

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>LENDER CONSULTING SERVICES, INC.</b>	:	DETERMINATION
	:	DTA NO. 829198
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period June 1, 2014 through	:	
May 31, 2017.	:	

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Petitioner, Lender Consulting Services, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period June 1, 2014 through May 31, 2017.

A hearing was held in Albany, New York, before Nicholas A. Behuniak, Administrative Law Judge, on November 12, 2020, with all briefs to be submitted by June 2, 2021, which date began the six-month period for issuance of this determination. Petitioner appeared by Hodgson Russ LLP (Joshua K. Lawrence, Esq. and Joseph N. Endres, Esq., of counsel), and the Division of Taxation appeared by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel).

***ISSUE***

Whether charges for petitioner’s subject reports constitute taxable information services under Tax Law § 1105 (c) (1).

***FINDINGS OF FACT***

Petitioner, Lender Consulting Services, Inc., submitted 41 proposed findings of fact, which have been incorporated substantially into the facts below, except part of proposed findings 14, for which petitioner failed to provide any citation in support of the requested fact, and 16,

which appears to be a quotation of federal law and is legal argument. The Division of Taxation (Division) submitted a brief but submitted proposed findings of fact in a narrative format without numbering any of the proposed findings of fact. Since the Division did not separately number each proposed finding of fact, they have not been ruled upon as such. However, with certain modifications, they have generally been accepted.

1. Petitioner is an environmental, valuation, and real-estate consulting firm based in Buffalo, New York.
2. Petitioner's clientele consists almost exclusively of banks and financial institutions. Ninety-five percent of clients who utilize petitioner's services are banks and financial institutions making loans secured by commercial real estate. Such companies rely on petitioner for solutions relating to financing real-estate transactions, including consulting and advice on regulatory compliance and environmental risk.
3. Petitioner's services include real-estate valuation, construction-related consulting, and environmental due diligence services. Petitioner's environmental services include advising lenders on risk-management policies, developing internal environmental risk policies, conducting environmental risk assessments on commercial properties, assisting with compliance and peer review of environmental investigations, and handling remediation of contaminated sites.
4. Petitioner offers several levels of environmental risk assessments designed to evaluate potential environmental contamination on a parcel. These include Phase I Environmental Site Assessments (Phase I), Transaction Screen reports, and three forms of "EAQuick" assessments. Specifically, the three EAQuick risk assessments are the "EAQuick Opinion" reports, "EAQuick Loan Check" reports, and "EAQuick Loan Check Plus" reports.

5. Meg Battin, petitioner's chief operating officer, who has worked in the environmental due diligence field for more than 30 years, testified at the hearing regarding the role environmental risk assessment and due diligence account for in the commercial lending industry and what factors would dictate the level of professional environmental review a lender would require to evaluate risk associated with real-estate backed loans.

6. The potential for environmental contamination on a parcel poses a significant risk and compliance issue for lending institutions making loans secured by commercial real property. First, the cost of remediating a contaminated parcel can directly impair the borrower's ability to repay a loan or to continue to operate a business on the property. Second, contamination on the site could result in the devaluation of the property and affect its marketability, which is a significant concern if a lender is forced to foreclose on property and attempt to sell it. Additionally, a lender forced to abandon or foreclose on a contaminated parcel could become liable itself for the cost of environmental clean-up on the site, and could face additional exposure to potential third-party damage claims resulting from the contamination. Finally, if a federal or state government agency is required to intervene to remediate a parcel, the agency can place a lien on the property superior to the lender's lien.

7. To assess and address these types of risks before accepting commercial real-estate as collateral, lenders are obligated to engage in some level of environmental due diligence and risk assessment. For this reason, lenders generally adopt their own internal environmental risk management policies dictating what level of environmental investigation is required on particular loans and parcels. Regulatory bodies such as the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC) and the National Credit Union Association

(NCUA), require such internal environmental risk policies and procedures as a compliance matter.

8. Certain lenders lack the resources to retain sufficient in-house personnel with the expertise necessary to handle environmental risk management and compliance internally, and thus depend on outside consultants to assist in the evaluation of environmental risk associated with the loans they underwrite.

9. Factors affecting the level of risk assessment a lender requires may include whether the loan is a new loan or a refinancing of an existing loan, whether the lender is considering foreclosing on a property, the dollar amount of the loan, the current use of the property and whether the Small Business Administrations (SBA) is involved in the loan.

10. Many lenders adopt or follow the SBA's standards for environmental investigations when determining what level of environmental investigation should be undertaken depending on the parcel or the requested loan. Those standards are set forth in the SBA's Standard Operating Procedure (SOP) for governing environmental investigations for lender and development company loan programs. Compliance with SBA standards is also mandatory on any loans guaranteed by the SBA. According to the SOP:

“SBA requires an Environmental Investigation of all commercial Property upon which a security interest...is offered as security for a loan or debenture. The type and depth of an Environmental Investigation to be performed varies with the risks of Contamination. This paragraph provides minimum standards. Prudent lending practices and internal bank policy may dictate additional Environmental Investigations or safeguards” (Small Business Association Standard Operating Procedure 50 10 5 [J]).

11. Petitioner's EAQuick reports, Transaction Screen reports and Phase I reports are designed to address varying levels of investigation.

12. One factor that can influence the level of environmental investigation necessary on a parcel of real estate is whether current or prior use of the site was by an environmentally sensitive industry. Under the SBA standards, if the use meets one of the North American Industrial Classification System (NAICS) codes designated by the SBA as an “environmentally sensitive” industry, the lender must commence an environmental investigation with a Phase I assessment. A gas station would be an example of an “environmentally sensitive” use.

13. A Phase I report is required for prospective purchasers of commercial property to qualify for the “innocent landowner” protection and other liability limitations provided under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

14. SBA standards permit lenders on properties not on the sensitive-industry list to obtain a Transaction Screen report or what the SBA defines as Records Search with Risk Assessment (RSRA). For loans exceeding \$150,000.00, the SBA requires that any environmental investigation must begin, at a minimum, with an Environmental Questionnaire and RSRA.

15. Petitioner’s EAQuick Loan Check and EAQuick Loan Check Plus reports are designed specifically to meet or exceed the SBA’s standard for an RSRA. Petitioner’s EAQuick reports, Transaction Screen Reports, and Phase I reports involve varying levels of required review, however, all share one core aspect, which is the assessment of environmental risk by a petitioner employed qualified environmental professional based on the results of the investigation.

16. While the requirements for RSRA level reports may be governed by a lender’s internal environmental risk policy or the SBA’s standards, both Transaction Screen and Phase I reports are generally governed by American Society for Testing and Materials (ASTM) standards which have been widely adopted in the industry. Many of the core components of each report are the same.

17. The SBA standards set three components necessary for a compliant RSRA investigation:

- a) an environmental questionnaire seeking pertinent information from the current owner or operator on the property
- b) a search of government database records pertinent to the property, compliant with the ASTM standards for a Phase I report, along with a review of historical use records relevant to the property.
- c) a risk assessment by an environmental professional based on the results of the records search as to whether the property is either “low risk,” “elevated risk” or “high risk” for contamination.

The SBA also requires the resulting report be signed by the environmental professional who performed the risk assessment. If the RSRA concludes that the property is an “elevated risk” or “high risk,” the lender must proceed with obtaining a Phase I report. If the RSRA concludes the property is a “low risk”, then the lender must submit the results of the environmental investigation to the SBA with recommendations and seek SBA’s concurrence. This includes the environmental professional’s risk assessment and all of the database reports and historical records relied upon for that opinion.

18. The ASTM standard for a Transaction Screen notes that the goal of conducting such an investigation is to identify potential environmental concerns on a commercial parcel. Per the ASTM standards, the elements of a compliant Transaction Screen investigation include:

- a) A transaction screen questionnaire, generally completed by the preparer, rather than the client and involving questions posed to the property owner and any major occupants as

well as a site visit to complete the questionnaire based on visual observations of conditions on the site and adjacent properties.

b) A search and review of government environmental databases and historical sources. This includes federal and state databases including listing of sites the Environmental Protection Agency has investigated, lists of sites with reported leaks of underground storage tanks, listing of landfill sites and similar records; it also includes a review of fire insurance maps, local street directories or aerial photographs to determine industrial uses on the site or adjacent sites.

19. The ASTM standards for a Phase I environmental site assessment notes that the objective of the investigation is to identify recognized environmental conditions in connection with the property, which are defined as “the presence or likely presence of any hazardous substance or petroleum products in, on or at a property.” A Phase I investigation must be completed by an environmental professional. The Phase I standard also lists certain requisite components required for the investigation:

a) “Records Review”: This includes a review of data from a sizable list of state and federal environmental databases required to be included, ranging from lists of registered underground storage tanks to known hazardous sites previously targeted for investigation or remediation. The standard also dictates the specific radius from the subject parcel the data base search must cover. The records reviewed must also include a review of historical use information including topographical maps, aerial photographs, and local street directories. The Phase I standard states that the environmental professional shall exercise professional judgment and consider the possible releases that might have occurred at the property in light of the historical uses and, in concert with other relevant information gathered as part of the

Phase I process, use this information to assist in identifying recognized environmental conditions.

b) “Site Reconnaissance”: This involves a site visit to visually and/or physically observe “information indicating the likelihood of identifying recognized environmental conditions” on the site.

c) “Interview”: This includes interviews with present and past owners and operators, and local government officials.

d) “Report”: The report prepared by the environmental professional must include a number of elements, one of which is the “documentation” underlying the environmental professional’s findings and opinion. It must also include the environmental professional’s opinion regarding the impact of those conditions as well as an opinion regarding “additional appropriate investigation” if necessary to detect hazardous substances or petroleum products.

20. A Phase I review does not involve any soil or ground water testing or sampling.

21. One of the common elements required in all three levels of environmental assessments, in addition to some form of questionnaire or interview with the property owner or operator and a review of historical records, is the requirement to obtain a review of governmental environmental database records. Each level of report prepared by petitioner, including the EAQuick reports, includes a government database search meeting the ASTM Phase I standard as well as an analysis of that data. To obtain all records relevant to the subject parcel itself and parcels within the required radius for review, petitioner purchases database reports, sometimes called “radius” reports from third-party vendors. Petitioner is charged for, and pays, sales tax to such vendors on the purchase of the reports.



22. The radius reports can vary in volume depending on the density of commercial properties in the required radius and the nature of the area. Ms. Battin testified that a radius report for a farm business in a rural area may yield a far smaller report than that for a parcel in a dense, industrial area. The radius report is included as an attachment to petitioner's EAQuick and other environmental assessments, as are the interview or questionnaire results and historical records relied upon by the environmental professional, if applicable. Ms. Battin also testified that petitioner's risk opinion and findings are what make up petitioner's "report" and that the database or "radius" report is merely included as an attachment. No executive summary is provided to the full contents of the radius report; nor are page citations given to the radius report if one of petitioner's reports identifies a potential concern relating to a property appearing in the radius report.

23. Petitioner does not offer a service or product allowing a lender to purchase a radius report alone, without accompanying review and opinion by one of petitioner's environmental professionals.

24. In August 2018, the Division commenced a sales and use tax audit of petitioner, covering the period June 1, 2014 through May 31, 2017. Petitioner's sales were reviewed for a one-quarter test period of March through May 2016.

25. As a result of the audit, additional tax was asserted in the areas of capital expenditures, recurring expenses and sales. With regard to sales, additional tax was asserted on two of petitioner's services, petitioner's "turnkey" site-remediation services and the three categories of EAQuick reports. No additional tax was asserted on petitioner's other levels of environmental reviews and assessments, including Transaction Screens or Phase I assessments. Of the

additional tax asserted, petitioner disputed only the taxability of the EAQuick reports; thus, separate AU-346 forms were issued on EAQuick reports and on the other agreed areas.

26. On November 14, 2018, the Division issued a notice of determination (notice) asserting additional tax of \$29,273.00 representing tax on the EAQuick reports, plus interest. Penalties were not imposed.

27. The Division's auditor, James Nicholas, in his field audit report, acknowledged that petitioner is an "environmental and real estate consulting firm" offering services including solutions relating to regulatory and environmental risks.

28. With respect to the EAQuick reports, the field audit report noted that the reports were considered risk management analysis reports which consisted of public search information obtained from third party database services. The field audit report added that "[d]espite an aspect of the report consisting of professional service, the primary function is to provide risk management analysis."

29. At the hearing, the Division's auditor testified that he considered EAQuick reports to be "entry-level" reports consisting of a "compilation" of third-party data along with a "general summary analysis of that information." The Division's auditor explained that the difference between petitioner's services that were deemed taxable and those not deemed taxable was because he understood the other products were "of a consulting nature" but that the EAQuick reports were held taxable because they "primarily consisted of third-party data," the analysis "really relied solely on the information itself," and the "rating that was provided was general." When discussing the conclusion that the EAQuick reports consisted "primarily" of third-party data, he testified that the report consisted of several hundred pages with the opinion portion only consisting of a "summary narrative of the contents of the rest of the report." Asked to describe

the relation between third-party data and analysis in the products found nontaxable, the Division's auditor testified that he "didn't focus too much on the nontaxable reports," but at the time determined them to be "more in the line of consulting" or "more of a professional service report," based on an "additional level of service provided by employees of [petitioner] and the input on those reports."

30. On December 31, 2018, petitioner submitted a letter to the Division responding to the notice and remitting a partial payment, under protest, of \$35,823.87 toward the assessed tax and interest.

31. At the hearing, petitioner submitted into the record the affidavit of Keith Clearly, senior vice president and director of business banking for ESL Federal Credit Union. Mr. Clearly attested in the affidavit that he is responsible for reviewing commercial loan applications and ensuring the credit union's loans comply with necessary standards for environmental risk assessment. He attested that the credit union depends on petitioner and other environmental professionals to perform environmental investigations, and that the main purpose of purchasing any of petitioner's environmental assessment services is to "obtain the professional opinion, assessment and recommendation of a qualified Environmental Professional regarding environmental risks" associated with a property and that the Credit Union does not have sufficient in-house capacity or expertise to make such risk determinations itself.

32. In marketing EAQuick assessments, petitioner emphasizes both the fully insured nature of the reports and the significance of the review, risk opinion and recommendations by an environmental professional. In a 2018 excerpt from petitioner's website responding to new FDIC guidelines regarding the necessity of initial environmental risk analysis as part of lenders' environmental due diligence process, petitioner noted that it had developed its EAQuick reports

three years prior, precisely to meet the type of analysis recommended by the FDIC and to provide a cost-efficient level of review on a property “relative to environmental risks.”

Petitioner noted in its marketing material that the “definite distinction between our product and other offered on the market today is that we offer the opinion and recommendations of an Environmental Professional [apparent legal citation] and the report is fully insured.”

33. Petitioner carries professional liability insurance and general insurance covering errors and omissions. Ms. Battin testified that petitioner faces potential liability with respect to the risk opinions given in an EAQuick report. Ms. Battin testified that if petitioner assigned the wrong rating to a property being reviewed (e.g., “low risk” as opposed to “high risk”), petitioner could be held liable for damages and the costs of property remediation. The EAQuick reports contain disclaimers regarding petitioner’s liability, noting that the report is prepared for the exclusive use of the lender, is based on conditions at the time of the analysis and that petitioner’s liability is limited to a certain time period after the report is issued.

34. When a lender requests an environmental assessment from petitioner, whether an EAQuick Report, Transaction Screen or Phase I report, it will generally issue a “scope of work” order specifying the type of review required and what information should be included in petitioner’s review. A sample scope of work document was submitted into evidence for each type of EAQuick assessment. In each sample, the lender specifically required review by environmental professionals and a risk rating or assessment. For the EAQuick Loan Check and Loan Check Plus reports, the lender required the report be prepared in accordance with the SBA’s standard for an RSRA. The sample scope of work requests for both EAQuick Opinion and EAQuick Loan Check required that the report be prepared “with a staff of environmental professionals as defined by the EPA,” and include a risk rating.

35. Although the scope of work documents can be customized to include or exclude components to be considered in the review, the core components for each level of EAQuick assessments are generally consistent. All reports involve petitioner's review of an initial environmental questionnaire, generally prepared and supplied by the lender, which contains site-specific information from the property owner or operator regarding activities and conditions such as the presence or potential presence of underground fuel tanks on the site. All reports also include petitioner's review of the environmental database or "radius" report reviewing environmental databases for relevant information covering either the site itself or adjacent properties within the requested radius of adjacent properties. EAQuick Loan Check and Loan Check Plus reports also include petitioner's review and analysis of historical records such as Sanborn fire insurance maps, aerial photographs, past city directories, and municipal records to determine historical uses on the site and adjacent properties that could raise concerns. An EAQuick Loan Check Plus report includes a site inspection by petitioner and in some cases a lengthier questionnaire prepared by petitioner such as that required under a Transaction Screen.

36. Petitioner entered into evidence a sample report for each category of EAQuick assessment, along with internal and external email correspondence relating to the preparation of each, as well as internal timekeeping records documenting petitioner's employees involved in the report preparation. Ms. Battin provided detail on the specific properties investigated, the environmental issues identified, and associated discussions both internally and with the clients relating to each of the investigations.

37. Petitioner presented the testimony of David Crandall, petitioner's vice president and director of environmental due diligence services, who oversees a staff of 11 employees involved in preparing all of petitioner's environmental assessment reports. Mr. Crandall, a licensed

geologist (one of 6 geologists employed by petitioner) with more than 15 years of experience in the environmental field, testified as to the steps involved in completing an EAQuick assessment.

38. All of petitioner's staff that work on environmental assessments work across all three levels (EAQuick assessments, Transaction Screens and Phase I reports). While an employee other than a qualified environmental professional can work on an EAQuick assessment, every report must be reviewed and signed by an environmental professional. However, any employee participating in an environmental assessment would have at least a bachelor of science degree in environmental or related science.

39. Mr. Crandall explained that a potential environmental concern could arise from the review of any of the sources specified for the review, including the initial order or site questionnaire from the client describing activities or structures on the site, historical records such as Sanborn fire insurance maps and municipal records showing past uses on the site, or records in the database report relating to reported releases, registered underground tanks and other relevant data from governmental sites.

40. Mr. Crandall testified that, while issues like the current or historical presence of an underground storage tank on the property or a reported release of substances on an adjacent property might be noted on petitioner's report, the mere presence of such items in the sources reviewed will not automatically affect the risk-level assigned to the parcel. For example, Mr. Crandall explained, confirmation in the initial questionnaire that an underground storage tank exists on the property would not necessarily affect the risk opinion without further investigation. According to Mr. Crandall, the preparer would need to rely on information such as whether tank-tightness testing had been completed, what type of materials are stored and where the type of tank is in its useful life. Similarly, a review of historical maps and city directories, sometimes as

far back as 1940, might reveal a prior on-site or adjacent use as a gas station. However, although that might be mentioned in the report, whether it affected the risk opinion would depend on an analysis of information in a radius report or other sources to determine the likelihood of that use posing a potential risk of contamination. Finally, if the database contains mention, for example, of a sensitive use or actual release on a nearby property within the applicable radius, factors such as the history or regulatory involvement, the types of materials stored and how they were stored and the relative elevation of the property to the subject property and the nature of the contaminant itself would need to be evaluated to determine whether that created a potential environmental concern sufficient to affect the risk opinion. Mr. Crandall noted that his training as a geologist assists in evaluating factors such as the potential migration of contaminants from an adjacent site to the subject site.

41. Prior to taking the collateral of a loan, petitioner's customers seek petitioner's services to determine if there are any environmental impairments or concerns associated with the property in question. According to the field audit record, petitioner "helps cover the compliance requirements and concerns when dealing with the sale, purchase, or development of real property. The evaluation and management of the environmental risks and concerns and property condition assessments may affect bank loan status, governmental regulations, property value, and safety."

42. The Division's auditor determined that the EAQuick reports "consist primarily of information obtained from database or public records services and some level of analytical input may be incorporated."

43. All EAQuick reports involve a review by petitioner of an initial environmental questionnaire and a review by petitioner of databases for relevant information covering the property and adjacent locations within a specific radius.

44. The Division's auditor testified that the report consisted mainly of historical aerial photographs, Sanborn maps, municipal directory listings, and similar common databases of public information. Petitioner also contacts local municipalities to obtain copies of assessment records to include in the report.

45. Every document that is reviewed by petitioner is included with the report sent to clients.

46. In the limitations section of the sample EAQuick Loan Check report entered into the record, the report states: "[the report] should not be used by the parties hereto as a decision tool in reaching a decision to purchase the property or to seek shelter under the Innocent Landowner Defense of CERCLA." The limitations section also notes: "[t]his report was prepared using property information provided by [the lender], data, information, and references available from federal, state, and local governmental agencies and information supplied by knowledgeable parties, relying in large part on owner or occupant interviews. [Petitioner] neither assumes nor accepts any liability for the completeness or accuracy of information gained from these sources or for any misstatement or misrepresentation of facts from the parties interviewed during this process."

47. Of the sample EAQuick reports entered into evidence, it appears as if the summary and opinion portion of the reports takes up approximately one to two pages of the reports, whereas the supporting documentation takes up approximately one hundred to several hundred pages of the reports.

***SUMMARY OF THE PARTIES' POSITIONS***



48. Petitioner asserts that it acquires a substantial amount of information and documentation regarding a property at issue; however, such is support for the summary and opinion ultimately provided by one of petitioner's environmental specialists. Petitioner argues that the analysis and opinion of the environmental specialist is the primary element that clients seek from the reports at issue.

49. The Division asserts that the main value of the reports at issue is the collection and dissemination of the underlying supporting documentation obtained by petitioner. The Division argues that the vast majority of the final product sent to clients is made up of documentation and information and the professional's summary and opinion portion of the report is a very small component of the larger whole of the final report. In essence, the Division argues that petitioner's professional summary and opinion of all the data accumulated on a property is not the primary thing sought by clients who are purchasing the reports from petitioner. The Division's view is that petitioner's primary function is that of a conduit or reseller of underlying supporting documentation and information the environmental expert uses in making a conclusion regarding the property at issue. In addition, the Division asserts that the EAQuick reports at issue are comprised of information that is derived from sources that are publicly available, widely accessible, and not confidential, and therefore not personal or individual in nature and thus subject to taxation.

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

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

“The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of

information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, and excluding the services of advertising or other agents, or other persons acting in a representative capacity, and information services used by newspapers, electronic news services, radio broadcasters and television broadcasters in the collection and dissemination of news, and excluding meteorological services.”

B. In questions of statutory interpretation where the issue is the imposition of a tax, the statute cannot be read to allow the government to tax anything more than the clear terms of what the statute allows (*see Matter of Grace v New York State Tax Commn.*, 37 NY2d 193 [1975], *lv denied* 37 NY2d 816 [1975]; *Matter of Debevoise & Plimpton v New York State Dept. of Taxation & Fin.*, 80 NY2d 657 [1993]; *Wegmans Food Markets, Inc. v Tax Appeals Tribunal of the State of NY*, 33 NY3d 587 [2019]).

C. In determining whether a service is taxable under section 1105 of the Tax Law, the analysis “focuses on the service in its entirety, as opposed to reviewing the service by components” (*Matter of SSOV '81 Ltd.*, Tax Appeals Tribunal, January 19, 1995). “[T]he mere fact that information is transferred will not create a taxable event” or convert an otherwise nontaxable service into a taxable service (*id.*). Moreover, when determining the taxability of integrated services, such as the ones in question in this case, taxability is determined based on the service’s primary function (*id.*, *see also Matter of Audell Petroleum v New York State Tax Commn.*, 69 NY2d 818 [1987], *Rochester Gas and Electric Corp.*, Tax Appeals Tribunal, January 4, 1991).

Petitioner points out that the Division itself has acknowledged this concept in policy guidance on services, specifically recognizing that:

“Whether a service qualifies as an information service depends on its primary function... The Tax Department will determine a service’s primary function on an examination of the nature of the service being sold and what is being paid for by the purchaser” (TSB-M-10[7]S, July 19, 2010).

The Division again more recently acknowledged this concept noting that “[g]enerally, taxability of an integrated service... is determined based on the service's primary function” (TSB-A-20[49]S, October 27, 2020).<sup>1</sup>

The Division asserts that “[t]he sole value of the reports in question are the information that [petitioner has] gathered to provide to [p]etitioner’s customers in allowing the customer to assess their own levels of environmental due diligence and risk management.” The Division bases this conclusion in large part on the auditor’s determination that the girth of the documentation provided in the reports is documentation obtained from third parties and not the analysis performed by petitioner.

“Environmental risks are a significant concern in many real estate transactions and lenders today ignore the requirements of environmental laws at their peril” (Patrick J. Rohan, *Real Estate Financing - Text, Forms, Tax Analysis*, Real Estate Transaction Series, LexisNexis Matthew Bender, Volume 5, § 4D). “Of first and foremost concern for many lenders is the direct risk of liability for cleanup of environmental contamination at mortgaged property” (*id.*). It is a common practice for commercial mortgage lenders to require a third-party environmental specialist’s analysis and opinion regarding a property for which a lender is contemplating taking a collateral interest in (*see Real Estate Financing - Text, Forms, Tax Analysis*, Volume 4B, § 3E Loan Closing Checklists). This conclusion is buttressed by the representations made in the affidavit of a senior vice president and director of business banking for a lending institution, wherein he expressed that the financial institution’s main purpose in purchasing petitioner’s, and

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<sup>1</sup> An advisory opinion is a written statement issued on behalf of the Commissioner of Taxation and Finance (Commissioner) regarding the application of the Tax Law to a specific set of facts. Advisory opinions are not binding on the Commissioner except with respect to the person to whom the opinion is issued (Tax Law § 171 [24]). Advisory opinions have no precedential value but may provide some guidance to similarly situated taxpayers (*Matter of DZ Bank*, Tax Appeals Tribunal, May 11, 2009).

other environmental specialists', reports was to obtain a professional opinion regarding the environmental status of a property (*see* finding of fact 31). The opinions in petitioner's reports are completed by environmental professionals and they provide financial institutions an experts' environmental analysis and review of the documentation and information gathered that pertains to a property. The financial services industry is highly regulated, and it appears that inclusion of the backup documentation for the opinions found in the reports is a regulatory requirement and also necessary for petitioner to justify the opinions it reached. The fact that petitioner includes the backup documentation used in making its opinion expressed in the report does not change the main purpose of the report. An analysis to identify potential environmental concerns on a commercial parcel and opine on such are the most important element of petitioner's reports and what client financial institutions are primarily paying for.

Viewing petitioner's subject reports in their entirety, their primary function is to provide financial institutions with a qualified environmental professionals' review and opinion regarding the potential environmental risks on a parcel of property.

The Division also asserts in its brief that since the limitations section of the sample EAQuick Loan Check report entered into the record states that: "[the report] should not be used by the parties hereto as a decision tool in reaching a decision to purchase the property or to seek shelter under the Innocent Landowner Defense of CERCLA," such is evidence that the opinions in the reports have no real value.<sup>2</sup> In its reply brief, petitioner attempts to dismiss this argument by asserting that the provision in question is addressed to the potential mortgagee owner/purchaser of the property who may receive a courtesy copy of the report and not the financial institution purchasing the report. Petitioner's argument appears misguided. The report

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<sup>2</sup> It is noted that the Division first raises this argument in its brief which was filed after the hearing. Petitioner's chief operating officer testified at the hearing but was not questioned on the purpose of this provision.

is an arrangement between petitioner and a financial institution purchasing it, thus those are “the parties hereto” noted in the limitations section. Under CERCLA, a lending institution mortgagor can potentially expose itself to significant increased liability by, among other tactics, taking possession of the property at issue (*see Real Estate Financing - Text, Forms, Tax Analysis*, Volume 5, § 4D). As noted, the report is in fact prepared by petitioner for a financial institution potential mortgagor client; the limitation provision appears to attempt to limit petitioner’s potential exposure to environmental liability claims should the mortgagor decide to take possession of the subject property, or use some other more aggressive tactic, against a mortgagee if a default on the underlying loan occurs. This attempted limitation on liability does not affect what the primary purpose of the report is and thus the Division’s argument in this regard is rejected.

D. Because petitioner’s EAQuick reports at issue have already been found to be primarily for nontaxable environmental analyses and opinions, the Division’s assertion that the reports are comprised of information that is derived from sources that are publicly available, widely-accessible, and not confidential, and therefore not personal or individual in nature and thus not subject to taxation under Tax Law § 1105 (c) (1) is moot. However, for completeness such argument will be addressed.

In its brief, the Division asserts that petitioner has not adequately demonstrated that the reports at issue are personalized or individualized in nature and that the information gathered is not publicly available. Petitioner responds that property owner/operator questionnaires used in the reports do meet these requirements and thus separately shield the reports from taxation.<sup>3</sup>

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<sup>3</sup> It is noted that both parties concentrated their efforts on what the primary purpose of the reports in question are in determining their taxability. The Tax Law § 1105 (c) exclusion for information that is “personal and individual in nature” argument is not extensively briefed by either party to this matter.

It appears that most of the information acquired by petitioner for use in the reports come from publicly available databases. In addition, the owner/operator interviews and questionnaires obtained appear to be documents and information that also are readily accessible by other parties, especially by other lending institutions considering providing funding to the property owner. Likewise, other parties, including other lenders, may request, and obtain, the same report for the same property location. Petitioner argues that the limitations section of the reports limits the use and reliance of the reports to a limited period of time and thus a subsequent lender considering the property may get a different report because conditions affecting a site are constantly subject to change. This argument is not compelling; a report may have a limited useful life span, but every lender would be getting similar reports based upon the time period the reports were ordered from petitioner. Also, the fact that courtesy copies of the reports are typically provided to parties other than petitioner and its client, the lending institution, supports the finding that the reports are not proprietary.

The publicly accessible nature of almost all, if not all, of the information gathered and the accessibility to acquisition of the same reports and opinions by any lender wishing to purchase such lead to the conclusion that the subject reports and related supporting documentation are not entitled to be excluded from taxation as sufficiently personalized or individualized in nature to warrant such (*see Wegmans Food Markets, Inc.*).

E. The petition of Lender Consulting Services, Inc., is granted, and the notice of determination dated November 14, 2018, is hereby cancelled.

DATED: Albany, New York  
December 02, 2021

/s/ Nicholas A. Behuniak  
ADMINISTRATIVE LAW JUDGE