

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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

Petitioner, Dynamic Logic, Inc., (by Kantar LLC, as successor-in-interest), filed 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 September 1, 2011 through August 31, 2014.

A hearing was held before Barbara J. Russo, Administrative Law Judge, in New York, New York, on November 6, 2019 at 10:30 a.m., with all briefs to be submitted by July 17, 2020, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Mayer Brown LLP (Amy F. Nogid, Esq., and Leah Robinson, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly determined that petitioner's services constitute an information service subject to tax pursuant to Tax Law § 1105 (c) (1).

FINDINGS OF FACT¹

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

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

3. During the period at issue, the services Dynamic Logic offered its clients included AdIndex, CrossMedia, Dynamic Tracking, FanIndex, Link, and Digital Tracking (collectively referred to as services).²

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

“Adindex is a research solution that uses a control/exposed methodology to measure the effectiveness of digital advertising at communicating brand messaging. One AdIndex study will measure one specific digital campaign with one or more creatives on a site or network of sites. It includes the use of ADSCOUT tracking technology as well as the survey technology and related

1 The parties entered into a joint stipulation of facts with attached exhibits that were jointly introduced into the record in this proceeding. The relevant stipulated facts have been incorporated herein.

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

online results. The basic AdIndex study consists of one standard survey, two or more flexible survey questions, and two cells (Control, Exposed) with a total of 600-800 respondents. Dynamic Logic provides the account management for overseeing the study and recruitment of respondents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The contract further provides that the deliverables for the CrossMedia Management

Presentation for each CrossMedia study includes:

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

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

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

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

8. Digital Tacking is described in the contact as:

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

Digital Tracking can include the use of Dynamic Logic’s ADSCOUT text code tracking technology as well as its survey technology. Dynamic Logic provides the account management

for overseeing the study and recruitment of respondents as well as research support for designing and programming the survey and analyzing results.

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

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

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

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

allow a website to obtain a text file based on the user's visit to that website. The client must obtain permission from the website to place the cookies and send survey invitations.

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

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

15. Dynamic Logic retains the rights to copy, distribute, resell, modify and otherwise use the data it collects from end users through the performance of its services for clients and may use the data in connection with Dynamic Logic's MarketNorms database. However, Dynamic Logic may not disclose the data in a manner that identifies the client or its affiliates.

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

17. MarketNorms is a database of anonymized and aggregated results from AdIndex and mobile studies that can be used for benchmarking purposes. MarketNorms uses the campaign effectiveness results of AdIndex clients to calculate a normative score that is used as a benchmark to compare results. The normative score allows clients to understand how the effectiveness of their advertising campaign compares in relation to industry peers. The MarketNorms database is not publicly available; clients must pay a subscription to access the database. Additionally, AdIndex clients receive a comparison of the client's specific advertising campaign to the MarketNorms benchmarking data.

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

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

<u>Service</u>	<u>Asserted Adjusted Tax Due</u>
AdIndex	\$1,986,856.49
CrossMedia	\$480,468.31
Dynamic Tracking	\$90,994.75
FanIndex	\$5,825.55
Link	\$103,749.93
Digital Tracking	\$29,098.73
Other	\$46,888.55
Total Tax at Issue	\$2,743,882.31

CONCLUSIONS OF LAW

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

“The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons. . . .”³

Regulations of the Commissioner of Taxation and Finance, at 20 NYCRR 527.3, in relevant part, provide that “[t]he collecting, compiling or analyzing information of any kind or nature and the furnishing reports thereof to other persons is an information service” (20 NYCRR 527.3 [a] [2]) and identify taxable information services to include “credit reports, tax or stock market advisory and analysis reports and *product and marketing surveys*” (20 NYCRR 527.3 [a] [3], emphasis added).

B. Tax Law § 1105 (c) imposes tax only on certain specifically enumerated services (*see Matter of Rochester Gas and Electric Corp.*, Tax Appeals Tribunal, January 4, 1991). Accordingly, whether a service is taxable as one of these specifically enumerated services is properly construed pursuant to the rule applicable when determining whether a transaction is subject to taxation at all (*see Matter of Grace v New York State Tax Commn.*, 37 NY2d 193 [1975], *lv denied* 37 NY2d 708 [1975]); that is, construed most strongly against the government and in favor of the citizen (*see Matter of Building Contractors Association v Tully*, 87 AD2d 909 [3d Dept 1982]). This rule of construction stands in contrast to the rule with respect to exemptions from tax, i.e., strictly and narrowly construed against the taxpayer (*see Matter of*

³ In 1990, Tax Law § 1105 (c) was expanded by the addition of paragraph nine so as to impose tax upon the receipts from every sale, except for resale, of an information service that is provided via telephony or telegraphy (Tax Law § 1105 [c] [9] [i], as added by L 1990, ch 190, eff September 1, 1990). Section 1105 (c) (9) (i) provides that “in no event (i) shall the furnishing or provision of an information service be taxed under this paragraph unless it would otherwise be subject to taxation under paragraph one of this subdivision if it were furnished by printed, mimeographed or multigraphed matter.”

International Bar Assn. v Tax Appeals Trib., 210 AD2d 819 [3d Dept 1994], *lv denied* 85

NY2d 806 [1995]). Nevertheless, even with such a construction, petitioner bears the burden of proof in this proceeding and it must show that the service it provides is not one of those set out in Tax Law § 1105 (c) (*see* 20 NYCRR 3000.15 [d] [5]).

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

“has been interpreted to mean ‘the sale of the service of furnishing information by a business whose function it is to collect and disseminate information which is taxable under Tax Law § 1105 (c) (1) and not the mere sale of information’ In order to determine a service’s taxability, the analysis employed by the New York courts and the Tax Appeals Tribunal focuses on the service in its entirety, as opposed to reviewing the service by components or by the means in which the service is effectuated” (citations omitted).

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

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

D. Petitioner argues that its primary function is to provide consulting services. However, the evidence shows that contrary to petitioner's argument, its primary function is to collect information regarding the effectiveness of its clients' advertising by conducting surveys, analyze that information, and furnish that information and analysis to its clients via reports. Specifically, petitioner's obligations to its clients pursuant to the contract are to use tags and cookies to collect data that show when an advertisement is viewed, to then conduct surveys to gather information from respondents who either viewed or did not view the ads, to compile and analyze that information, and then disseminate that information via a "management presentation" to its clients. The contract presented into the record by the parties, which petitioner stipulates is illustrative of its contracts during the period at issue, shows that petitioner's services fall squarely within the realm of Tax Law § 1105 (c) (1). The process of collecting, compiling and analyzing information is the very essence of an information service and product and marketing surveys are specifically listed as an example of an information service in the regulations (*see* Tax Law § 1105 (c) (1); 20 NYCRR 527.3 [a] [2])).

The information collected by petitioner is integral to its function, and without the collected data, petitioner would have nothing to analyze and report to its clients. As explained by petitioner's witnesses, Dynamic Logic's clients want to know how well their advertising campaigns are performing. Petitioner gathers information on the advertisement's performance

using its data collection techniques, including its use of tracking and survey technology, analyzes the data collected, and then furnishes its analysis of the information to its clients. This function and process clearly fall within the realm of Tax Law § 1105 (c) (1) and its language of “collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons . . .”.

E. In concluding that petitioner’s service is an information service as enumerated in Tax Law § 1105 (c) (1), the next issue to be addressed is whether the service falls within the exclusion contained in that section as “the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons” (Tax Law § 1105 [c] [1]). As noted above, exclusions and exemptions must be narrowly construed against the taxpayer (*see Matter of Wegmans Food Mkts., Inc. v Tax Appeals Trib. of State of NY*, 33 NY3d 587 [2019]).

In determining whether the information is personal or individual in nature, the source of the information is controlling (*see id.*). In *Matter of Wegmans*, the petitioner engaged the services of RetailData, LLC (RetailData) to monitor competitors’ retail prices through competitive price audits as part of its pricing strategy. Wegmans selected the products, time periods covered and locations of specific competitors for RetailData to surveil. RetailData’s data collectors then traveled to the specified locations and collected information by scanning prices from the store shelves using scanners or smart phones. After collecting the prices, RetailData validated the information, created reports and furnished the reports to Wegmans. The competitive price audits and resulting reports were kept confidential to prevent Wegman’s competitors from discovering the products it monitors and its pricing strategies. In affirming the Tribunal’s decision that the information was not personal or individual in nature, the Court of Appeals found that:

“The information that RetailData compiled and the reports furnished to Wegmans derived from a non-confidential and widely-accessible source, the supermarket shelves of Wegmans’s competitors. There is nothing about the information itself that is personal or individual in nature. RetailData simply collected the prices of products at grocery stores and compiled that information into reports which it furnished to Wegmans. The 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. Moreover, in these circumstances, it was rational for the Tribunal to determine that RetailData’s customization of the publicly-available information it collected from supermarket shelves into a report format did not render the furnished information personal or individual in nature....” (*Matter of Wegmans Food Mkts., Inc. v Tax Appeals Trib. of State of NY* at 595, citations omitted).

Unlike the publicly available source that information was derived from in *Matter of Wegmans*, the information gathered by petitioner for its clients in this matter was not publicly available or widely accessible. Rather, the information was obtained using petitioner’s patented tracking and survey technology. In order to collect the information using the tracking and survey technology, petitioner’s clients needed to obtain the necessary permission and authorization from the advertisers and websites in order for petitioner to apply the tags and cookies, and to conduct the surveys with the website viewers. As explained in the testimony, a person cannot simply drop a cookie on the internet. Nor could any member of the public randomly tag an advertisement to see how many visitors to a site viewed it or invite them to take survey. The information could only be gathered by obtaining the necessary permission in order to use petitioner’s specially developed tracking and survey technology. As such, the source of the information was not publicly available, but was personal and individual in nature.

F. In determining that the information was personal and individual in nature, the next question as to whether the exclusion applies is whether the information “is not or may not be substantially incorporated in reports furnished to other persons” (Tax Law § 1105 [c] [1]).

With regard to the AdIndex studies, petitioner argues that the “information” furnished is the AdIndex study, not the underlying data collected. This argument is rejected. As discussed above, the information collected, compiled, analyzed and furnished to petitioner’s clients is the information that petitioner obtains through its tracking and survey technology.

Petitioner further argues that AdIndex and CrossMedia studies are not substantially incorporated into reports provided to others and points to its witness’s testimony that information obtained from CrossMedia studies is not included in the MarketNorms database. However, this testimony is contradicted by the contract, which provides that for all of the services offered by petitioner, Dynamic Logic retains the rights to copy, distribute, resell, modify and otherwise use the data it collects from end users through the performance of its services for clients and may use the data in connection with its MarketNorms database, so long as it does not disclose the data in a manner that identifies the client or its affiliates. Additionally, Dynamic Logic’s clients may furnish the data and information collected through petitioner’s services in the client’s own reports to the public and its clients.

Thus, petitioner’s argument ignores the portion of the language in the exclusion that states “*or may not be* substantially incorporated . . .” (Tax Law § 1105 [c] [1], emphasis added). Petitioner’s contract shows that the information obtained from any of petitioner’s services *may be* substantially incorporated into reports furnished to others. As such, petitioner has failed to meet its burden of proving that the exclusion applies to its services. Accordingly, petitioner’s services are taxable information services that do not qualify for the exclusion.

G. The petition of Dynamic Logic is denied and the notice of determination dated March 20, 2017, as recomputed in accordance with finding of fact 19, is sustained.

DATED: Albany, New York
January 14, 2021

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE