's advertiser customers. This is also apparent from review of the media company contracts. Under all three contracts, petitioner is required to make multiple presentations to the customer to provide analytic marketing insights. Under the Discovery contract petitioner is to present "Scenario Deep Dives," described as "[u]p to 5 budget allocation scenarios," and up to four "on-site or webcast presentations of the preliminary and final model recommendations and a presentation

showing its "final results." Under the Bloomberg contract, petitioner must make various presentations, including "model review sessions," and a "final results presentation." The first two SOWs attached to the Turner contract are quite similar to the Discovery and Bloomberg contracts, as petitioner must provide "model review sessions," a "model results presentation," and a case study.

Review of the Bloomberg and Discovery contracts also confirms Mr. Koudsi's testimony that petitioner is required to help the media company prove the value of the media company's platform to prospective advertiser clients. Petitioner can perform that function, given its status "as a trusted third party" for marketing brands. Thus, under the Discovery contract, even after the deployment of the software, petitioner's "key activity" under the contract is to develop a "sales narrative" and a "key deliverable[]" is ongoing "sales support." Likewise, under the Bloomberg contract, petitioner is to "accompany Bloomberg on up to five (5) sales meetings . . ., and provide weekly office hours during the life of the contract to answer questions about the tool or analysis from the Bloomberg research and sales team." This role in promoting the media company's platform to prospective advertisers appears to be a marketing service. Even if, looked at in isolation, the service involves the transmission of information to the media company's prospective advertiser, it does not appear to help the Division's argument that the media company service is an information service, because the information would not be going to the purchaser of the service (***see*** TSB-A-13[27]S, September 27, 2013 [advisory opinion issued by the Division concludes that, because the credit rating service sold by the advisory opinion requester is used by the client, not for its own informational purposes, but "to attest to third parties" about the client's credit worthiness, the service does not qualify as an information service]).

In sum, the primary function of petitioner's media company contracts is to give customers guidance and advice to transition to analytic marketing, and to use analytic marketing to help the customer make better marketing decisions, which was determined above to be a nontaxable consulting service. Helping the media companies to prove to potential clients the value of their respective media platforms is a secondary function and would also not constitute an information service. Accordingly, petitioner's media company service is not subject to sales and use tax (***see*** Tax Law § 1105 [c] [1], [9]).

I. The third SOW attached to the Turner contract, however, is different because it requires petitioner only to provide a "model rebuild" and access to its software platform. It does not require petitioner to perform any professional services. Accordingly, petitioner's duties under the third SOW are limited to providing Turner with online access to its software platform where its analytic marketing platform resides. Access to its analytic marketing platform constitutes an information service (***see Matter of DZ Bank***, Tax Appeals Tribunal, May 11, 2009 [petitioner's web-based product, which delivers credit measures and financial analysis data from a variety of sources to support trading and investment decisions, held to be a taxable information service]). As was the case with regard to petitioner's advertiser product, Mr. Koudsi's testimony that the bulk of the information used in the models comes from the customer is too conclusory to meet petitioner's burden of showing that a substantial amount of the information does not come from a public source. Accordingly, petitioner's charges to Turner under the third SOW are found to be subject to sales and use tax under Tax Law § 1105 (c) (1) and (9).

J. Assuming that petitioner's analytic marketing service for media companies is ultimately determined to be an information service, the personal or individual exclusion in Tax Law § 1105 (c) (1) again becomes an issue. As was the case with petitioner's advertiser service,

petitioner has failed to establish that most of the data for its service for media companies derives from the customer, so as to come within the ambit of ***Westwood***. The provisions in petitioner's media company contracts regarding petitioner's obligation to obtain data for the models are too open-ended to allow any determination as to the relative amount of data derived from customers versus data purchased by petitioner (***see*** findings of fact 39, 44, and 48). Mr. Koudsi's testimony that the "bulk" of the data used in the models for the media companies came from the customer is again determined to be too conclusory to prove the point. Thus, petitioner has failed to meet its burden of proving the applicability of the personal or individual exclusion.

White Paper Service

K. The two agreements concerning petitioner's white paper service both involve petitioner producing white papers that are to provide information about the effectiveness of different types of advertising media (e.g., "Out of Home" and broadcast and cable TV) on different industry categories, including references to publicly available information ("academic literature and public [MarketShare Partners'] work") (***see*** findings of fact 56 and 57). According to petitioner, it generates insights and recommendations by engaging in the same four phases it performs when providing its marketing analytics service, with the only difference being that in the insights phase, petitioner supplies the customer with a white paper. It argues that, because its analytic marketing service is a "non-enumerated, nontaxable research and development service," its preparation of the white papers should also be treated as nontaxable, citing ***Matter of Rochester Gas and Electric Corp.***, Tax Appeals Tribunal, January 4, 1991). In that case the issue was whether the services provided by the Empire State Electric Energy Research Corporation (ESEERCO) were subject to sales tax as an information service. In holding the service to be nontaxable, the Tribunal concluded that the service was a research and development

service, within the meaning of the regulatory definition of "research and development, in the experimental or laboratory sense" (20 NYCRR 528.11 [b]) because the utility was paying ESEERCO for the development of certain technology, and not for the written reports of the project also produced by that company.

Thus, petitioner's argument is premised on its white paper service constituting a research and development service, with the white paper being only an ancillary part thereof. Even assuming that petitioner's analytic marketing work would be a type of research and development service for purposes of the regulatory definition in 20 NYCRR 528.11 (b), petitioner has not established that the white paper service involved its four-step analytic marketing service. While Mr. Koudsi testified that the white paper service did involve the same goal alignment, data collection, and model building activities, as its analytic marketing service, that testimony is inconsistent with the two contracts for its white paper service in the record. Those contracts do not require or even mention petitioner developing any models for the contract. Similarly, they also do not mention petitioner collecting any data from the two customers, which contrasts with the contracts for analytic marketing services with media company or advertiser clients. Mr. Koudsi did not provide any explanation as to why the collection of data, which appears to be a *sine qua non* for petitioner's analytic marketing service, is not mentioned in the two white paper contacts. Moreover, in his testimony, he did not explain why he would be familiar with petitioner's white paper service done in 2010 when in fact he did not become an employee of petitioner until 2011. Under these circumstances, it is concluded that petitioner's white paper service did not involve data collection and modeling services similar to petitioner's advertiser or media company services. Thus, the white papers petitioner produced were not incidental to some

larger research and development service, as was the case in ***Matter of Rochester Gas and Electric Corp.***, and that case does not avail petitioner.

Review of the facts herein shows that the white papers petitioner was to produce were to include information and data, as well as recommendations, from petitioner. It is not possible to say, however, what the balance was between these two components of the white papers. Petitioner could have clarified that issue by either providing knowledgeable testimony or copies of the white papers themselves, which petitioner chose not to do. Because the white papers were to include widely-available public information, such as academic literature, and petitioner has not even alleged that the white papers qualify for the personal or individual exclusion, it is determined that petitioner has not met its burden of showing that its white paper service was not taxable as an information service (***see Rich Prods. Corp.***, 132 AD2d at 179 [upholding the State Tax Commission's determination that petitioner's marketing reports were taxable information services based in part on petitioner's failure to produce copies of reports furnished to petitioner's competitors in order to allow a determination on the degree of overlap in the reports, referred to as "readily available evidence"]).

Advertising Agency Product

L. The parties agree that the product that petitioner sells to advertising agencies is to be treated as prewritten software.[5] As noted above, sales of prewritten software are subject to sales and use tax because the definition of "tangible personal property" includes "prewritten computer software, whether sold as part of a package, as separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser" (Tax Law § 1101

[5] The advertising agency product contains an element of an information service, as Mr. Koudsi testified that the algorithms used in the software made available to the agencies are informed by aggregated coefficients derived from petitioner's work for its advertiser customers. However, the Division has raised no argument that the product is an information service, and so that issue is not addressed in this determination.

[b] [6]). The issue here distills to whether a seller who makes its software platform, located on a server out-of-state, available to a customer who uses it over the internet while located in New York has transferred "title or possession or both, exchange or barter, rental, lease or license to use or consume" to that customer in New York, i.e., made a sale of tangible personal property in New York.

On their face, the contracts appear to constitute a license to use software, as they confer on the customers the right to use petitioner's on-line software platform for a consideration. All the contracts refer to "Licensed Software" and petitioner's hearing brief concedes that petitioner is providing prewritten software to the advertising agencies (***see*** finding of fact 52). The sales tax regulations provide that:

> "[t]he terms *rental, lease and license* to use refer to all transactions in which there is a transfer for a consideration of possession of tangible personal property without a transfer of title to the property. Whether a transaction is a 'sale' or a 'rental, lease or license to use' shall be determined in accordance with the provisions of the agreement" (20 NYCRR § 526.7 [c] [1]).

The regulations further elaborate that "a sale is taxable at the place where the tangible personal property or service is delivered, or the point at which possession is transferred by the vendor to the purchaser or his designee (20 NYCRR § 526.7 [e] [1])." Section 526.7 (e) (4) of the regulations specifies what constitutes a "transfer of possession" in the case of a license to use:

> "(4) *Transfer of possession* with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:
> (i) custody or possession of the tangible personal property, actual or constructive;
> (ii) the right to custody or possession of the tangible personal property;
> (iii) the right to use, or control or direct the use of, tangible personal property."

The Division argues that the software licenses petitioner extends to the advertising agencies "gives [them] the right to use, control, and direct the use of the software to run scenarios for their

own advertiser clients," and that "[t]herefore, there was a transfer of possession, pursuant to the license," citing ***Towne-Oller***. This argument is a plausible reading of the sales tax regulations.

In response to the Division's argument, petitioner does not claim that the Division is misreading its regulation, nor dispute that it conferred the right to use or control software on its advertising agency customers. Petitioner also does not raise any issue as to whether, if there were transfers of software, the transfers occurred in New York, where all four advertising agency customers had offices. Rather, petitioner asserts that the Division's argument overlooks certain cases that have held that transfers of tangible personal property do not qualify as sales for sales tax purposes where there is no "actual exclusive possession" granted the customer. At the root of this line of cases, and the only one offering helpful analysis, is the Court of Appeals' decision in ***American Locker*** (***American Locker Co. v Gallman***, 308 NY 264 [1955]). That case involved the application of New York City's sales tax to coin-operated storage lockers. After depositing a coin, the patron could leave his or her belongings in the locker, thereby protecting those belongings from third parties for 24 hours. In concluding that the amount paid by the customer was not subject to sales tax, the Court of Appeals carefully considered the patrons' degree of control over the lockers:

> "The lockers are physically and permanently attached to each other, having been manufactured so as to comprise a cabinet unit. The patron has no right to move any of the lockers. The city recognizes that there is no transfer of actual physical possession but maintains that constructive possession of the locker is delivered to the patron and that that is enough to warrant imposition of the tax. It is true, of course, that the patron may keep his baggage in the locker for a period up to twenty-four hours and that during such period he may exclude all others from use of the locker. However, this is, at best, a limited type of constructive possession. The patron has the right only to lock and unlock the locker once during a period not in excess of twenty-four hours. After the door has been locked the patron may not open the locker without ending his right to its further use. If the transaction were one in which real, exclusive possession had been transferred, it seems to us that the patron would have the right or privilege of opening and closing the door

> as many times as he wished during the twenty-four-hour period" (***American Locker Co.***, 308 NY at 267–268).

The same principle was applied, with no further analysis, to charges for the use of coin-operated amusement devices ("automatic phonographs, bowling games and the like") at bars and restaurants (***Bathrick Enterprises v Murphy***, 27 AD2d 215 [3d Dept 1967], ***affd*** 23 NY2d 664 [1968]), coin-operated televisions in hospitals (***Matter of Hosp. Tel. Systems v New York State Tax Commn***, 36 NY2d 746 [1975]),[6] the snow at a ski resort (***Shanty Hollow Corp. v New York State Tax Commn***, 111 AD2d 968, 969 [3d Dept 1985], ***lv denied*** 66 NY2d 603 [1985]), and amusement rides at an amusement park (***Matter of Darien Lake Fun Country, Inc. v State Tax Commn***, 118 AD2d 945, 946 [3d Dept 1986], ***affd*** 68 NY2d 630 [1986] [amusement park operator was not allowed resale exclusion for its purchase of amusement ride equipment since users of the rides were not purchasing the ride equipment, as they were not being given exclusive possession of the equipment]).

These actual exclusive possession cases have some commonalities. They all involve situations where the customer had to travel to a third-party site to use the tangible personal property in question, the use was transient in nature, there was either no explicit charge for the tangible personal property in question (***Shanty Hollow*** and ***Darien Lake***), or the charges were the minimal charges of a coin-operated device (***American Locker***, ***Hosp. Tel. Systems***, and ***Bathrick***). Furthermore, in all the cases, the tangible personal property had limited functionality. The factual situation in this matter is much different: the tangible personal property in question,

[6] In affirming, the Court of Appeals was ambivalent about the statutory basis for the rule: "[A]part from the historical development in connection with the various amendments of the statute, as it now reads, it could be interpreted not to require a physical change of possession. However, in light of the decisional elaboration, any change should be effected legislatively" (36 NY2d at 747).

prewritten software, has significant functionality and price, can be accessed from any place where there is internet access, and can be used for unlimited time during the contract period.

In citing these cases, petitioner argues that it did not transfer actual exclusive possession to its advertising agency customers because, while it granted them access to its software, it did not provide them with access to the binary code underlying the software. Petitioner does not say why that fact should be decisive, but presumably it is because, having not transferred that code to any one customer, petitioner is able to allow other customers to access the same software over the internet – in other words, the customer's use of the software will not be exclusive. That reasoning, however, assumes that the actual exclusive possession rule turns on a single aspect of a customer's control of tangible personal property -- its ability to exclude others. That was not the approach of the Court of Appeals in ***American Locker*** where, as discussed, the customer could exclude others from the locker, but was found not to have actual exclusive possession because of a lack of control over the tangible personal property -- the customer lost the ability to lock the locker upon opening it even once during the 24-hour storage period. Petitioner's crabbed approach to exclusive possession also differs from the approach taken by the Court of Appeals in ***American Locker*** where, as discussed, the customer could exclude others from the locker, but was found not to have actual exclusive possession because of a lack of control over the tangible personal property -- the customer lost the ability to lock the locker upon opening it even once during the 24-hour storage period. That "exclude others" factor also would not explain the nontaxable outcome in ***Bathrick*** and ***Hosp. Tel. Systems*** where the customer had exclusive possession of the coin-operated amusement devices and televisions at issue there during the period of time covered by the coin he or she inserted. In short, the cases cited do not

offer persuasive support for petitioner's narrow view of the scope of the actual exclusive possession rule.

Petitioner's argument also contravenes the case relied on by the Division, ***Towne-Oller***. There, the Third Department ruled as follows:

> "The last issue which needs to be addressed herein is whether petitioner's use of computer time is subject to sales tax. Petitioner rents computer time from another company, Universal Car Loading and Distribution, Inc. (Universal). Petitioner sends its employee to operate the computer. When the computer is used by Universal at the same time, petitioner is charged one half the fee. At times petitioner is ordered to stop its use of Universal's computer when Universal has need of it. Respondent found that petitioner's use of the computer was subject to sales tax and, after an audit, issued a notice of deficiency.
>
> Petitioner contends that it is not subject to a sales tax for use of the computer, relying on 20 NYCRR 526.7 (e) (4) and (5). We disagree. Petitioner's use of Universal's computer is a transfer of possession within the definition given by the regulations. Merely because Universal may cease petitioner's use of the computer does not change the character of the transfer of possession which occurs on the use thereof by petitioner's employee" (***Towne-Oller & Assocs.***, 120 AD2d at 875).

Thus, the Appellate Division found there to be a taxable sale of computer equipment in ***Towne-Oller*** even though the court acknowledged that at times Universal used the computer at the same time its customer used it. This contradicts the crux of petitioner's argument that, unless a customer is the only party allowed to use an item of tangible personal property, there is no sale, regardless of all other circumstances. Petitioner did not address the case in its reply brief.

When the advertising agency transactions are viewed broadly, as the Court of Appeals appears to have done in considering the taxability of the coin-operated lockers in ***American Locker***, it is apparent that the actual exclusive possession standard is met here. Petitioner's contracts with the advertising agencies are large-dollar contracts ranging between a month and a year in duration, which allowed the advertising agencies to access petitioner's prewritten software from their own offices. According to Mr. Koudsi, petitioner's software platform

allowed the agencies to optimize the marketing budgets of companies owning national brands. To do such allocations, the agencies would obviously have to be able to enter information into databases and use the software to perform different analyses on that information, while being able to store all the entered information and analyses in a secure account. For this reason, for example, under the McCann contract, petitioner obligated itself to supply ID numbers to authorized users and allow those users to set up passwords. In giving its advertising agency customers secure accounts to use sophisticated software as they see fit, petitioner has transferred sufficient "actual exclusive possession" of the software to those customers, such that petitioner's advertising agency contracts qualify as taxable sales of tangible personal property for sales tax purposes (***see American Locker***; ***Towne-Oller***).

M. Petitioner asserts that the invoices issued to McCann, RSCG, Havas, and Ogilvy are for its advertising agency product. Petitioner introduced the contracts corresponding to the RSCG, Havas, and McCann invoices, and a review of those contracts shows that they are indeed for petitioner's advertising agency product, as described. Thus, petitioner's invoices to those companies during the audit period are found to be subject to sales tax.

N. The analysis for the Ogilvy invoices is different. The contract petitioner introduced for Ogilvy was dated November 19, 2014, and thus did not correspond to the 2010 invoices found taxable by the auditor. Petitioner did not offer to obtain the correct contract and introduce it into the record or explain its unavailability. The description on the invoices of the services performed is not sufficiently clear to know the primary function of the services being sold (***see*** finding of fact 53), although the invoice dated December 14, 2010, with its reference to "RapidROI for Caesar's Entertainment SOW#3 . . . for Acquire and Load Data, Econometric Modeling, and Analysis of Models & Report Generation" does not appear to support petitioner's

claim that the service being sold was its advertising agency product, which did not involve any modeling. While Mr. Koudsi testified that petitioner's 2014 contract was typical of its advertising agency contracts, he did not claim to know about petitioner's 2010 transactions with Ogilvy, which was before he started working for petitioner. In sum, petitioner failed to prove the nature of the services reflected by the Ogilvy invoices held taxable by the Division and thus the Division's conclusion that those invoices are taxable is sustained, regardless of the ultimate disposition of the taxability of petitioner's provision of prewritten software discussed in conclusion of law L (***see*** Tax Law § 1132 [c] [1]).

O. The petition, as set forth in conclusions of law F and H is granted, and the Division is directed to revise the notice of determination in accordance with those conclusions of law; otherwise the petition is denied, and the notice of determination is sustained.

DATED: Albany, New York
December 3, 2020

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE