

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

BREAKDOWN SERVICES, LTD.

DETERMINATION
DTA NO. 829396

for Revision of a Determination or for Refund of Sales
and Use Taxes under Articles 28 and 29 of the Tax
Law for the Periods September 1, 2007 through
February 28, 2015.

Petitioner, Breakdown Services, Ltd., 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 periods September 1, 2007 through February 28, 2015. A videoconferencing hearing was held before Winifred M. Maloney, Administrative Law Judge, via CISCO Webex on December 16, 2020, with all briefs to be submitted by July 27, 2021, which date began the six-month period for issuance of this determination. Petitioner appeared by Pillsbury Winthrop Shaw Pittman LLP (Marc A. Simonetti, Esq., and Zachary T. Atkins, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel).

ISSUES

- I. Whether the notice of determination had a rational basis.
- II. Whether the Division of Taxation erred in determining that petitioner provided taxable information services pursuant to Tax Law § 1105 (c).
- III. Whether the notice of determination violates the Internet Tax Freedom Act.

FINDINGS OF FACT

The parties entered into a stipulation of facts in connection with this matter. Such stipulated facts have been substantially incorporated into the findings of fact set forth herein.

1. Petitioner, Breakdown Services, Ltd. (Breakdown Services), is a California corporation with its headquarters in Los Angeles, California. During the period September 1, 2007 through February 28, 2015 (the audit period), petitioner had offices in the following markets: Los Angeles, New York, Toronto, and Vancouver. Petitioner filed New York State corporation franchise tax returns for the audit period.

2. Petitioner was not registered for New York State sales and use tax and did not file sales and use tax returns for the period September 1, 2007 through February 28, 2015.

3. Petitioner has operated in the New York market since 1979.

4. Petitioner presented the testimony of Gary Marsh, President and Chief Executive Officer (CEO) of Breakdown Services. As of the date of the hearing, Mr. Marsh has worked for Breakdown Services for 49 years. As president and CEO of Breakdown Services, Mr. Marsh oversees all the operations of the company. He makes “the decisions on what the company does” and “the direction the company goes.” Mr. Marsh testified about petitioner’s business operations.

5. Prior to Breakdown Services, Mr. Marsh was an actor who had screen, theatrical and television roles. After graduating from high school in 1971, Mr. Marsh began going to studios in Los Angeles to read scripts and make notes about the available roles for his mother, a talent agent, for gas money. Mr. Marsh also hoped that he “might get cast in more parts by being seen on the studio lot.” In October 1971, Mr. Marsh was at a studio reviewing a script for a *CHIPS* episode. At the time, there was only one script available, and another talent agent wanted him to

hurry up and finish his review so she could see the script. Mr. Marsh offered to carbon his notes for her. The talent agent then asked Mr. Marsh what other studios he was going to that day. Mr. Marsh offered to give her a copy of his notes for the day for \$20.00 in gas money for the week. When he delivered the typed notes to the agent at the end of the week, she told him that she had talked to some agent friends of hers and they all wanted Mr. Marsh to call them. At that point in 1971, Mr. Marsh began the service. Once the studios found out that he was reviewing scripts as a business, not just for his mother, he was barred from “every lot in town on the same day.” Eventually, he was again able to review scripts and provide a synopsis of the available roles to talent agents as a business.

6. On December 30, 1976, Breakdown Services was incorporated in California. On January 1, 1979, Breakdown Services began doing business in New York State, when it opened a branch office in New York City. In 1986, Breakdown Services opened a branch in Canada, in Vancouver, British Columbia. Subsequently, in 1988, Breakdown Services opened an office in Toronto, Canada.

7. According to Mr. Marsh, petitioner’s business fundamentally changed with the advent of the internet. Mr. Marsh testified that:

“With the coming of the internet, I had to remake the business, literally, to stay relevant. And in order to stay relevant, it was necessary to essentially change the business model so that the agents now, instead of messengering pictures and resumés based on the breakdown, we now – in 2006, we launched our first website allowing for agents and managers to submit electronically.

In 2002, we came out with the foundation of what is our current day system, by which agents receive breakdowns electronically. They would log in, see the breakdowns, and then they would go through their talent that we maintained for them; their pictures, their resumés, their video clips, their entire profile, and match up the actors they represent with the available roles, and electronically submit those to casting.

So that became how the business morphed from being a brick and mortar operation to being relevant in the internet world. And that's what we do now.”

8. Breakdown Services provides an internet-based casting facilitation service that connects casting directors seeking actors for available roles in productions such as feature films, television productions, commercial projects, and theater productions with talent representatives seeking acting roles for their actor clients. Breakdown Services provides its casting facilitation service to both casting directors and talent representatives through its website, Breakdown Express.

9. Petitioner's casting facilitation service allows casting directors to post details about their projects and acting roles that they are casting and find actors (talent) for those roles. The casting facilitation service also allows talent representatives to: (i) maintain a roster of actor clients with complete profile information; (ii) view details about feature film, television, and commercial projects that are currently casting; (iii) submit actor clients for projects that are currently casting; and (iv) manage audition requests and other communications from casting directors.

10. A casting director is responsible for casting actors for acting roles, meaning selecting actors who the casting director believes would be the right actors for roles and submitting those actors to the network, studio, producer, or director, as the case may be.

11. Casting entails reviewing the actors who are submitted by talent representatives for acting roles, determining which actors to bring in for auditions, recording the actors' auditions, and submitting the auditions of actors whom the casting director selects, along with the casting director's recommendations, to the network, studio, producer, or director for consideration.

12. A casting director may be either an employee of the studio or production, or an independent contractor hired by the studio or production. Depending upon the type of

production, casting directors may cast multiple roles simultaneously. For a half-hour television sitcom, a casting director may be casting two or three roles for one episode simultaneously. For an hour-long television drama, a casting director may be casting 20 or 25 roles simultaneously. The numbers could be even higher in the case of a feature film. In many cases, the casting director, acting on behalf of the studio or production, negotiates directly with talent agents for actors' services.

13. A talent agent represents the interest of an actor, submits the actor for acting roles, and negotiates on the actor's behalf.

14. A talent manager is more focused on the actor's career development, guiding and shepherding the actor and helping the actor with his or her career choices. A talent manager may submit an actor, directly or in concert with a talent agent, for acting roles.

15. When an actor is cast in an acting role, the talent representative, who is either a talent agent or a talent manager, can expect to receive 10 to 15 percent of the actor's gross pay.

16. The number of actors a talent representative may represent varies by talent representative. Some talent representatives may represent 100 actors, while others may represent 5,000 actors.

17. To use petitioner's casting facilitation service, a talent representative must create an account on Breakdown Express. After a talent representative creates an account on Breakdown Express, the talent representative creates an actor profile for each of his or her actor clients on Breakdown Express. Petitioner can see the talent representative's roster of actors.

18. The purpose of an actor profile is to allow the talent representative to submit the actor to casting directors who are in the process of casting acting roles. An actor profile can include the following: the actor's resumé; the actor's pictures; video clips of the actor's work

(also known as a “demo reel”); and a “slateshot,” which is a seven-second video of the actor stating his or her name.

19. An actor profile may contain multiple pictures of the actor that portray different “looks.” A slateshot gives the casting director a better idea of what an actor looks like, as well as the actor’s personality, voice tone, and voice quality.

20. Some talent representatives have their actor clients complete their own actor profile on Breakdown Express. Both the talent representative and actor client may update or edit the actor’s profile on Breakdown Express.

21. Petitioner must approve any pictures of an actor before the pictures can be posted to an actor’s profile.

22. A casting director must create an account on Breakdown Express to use petitioner’s casting facilitation service, although he or she may initially submit a “breakdown” on Breakdown Express without a permanent account.

23. A breakdown is a written synopsis of an acting role within a script. It typically consists of a description of the character’s physical characteristics and personality, and an explanation of how the character relates to the plot (i.e., the character arc). A breakdown also typically includes the names of the producer and director, the start date, the location, and the story line.

24. Casting directors use breakdowns to cast acting roles through Breakdown Express. The intended audience for breakdowns is talent representatives. A breakdown gives the talent representative the ability, without reading a full script, to pair his or her clients with an acting role and submit said actors to the casting director for consideration.

25. Depending upon the location of the production, the casting director or Breakdown Services may prepare the breakdowns.

26. Usually, casting directors prepare the breakdowns for New York productions themselves. However, petitioner will occasionally create a breakdown for New York productions.

27. Breakdown Services does not own the copyright or claim any proprietary interests in breakdowns created by casting directors.¹ However, Breakdown Services does copyright all breakdowns that it creates.

The Casting Facilitation Process

28. Petitioner's casting facilitation process for New York productions consists of five steps: (i) the casting director submits a breakdown for an available acting role to petitioner; (ii) petitioner reviews the acting role description and posts it on Breakdown Express; (iii) the talent representative views the acting role description and submits his or her actor clients to the casting director for consideration; (iv) the casting director evaluates the actors submitted by the talent representative, selects actors to audition, and schedules auditions for the selected actors; and (v) the casting director presents to the network, studio, producer, or director his or her recommendations for the role (collectively, the "Casting Facilitation Process").

29. The entire Casting Facilitation Process occurs through Breakdown Express.

30. At the hearing, Mr. Marsh testified that Breakdown Services is involved in the entire process of actors getting cast for acting roles, facilitating everything from the submitting of the acting role description through the audition process.

¹ The terms "breakdown," "acting role description," and "role description" are used interchangeably herein.

Step 1: Submitting the Breakdown

31. In the first step of the Casting Facilitation Process, the casting director submits a breakdown for an acting role to petitioner.

32. Petitioner accepts acting role descriptions only for speaking roles.

33. In the case of a New York production, the casting director submits an acting role description either by completing and submitting an online casting form (a “Casting Input Form”) through Breakdown Express or emailing the description to petitioner.

34. In the Casting Input Form, the casting director specifies his or her name, the production type (e.g., feature film, television show, or theater production), union status, rate of pay or contract, start or shoot date(s), and the production location. The casting director may also provide additional production-related information in the Casting Input Form, such as interview or audition dates, callback dates, start/shoot dates, and when applicable, rehearsal dates and closing dates. In addition, the casting director provides his or her contact information in the Casting Input Form in case petitioner needs to contact the casting director; however, petitioner does not post such information on Breakdown Express.

35. The Casting Input Form is dynamic and requires different types of information depending upon the nature of the production. For a commercial, the Casting Input Form requires information about usage of that commercial because the residuals for a commercial change based upon how it is played. For a theater production, the Casting Input Form requires information about the opening and closing dates and rehearsal dates because the talent representative would have to know when the actor would need to be available. For a television production or feature film, the Casting Input Form requires information about the start date or the date the actor will be needed.

36. The Casting Input Form also requires the casting director to submit information about the role, such as the name or title, gender, age range, ethnic appearance, and descriptions of the character's physical characteristics, personality, and character arc.

37. When the casting director submits the Casting Input Form, the physical characteristics, personality, and character arc for the role are merged, and the result is the "breakdown" for that role.

38. If the casting director emails the production information and acting role description to petitioner, petitioner uploads said information into its computer system, where the information is formatted appropriately.

39. The casting director must specify the geographic region or market to which petitioner will release the acting role description. Depending upon his or her casting needs, the casting director may submit multiple acting role descriptions for the same production, with each to be released in the geographic region specified by the casting director.

Step 2: Reviewing and Posting the Breakdown

40. In the second step of the Casting Facilitation Process, petitioner reviews the acting role description and posts it, i.e., the breakdown, on Breakdown Express.

41. Once a casting director submits an acting role description by way of the Casting Input Form or email, petitioner reviews it to ensure that the casting director provided all of the necessary information.

42. Petitioner does not change the content, nature, or character of role descriptions submitted by casting directors for New York productions, but petitioner may edit grammatical mistakes or misspellings.

43. Petitioner may ask a casting director to reconsider how the role description is written if it contains a derogatory, offensive, or inaccurate representation of an ethnicity or gender, but petitioner itself does not edit the description. Petitioner advises casting directors on how to describe acting roles in a respectful manner.

44. Whether the casting director submits the role description by way of the Casting Input Form or email, petitioner merges the descriptions of the physical characteristics, personality, and character arc. The casting director must approve the breakdown before posting.

45. After reviewing the role description submitted by the casting director, petitioner posts it on Breakdown Express. However, Mr. Marsh testified that with well-known casting directors, petitioner immediately posts the breakdown after submission.

46. In all instances where it creates the role description, petitioner sends the description to the casting director for approval. Upon receiving the casting director's approval, Breakdown posts the role description on Breakdown Express.

47. Petitioner posts acting role descriptions (breakdowns) on Breakdown Express continuously throughout the day, until 10:00 p.m. Pacific Time, on weekdays and weekends.

Step 3: Viewing the Breakdown and Submitting Actors

48. In the third step of the Casting Facilitation Process, the talent representative views the acting role description and submits his or her actor clients to the casting director for consideration.

49. Because the casting process moves so fast, talent representatives monitor Breakdown Express for newly posted acting role descriptions and submit their actor clients for roles as quickly as possible. Talent representatives receive an alert whenever Breakdown posts a new role description.

50. When the talent representative logs into Breakdown Express, he or she is able to view a list of current roles, which provides such information as the date and time the role was posted, the name and type of production, the name of the casting director, the start date of the production, and the production location. The talent representative has the ability to filter the breakdowns he or she wishes to look at by project type, such as voice-over projects.

51. When the talent representative clicks on the link for a specific production, the talent representative is taken to a web page that shows the description for the acting role. After the talent representative reviews the role description, including the requirements for the role, the talent representative searches the profiles of his or her actor clients to determine which of his or her clients best match the requirements for the role.

52. When the talent representative decides to submit an actor for a particular role, the talent representative can customize the actor profile submission for that role. The talent representative can select the picture of the actor that he or she believes best matches the role. Also, the talent representative can select a demo reel from the actor's profile to submit to the casting director. In addition, the talent representative can include a note to the casting director with the actor profile submission in the hope of catching the casting director's attention and causing the casting director to view the submission more favorably.

53. The talent representative can also send a "size card" with the actor profile submission, which provides the actor's height and weight for wardrobe purposes.

54. When the talent representative submits his or her actor client for a role, the actor's profile, as customized by the talent representative, is directed to the casting director through Breakdown Express.

55. Petitioner trains each talent representative that uses its casting facilitation service on how to properly submit actor profiles for roles. A talent representative cannot use petitioner's casting facilitation service unless he or she has been trained on how to properly submit actors for roles.

56. Petitioner teaches talent representatives best practices for getting greater traction with actor submissions, including ensuring that their actor clients have updated pictures, that the pictures are not sideways, that their clients have selected a picture as a default picture, that they include a slateshot, that their clients' resumés are up-to-date and complete, and that their clients' profiles have been filled out correctly.

Step 4: Evaluating Actor Submissions and Scheduling Auditions

57. In the fourth step of the Casting Facilitation Process, the casting director evaluates the actor profile submissions and selects actors for auditions and, depending upon the circumstances, follow-up auditions (commonly referred to as "callbacks").

58. Within hours of an acting role description being posted on Breakdown Express, the casting director may receive anywhere from 200 to 500 actor profile submissions per role. By the end of the day, the casting director may receive more than 1,000 actor profile submissions per role.

59. When the casting director logs into Breakdown Express, he or she can view all actor profile submissions for each of his or her roles. Breakdown Express allows talent representatives to see when a casting director has viewed a specific actor's submission.

60. The casting director evaluates each actor profile submitted, including the actor's picture, resumé, demo reel, and slateshot, and any notes the talent representative may have

included. The casting director can rank actor profile submissions, from one to six, according to his or her interest in the actor.

61. The casting director can see if he or she has ever brought in an actor for any role in the past and, if he or she has, the casting director can view a complete history of the actor's audition history, including video recordings of such auditions, with the casting director. This allows the casting director to get a reference of his or her history with that actor.

62. The casting director can view the name and email address of the talent representative who submitted the actor for the role.

63. If the casting director selects an actor profile submission, the casting director can schedule the actor for an audition, print the actor profile, or forward the actor profile to the producer.

64. The casting director can also move an actor profile submitted for one role to a different role or duplicate the actor profile if he or she wishes to consider the actor for multiple roles.

65. The number of actors a casting director typically selects to audition for a role depends upon the type of production: for a one-hour episodic, the casting director usually only has time to audition 20 actors per role; for a television pilot, the casting director may audition 75 to 125 actors for a role; and for a feature film, the casting director may audition a few hundred actors for a role.

66. After the casting director selects actors to audition, the casting director creates an audition schedule on Breakdown Express.

67. After the casting director schedules an actor for an audition, the actor's talent representative receives a notification on Breakdown Express indicating when and where the

casting director wishes to hold the audition. The talent representative can electronically confirm the audition for his or her actor client, ask the casting director for a different time, or indicate that the actor is unavailable. After the talent representative confirms that his or her actor client is available for the audition, the actor will appear on the casting director's audition schedule as "confirmed."

68. In advance of the audition, the casting director posts "sides," i.e., the material the actors will read during an audition,² on petitioner's website, Sides Express. The talent representative downloads the side from petitioner's website and provides it to his or her actor client so that he or she can prepare for the audition.

69. After the talent representative responds to the casting director, the casting director can request a self-tape of the actor instead of having the actor physically appear for an audition, move the actor's audition to another time, add notes to the actor's submission, mark the actor for a callback, or change the actor's status on Breakdown Express.

70. The casting director can track on Breakdown Express how many actor profile submissions for a particular role he or she has and has not viewed, how many actors he or she has selected for auditions, how many of those selected actors have and have not been scheduled for auditions, and how many callbacks have been scheduled.

71. The casting director can view on Breakdown Express his or her "quicksheet," which is a recap of the status of the actors the casting director is auditioning or has auditioned for roles in a production. The quicksheet shows whether an actor is confirmed, unconfirmed, or has declined an audition. It also shows whether the casting director has already auditioned the actor

² A side may be lines from the production's script or some other material.

for the role, in which case the casting director can click on a thumbnail link and watch the actor's recorded audition.³

72. On the quicksheet, the casting director can mark the actor for a callback, put the actor on "avail," which lets the talent representative know his or her actor client is being seriously considered for the role and should remain available, or book the actor for the role. At that point, petitioner's involvement in the particular project ends.

Step 5: The Casting Director's Presentation

73. In the fifth step of the Casting Facilitation Process, the casting director presents his or her recommendations to the network, studio, producer, or director.

74. After the casting director auditions an actor for a role, the casting director uploads the recording of the audition to Breakdown Express. Depending upon the production, the network, studio, producer, or director may ultimately decide which actor to hire for a role. The casting director makes a presentation, through Breakdown Express, to the network, studio, producer, or director, as the case may be, as to which actors the casting director recommends for the role.

75. The casting director prepares an email list of the people (e.g., the network, studio, producer, or director) to whom the casting director wishes to present his or her recommendations for the acting role. The network, studio, producer, or director can view the auditions recorded by the casting director, as well as the submissions for the actors in question, on Breakdown Express. In addition, the network, studio, producer, or director can view the casting director's notes about particular actors and provide the casting director with written feedback about the actors on Breakdown Express.

³ A casting director will record an actor's in-person audition and upload the same onto Breakdown Express.

76. Petitioner does not know which actors are ultimately hired for the roles. Mr. Marsh testified that the studios really control that information because they want to make the announcements regarding the actors hired for projects. He further testified that is typical in the industry.

77. Petitioner protects casting directors, talent representatives, actors, and the casting process by vetting casting directors and talent representatives before they can use its casting facilitation service.

78. When a new casting director accesses Breakdown Express for the first time, petitioner vets the casting director to ensure he or she is professional in his or her conduct and character and to make sure the new casting director's acting role description is for a legitimate production.

79. If Breakdown does not recognize a new casting director, petitioner requires the new casting director to submit (i) a script for the production so that petitioner can verify the production is legitimate and not abusive in any way, and (ii) a government-issued ID card that petitioner can turn over to the police if necessary. Talent representatives expect that petitioner will vet casting directors who use the casting facilitation service to ensure the casting directors are legitimate.

80. Mr. Marsh testified that the ability to submit actors for acting roles is very powerful, and actors are most vulnerable to being taken advantage of because of their eagerness and willingness to do anything to be on screen or stage. Petitioner views itself as a gatekeeper, preventing actors from being taken advantage of financially or otherwise. According to Mr. Marsh, a talent representative should only receive compensation from his or her actor client when the actor client secures an acting role. The talent representative should not charge the actor

for lessons, pictures, or advice, although many of them do. Petitioner does not permit talent representatives who charge actors for submissions to use its casting facilitation service.

81. Petitioner's requirements for talent representatives who want to use its casting facilitation service differ by state. For example, during the audit period, petitioner required every new talent representative in Texas to provide letters of recommendation from five casting directors in that state, two of whom had to be located in the city in which the talent representative was located. Petitioner required every new talent representative in California to be licensed by the state and optionally franchised by the Screen Actors Guild. The record is silent as to what petitioner's requirements were for new talent representatives in New York State.

82. Petitioner rejects casting directors and talent representatives who do not meet its requirements to use the casting facilitation service.

83. Petitioner's casting facilitation service is a subscription-based service. Petitioner charges talent representatives a monthly retainer fee for its casting facilitation service. The monthly retainer fee petitioner charges varies by geographical region or market. During the audit period, the monthly retainer fee petitioner charged for the New York market was \$144.00. Currently, petitioner charges a monthly retainer fee of \$144.00 for the New York market.

84. Talent representatives do not pay a fee each time they view an acting role description on Breakdown Express. Rather, they pay the same fee whether they view one description or 1,000 descriptions.

85. Talent representatives are limited to viewing acting role descriptions for the region (market) for which they pay to access petitioner's casting facilitation service. For example, if a talent representative only pays to access petitioner's service in New York, the talent

representative can only view and submit his or her actor clients for roles that are released to the New York market.

86. There is no limit on the number of acting role descriptions a talent representative can view for the region to which he or she subscribes.

87. Petitioner does not charge casting directors fees for its casting facilitation service.

88. In the casting business, time is of the essence. An acting role description may be posted on Breakdown Express in the morning, and the casting director may be auditioning actors that afternoon and having callbacks the next morning. Mr. Marsh, at the hearing, testified that petitioner facilitates the casting process.

89. A casting director is free to post a breakdown he or she created on a competitor's website, if he or she so chooses. Mr. Marsh testified that it really does not work to anyone's advantage to post a breakdown on both sites. "It's not efficient for the casting process. The talent reps get confused where to divide their time."

90. The value proposition of petitioner's casting facilitation service to talent representatives is the ability to quickly submit actors for available acting roles. Because of the speed at which the casting process occurs, talent representatives cannot get their actor clients considered for acting roles without Breakdown's casting facilitation service.

91. Mr. Marsh testified that talent representatives cannot do business without using petitioner's casting facilitation service. He also testified that casting directors cannot do their casting work without petitioner's casting facilitation service.

92. Petitioner maintains strong relationships with the casting directors who use its casting facilitation service, which in turn helps petitioner provide its casting facilitation service to talent representatives. Petitioner receives feedback from casting directors and talent

representatives about the tools they need to do their jobs, and petitioner's casting facilitation service allows casting directors and talent representatives to do their jobs more easily and efficiently.

93. For instance, petitioner developed its slateshot feature (which allows an actor to upload a seven-second video clip in which the actor states his or her name) in response to complaints from casting directors that it was difficult to get a good sense of the actor, including voice quality, from his or her two-dimensional picture. In addition, during the audit period, petitioner developed Eco Cast, a feature that allows the casting director to invite an actor to self-tape his or her audition and upload the recording to Breakdown Express for the casting director to see instantaneously.

94. Breakdown Services is the only company endorsed by the Casting Society of America as a facilitator of the casting process.

The Audit

95. For the period at issue, petitioner filed New York State corporation franchise tax returns (CT-3s) and reported New York sales. However, petitioner was not registered as a New York sales tax vendor for sales tax and did not file sales and use tax returns (*see* finding of fact 2). In or about December 2012, the Division of Taxation (Division) performed research on petitioner and determined that petitioner was possibly providing a taxable information service, which would require it to be registered for New York State sales tax.

96. Alan Embrey, the team leader on petitioner's audit, was responsible for the pre-audit analysis until the Division officially commenced a sales and use tax examination of petitioner for the period September 1, 2007 through February 28, 2015.

97. By letter dated January 10, 2013, Mr. Embrey advised petitioner that a review of the Division's files indicated that petitioner may not be registered for New York State sales tax. If that information was incorrect, the letter requested petitioner to supply its current registration number and validation number from its sales tax certificate of authority. The letter also advised that based upon information currently available to the Division, it appeared that petitioner "may have taxable sales and/or taxable services being delivered into New York." If petitioner was not registered, the letter asked for information including, among other things, the type of sales or services that petitioner provided, any types of tax-exempt sales or services, and why petitioner considered those sales or services to be tax exempt. A response was requested by February 11, 2013. When petitioner failed to respond to his January 10, 2013 letter, Mr. Embrey sent a "SECOND REQUEST" letter, dated March 4, 2013, to petitioner. The contents of that letter were identical to Mr. Embrey's earlier letter, with the exception that a response was due by March 19, 2013.

98. By letter dated May 21, 2013, petitioner's then-representative, Michael Sardar, Esq., responded to Mr. Embrey's "sales tax inquiry" regarding petitioner. In the letter, Mr. Sardar provided the following information regarding petitioner's business activity:

"Breakdown's business generally consists of two activities:

A. Breakdown provides casting directors, professional actors, and talent agents an online platform through which casting directors can share available roles and match them to interested actors and their agents.

B. A very small portion of Breakdown's New York revenues stem from the sale of mailing lists."

The letter went on to explain that:

"The activity described in item A is exempt from sales tax in New York State. The activity is exempt because the activity is a matchmaking service whose

primary purpose is to match actors and their agents with casting directors. Breakdown provides a forum through which the two sides can interact.”

In support of his explanation that petitioner did not provide a taxable service in New York, Mr. Sardar, in his letter, cited *Matter of SSOV’81 Ltd. d/b/a People Resources*, Tax Appeals Tribunal, January 19, 1995 (*SSOV’81*), and the Division’s “Advisory Opinion No. TSB-A-97(55)S.” Copies of both the Tax Appeals Tribunal’s decision and the Division’s advisory opinion were attached to the letter. However, petitioner did not provide any documentation to substantiate the arguments.

99. Mr. Embrey reviewed the information provided in the letter and determined that it was insufficient to conclude that petitioner was not providing a taxable service. Subsequently, the Division assigned Sosthenes Pierre-Philippe, a former Tax Auditor 1 in the Division’s Rochester District Office Transaction Audit Bureau,⁴ to conduct the field audit of petitioner’s books and records.

100. On August 20, 2013, the auditor sent petitioner a letter informing it that the Division was commencing a sales and use audit for the period September 1, 2007 through August 31, 2013. On September 30, 2013, the auditor spoke with petitioner’s then-representative to discuss audit issues, and on the next day sent Mr. Sardar a copy of the field audit appointment letter. This appointment letter also included Information Document Request (IDR) #01, dated October 1, 2013. IDR #01 requested books and records for the business, including any documentation necessary to prove nontaxable sales.

101. On October 28, 2013, the auditor met with Mr. Sardar at his office to discuss the audit. On October 29, 2013 and October 30, 2013, the auditor reviewed petitioner’s expenses and the depreciation schedule, and on October 31, 2013, the auditor reviewed petitioner’s sales.

⁴ Sometime after the completion of petitioner’s audit, Mr. Pierre-Philippe retired from State service.

On November 1, 2013, the auditor again met with Mr. Sardar at his office to discuss the audit and the additional records needed. The auditor requested additional information related to New York sales for the period September 1, 2007 through August 31, 2013. On November 25, 2013, the auditor received some sales data from petitioner's then-representative. The Tax Field Audit Record (audit log) entry for December 9, 2013 indicates that the auditor reviewed the data and noted that the records received did not contain invoice details and jurisdictions of the sales. The December 9, 2013 audit log entry also noted that the auditor called Mr. Sardar and requested the invoice details and jurisdictions of the sales. On February 11, 2014, April 1, 2014, and May 23, 2014, the auditor left voicemail messages for petitioner's then-representative requesting additional information related to petitioner's New York sales.

102. By email dated August 26, 2015, the auditor informed Mr. Sardar that the books and records he received and reviewed to date, consisting of a general ledger summary for the month of April 2011, a general ledger summary for the period November 2011 to March 31, 2012, a schedule of sales for various months of 2011, and a schedule of online sales for November 1, 2011 through February 28, 2012, were inadequate to determine sales tax due. In the email, the auditor also asked for a chart of accounts for each year of the audit period, general ledger details by year for the audit period, New York sales invoices for the audit period, New York fixed assets listings for each year of the audit period, and New York expense purchases listings for each year of the audit period.

103. On November 18, 2015, the auditor sent IDR #02 to petitioner's then-representative, in which the following documents and information were requested: the chart of accounts for each year of the audit period, general ledger details for each year of the audit period, New York sales invoices for the audit period, New York fixed assets listing and related invoices

for each year of the audit period, and expense purchases listing and related invoices for each year of the audit.

104. On December 2, 2015, the auditor met with petitioner's then-representative to discuss the documents requested in IDR #02. On December 3, 2015, while waiting for the requested documentation, the auditor conducted internet research to determine the products offered for sale by petitioner. On December 10, 2015, petitioner's then-representative produced a chart of accounts and a list of New York assets, but none of the other requested documentation.

105. On March 15, 2016, the auditor sent petitioner's then-representative a letter reiterating the list of records requested on November 18, 2015. The letter noted that to date the Division had only received a chart of accounts and a listing of New York assets. The letter requested that the remaining records be provided for review so that the sales tax audit could be completed.

106. On May 13, 2016, the auditor sent petitioner's then-representative IDR #03 along with a letter expanding the audit period to September 1, 2007 through February 28, 2015.

107. On June 13, 2016, the auditor received a telephone call from Mr. Sardar. During that telephone call, the audit was discussed, and Mr. Sardar asserted that his client's sales were not taxable but did not provide any documentation to support that position. On July 18, 2016, the auditor spoke to a new representative for petitioner, Pat Waller, CPA. Subsequently, Ms. Waller provided some documentation consisting of general ledger information, sales invoices and CT-3s for petitioner. The auditor reviewed this information.

108. On February 21, 2017, the auditor and Ms. Waller had a conference call to discuss the audit. The auditor informed her that the records were still not adequate to determine tax due

because they were missing source documents that would detail the products sold and the location of the sales.

109. During this conference call, Ms. Waller asked the auditor why the Division thought petitioner's sales were taxable. After the conference call, the auditor conducted research and drafted a summary of the taxability of petitioner's products. On February 28, 2017, the auditor sent a letter to Ms. Waller informing her that the Division determined that petitioner provides information services and cited to TSB-M-10(7)S. On May 8, 2017, Ms. Waller provided additional sales information which the auditor subsequently reviewed.

110. On August 7, 2017, Mr. Pierre-Philippe traveled to Los Angeles for a meeting with Ms. Waller and Mr. Marsh scheduled for August 8, 2017. At the August 8, 2017 meeting, Mr. Marsh detailed the different products offered by petitioner and demonstrated access to petitioner's website "as initiated by Producers, Talent Agents and Actors." A discussion of access also took place at the meeting. The audit log entry for August 8, 2017 also noted that revenues were assigned to the billing zip code, and the auditor reviewed "billings for the audit period." After this meeting, the auditor requested additional sales documentation from Ms. Waller. On October 27, 2017, the auditor received a "sales revenue breakdown" from Ms. Waller.

111. After reviewing the information presented during the audit, the auditor concluded that certain of petitioner's services constituted taxable information services. The auditor also determined that the books and records provided by petitioner were inadequate to determine sales tax due. Specifically, the auditor determined the books and records provided by petitioner were inadequate because petitioner failed to provide sales invoices, which were needed to verify the

transactions in the general ledger and trial balances. The auditor used the books and records that were provided to estimate sales tax due.

112. Of the books and records provided, there were complete sales journal records for fiscal year April 1, 2012 through March 31, 2013. The auditor compared the general ledger for that period to petitioner's sales journal for the same period and determined that the amount reported reconciled to the amount of \$706,057.00 reported as "Sales of tangible personal property allocated to New York State" on petitioner's corporation franchise tax return for the fiscal year April 1, 2012 through March 31, 2013, for purposes of allocating its business allocation percentage. The auditor deemed that amount, \$706,057.00, as petitioner's gross sales for the fiscal year April 1, 2012 through March 31, 2013.

113. The gross sales of \$706,057.00 were allocated among 8 revenue categories: BDS Fee Income NY,⁵ CD Subscription NY, CD Directory Book NY, CD Labels NY, Agency Labels NY, Internet Postings NY, Audition Services Scheduled NY, and NY Misc Income. The auditor determined that all revenue categories were taxable except Internet Posting NY, which was attributed to fees for posting information.⁶ The gross sales for Internet Posting NY were \$13,607.75. The auditor subtracted \$13,607.75 from \$706,057.00 to arrive at \$692,449.25, which amount the auditor deemed to be taxable receipts from sales of information services for the fiscal year April 1, 2012 through March 31, 2013.

114. The auditor divided \$13,607.75 of Internet Posting NY revenue by gross New York sales of \$706,057.00 and treated the result, 1.927288%, as the "adjustment rate," i.e., the percentage of Breakdown's receipts for each of the fiscal years within the audit period that the

⁵ BDS Fee Income NY revenue consisted of monthly fees that petitioner charged talent representatives for its casting facilitation service in the New York market.

⁶ Petitioner charged a fee of \$2.00 per posting when actors posted their pictures on petitioner's website.

auditor deemed nontaxable receipts. The auditor subtracted the adjustment rate of 1.927288% from 1.0 and treated the result, 98.072712%, as the “margin,” i.e., the percentage of petitioner’s receipts for each of the fiscal years within the audit period that the auditor deemed taxable receipts from sales of information services.

115. The auditor then used the gross sales reported as the “Sales of tangible personal property allocated to New York” on petitioner’s corporation franchise tax return for each of the fiscal years within the audit period multiplied by the margin to arrive at deemed taxable receipts from sales of information services, as shown in the table below.

Fiscal Year Ending	As Reported on Line 129, CT-3	Margin	Deemed Taxable Receipts from Information Services
03/31/2008	\$509,211.00	98.072712%	\$499,397.04
03/31/2009	\$637,766.00	98.072712%	\$625,474.41
03/31/2010	\$546,795.00	98.072712%	\$536,256.69
03/31/2011	\$672,503.00	98.072712%	\$659,541.93
03/31/2012	\$680,612.00	98.072712%	\$667,494.65
03/31/2013	\$706,057.00	98.072712%	\$692,449.25
03/21/2014	\$732,494.00	98.072712%	\$718,376.73
03/31/2015	\$681,023.00	98.072712%	\$667,897.73
Total	\$5,166,461.00		\$5,066,888.43

116. After computing the deemed taxable receipts from the sales of information services for each fiscal year, the auditor divided the deemed taxable receipts for each fiscal year by 12 to arrive at average monthly deemed taxable receipts, as shown in the table below.

Fiscal Year Ending	Deemed Taxable Receipts from Information Services	Number of Months During Fiscal Year	Average Monthly Deemed Taxable Receipts
03/31/2008	\$499,397.04	12	\$41,616.42
03/31/2009	\$625,474.41	12	\$52,122.87
03/31/2010	\$536,256.69	12	\$44,688.06
03/31/2011	\$659,541.93	12	\$54,961.83
03/31/2012	\$667,494.65	12	\$55,624.55
03/31/2013	\$692,449.25	12	\$57,704.10
03/21/2014	\$718,376.73	12	\$59,864.73
03/31/2015	\$667,897.73	12	\$55,658.14

Total	\$5,066,888.43		
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117. The auditor determined petitioner’s quarterly deemed taxable receipts using the average monthly deemed taxable receipts for each of the quarters within the audit period.

Quarter Ending	Quarterly Deemed Taxable Receipts from Information Services	Quarter Ending	Quarterly Deemed Taxable Receipts from Information Services
11/30/2007	\$124,849.26	08/31/2011	\$166,873.66
02/29/2008	\$124,849.26	11/30/2011	\$166,873.66
05/31/2008	\$145,862.16	02/29/2012	\$166,873.66
08/31/2008	\$156,368.60	05/31/2012	\$171,032.75
11/30/2008	\$156,368.60	08/31/2012	\$173,112.31
02/28/2009	\$156,368.60	11/30/2012	\$173,112.31
05/31/2009	\$141,498.99	02/28/2013	\$173,112.31
08/31/2009	\$134,064.17	05/31/2013	\$177,433.56
11/30/2009	\$134,064.17	08/31/2013	\$179,594.18
02/28/2010	\$134,064.17	11/30/2013	\$179,594.18
05/31/2010	\$154,611.72	02/28/2014	\$179,594.18
08/31/2010	\$164,885.48	05/31/2014	\$171,181.01
11/30/2010	\$164,885.48	08/31/2014	\$166,974.43
02/28/2011	\$164,885.48	11/30/2014	\$166,974.43
05/31/2011	\$166,210.93	02/28/2015	\$166,974.43
Total			\$4,803,148.18

118. The auditor multiplied petitioner’s quarterly deemed taxable receipts by the sales tax rate in effect for each quarter to arrive at the New York sales tax allegedly owed by petitioner for each quarter.⁷ The auditor used the sales tax rate in effect in New York County due to the nature of petitioner’s business and the fact that petitioner maintained an office in New York City.

119. By the above-described method, the Division determined that petitioner owed \$421,248.61 in tax, plus interest. At the conclusion of the audit, the Division issued a statement of proposed audit change for sales and use tax to petitioner for taxes determined due on

⁷ For the quarters ending November 30, 2007 through August 31, 2009, the auditor used the sales tax rate of 8.375%. For the quarters ending November 30, 2009 through February 28, 2015, the auditor used the sales tax rate of 8.875%.

petitioner's sales of information services. This statement of proposed audit change asserted tax due in the amount of \$421,248.61, plus interest. The auditor did not assert penalties against petitioner.

120. On or about January 25, 2018, the Division mailed petitioner's representatives the statement of proposed audit change and supporting workpapers asserting that petitioner owed additional tax in the amount of \$421,248.61, plus interest. Petitioner returned the statement of proposed audit change as disagreed.

121. The Division's audit spanned over four and a half years, during which time the Division recorded a total of 398.5 hours of work on the audit, 368.5 hours of which were recorded by Mr. Pierre-Philippe.

122. On March 16, 2018, the Division issued a notice of determination, assessment ID no. L-047812423, (notice) assessing tax due in the amount of \$421,248.61 plus interest.

123. Petitioner does not dispute the computation of New York sales tax that would be due if its sales for the audit period were taxable.

124. The Division presented the testimony of Mr. Embrey, the team leader who conducted the pre-audit analysis and supervised Mr. Pierre-Philippe during the audit. Due to Mr. Pierre-Philippe's retirement from State service, he was not available to testify (*see* footnote 3). Mr. Embrey testified that he had 27 years' experience as an auditor and that experience included information service audits. During the audit, Mr. Embrey worked directly with the auditor, reviewed the auditor's work, and approved said work. Mr. Embrey testified as to his familiarity with the facts and circumstances of this audit as the team leader and Mr. Pierre-Philippe's supervisor on the same.

125. As part of his pre-audit analysis, Mr. Embrey reviewed Mr. Sardar's May 21, 2013 letter and considered petitioner's point of view. Mr. Embrey determined that petitioner's casting facilitation service was distinguishable from the services at issue in *SSOV'81* because, as Mr. Embrey explained it, petitioner's casting facilitation service was not a "matching service." According to Mr. Embrey, a "matching service" is an unenumerated, nontaxable service in which a vendor "takes two parties that want to get together for some purpose and puts them together." The audit was undertaken to verify and understand the nature of petitioner's business before rendering a final determination on taxability.

126. Mr. Embrey testified that on audit, the Division requested books and records from petitioner, reviewed the books and records produced, and determined that they were inadequate to determine if petitioner remitted the proper amount of sales tax due to New York State. He testified that the taxable information service provided by petitioner was the service of providing breakdowns to talent agents for a monthly subscription fee. Mr. Embrey explained that either petitioner or casting directors create the breakdowns which were posted on petitioner's website for sale. He further explained that the person creating the breakdown does not impact the taxability of the service being provided. According to Mr. Embrey, the Division did not conduct an audit for expenses or capital under this field audit.

127. Mr. Embrey testified that the Division and petitioner had multiple conversations over the course of the audit to discuss the Division's position and to provide petitioner with an opportunity to provide evidence to contradict that position. He testified that the Division did not apply the primary function analysis during the audit to determine the taxability of petitioner's casting facilitation service, because there was no information provided by petitioner "to support any further explanations or further investigation." He also testified that the Division did not ask

petitioner any specific questions during the audit relating to the taxability of petitioner's casting facilitation service. According to Mr. Embrey, he did not know why the Division did not ask petitioner for information showing that it is necessary to make the connection between casting directors and actors vis-à-vis the talent representatives. Mr. Embrey testified that once he saw that petitioner provided acting role descriptions to talent representatives, he concluded that petitioner's casting facilitation service was an information service and stopped analyzing the service.

128. Mr. Embrey testified that the primary function analysis or test is used to determine the taxability of a service that has multiple components, some of which are taxable and some of which are nontaxable. Mr. Embrey conceded that petitioner's casting facilitation service consisted of multiple components, including allowing talent representatives and casting directors to access petitioner's website, allowing casting directors to post acting role descriptions, allowing talent representatives to view the descriptions, and allowing talent representatives to submit their actor clients for the roles described therein. According to Mr. Embrey, petitioner's casting facilitation service is different from the service at issue in *SSOV'81* because, in his view, petitioner merely provides "the forum" and the information for casting directors and actors, and it is the talent representatives, not petitioner, who make the match.

129. Mr. Embrey testified that, in his view, the primary function of petitioner's casting facilitation service is information, i.e., acting role descriptions, but he also testified that the purpose of transmitting acting role descriptions from casting directors to talent representatives is to connect actors to jobs.

130. Pursuant to 20 NYCRR 3000.15 (d) (6), petitioner submitted 179 proposed findings of fact.⁸ In accordance with State Administrative Procedure Act § 307 (1), proposed findings of fact 1, 4 through 33, 35 through 53, 55 through 60, 62, 64 through 78, 80 through 114, 116 through 149, 152, 154 through 156, and 158 through 176 are supported by the record, and have been combined, renumbered and substantially incorporated herein. Proposed findings of fact 2, 3, 34, 54, 61, 63, 79, 115, 150, 151, and 153 have been modified to more accurately reflect the record, and have been combined, renumbered, and substantially incorporated herein, as modified. Proposed findings of fact 157, and 177 through 179 are rejected as irrelevant.

CONCLUSIONS OF LAW

A. It is well settled that a presumption of correctness attaches to a properly issued statutory notice issued by the Division and the taxpayer bears the burden to prove that the assessment is incorrect (*see Matter of Hotel Depot, Inc.*, Tax Appeals Tribunal, January 24, 2020, citing *Matter of Darman Bldg. Supply Corp v Mattox*, 106 AD3d 1150, 1151 [3d Dept 2013]; *Matter of Blodnick v New York State Tax Commn.*, 124 AD2d 437, 438 [3d Dept 1986], *appeal dismissed* 69 NY2d 608 [1987]). Although a determination of tax must have a rational basis in order to be sustained, the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (*see Leogrande v Tax Appeals Trib.*, 187 AD2d 768 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]). However, a determination of tax must have a rational basis to be sustained upon review (*see Matter of Grecian Sq. v New York State Tax Commn.*, 119 AD2d 948, 950 [3d Dept 1986]). If it has no rational basis, it must be set aside (*see Matter of Synder v State Tax Commn.*, 114 AD2d 567, 568 [3d Dept 1986]; *Matter of Ristorante Puglia, Ltd. v*

⁸ It is noted that the Division did not appear to challenge any of petitioner's proposed findings of fact.

Chu, 102 AD2d 348, 350 [3d Dept 1984]). In *Matter of Atlantic & Hudson Ltd.* (Tax Appeals Tribunal, January 30, 1993), the Tax Appeals Tribunal (Tribunal) established how the presumption of correctness of an assessment may be overcome.

“Although a determination of tax must have a rational basis in order to be sustained upon review, the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment. Evidence that both rebuts the presumption of correctness and indicates the irrationality of the audit may appear: on the face of the audit as described by the Division through testimony or documentation; from factors underlying the audit which are developed by the petitioner at hearing; or in the inability of the Division to identify the bases of the audit methodology in response to questions posed at the hearing.”

The record must provide sufficient evidence to allow the trier of fact to determine whether the audit had a rational basis (*see Matter of Hammerman*, Tax Appeals Tribunal, August 17, 1995).

B. Petitioner contends that the notice is irrational because the Division did not properly examine the casting facilitation service to determine its primary function; specifically, the Division failed to comprehensively analyze petitioner’s casting facilitation service to determine its primary function. Because Mr. Marsh provided a live demonstration of the service and the audit file contains numerous references to the various aspects of the business, petitioner contends that the Division knew or should have known that the casting facilitation service has multiple components, some of which may be taxable when viewed in isolation. It further contends that the Division was required to apply the primary function analysis to determine whether petitioner’s service was taxable. Since the Division failed to do so, petitioner asserts that the Division failed to conduct a proper audit and, therefore, the notice does not receive the presumption of correctness. This argument is completely without merit.

The record clearly shows that the Division made multiple requests for petitioner’s books and records, additional requests after records were produced, and requests for clarification of the

records produced. The Division's requests for records included, among other things, any documentation necessary to prove nontaxable sales. The auditor examined the books and records produced, and he also conducted independent research of petitioner's business. Petitioner failed to provide any documentation that its service was nontaxable. The auditor had multiple conversations with petitioner's representatives regarding the Division's position that petitioner was providing a taxable information service. At the request of petitioner's representative, Ms. Waller, the auditor sent her a letter stating why petitioner's service was a taxable information service. Additionally, the auditor traveled to California where he met with Ms. Waller and petitioner's president and CEO, Mr. Marsh. At that meeting, Mr. Marsh provided details about the different products offered by petitioner and demonstrated access to petitioner's website. During that same meeting, a discussion of access took place. Thereafter, the auditor reviewed the information provided and, after analysis of petitioner's business, concluded that petitioner provided a taxable information service. Petitioner's failure to provide information that would have led the auditor to a different conclusion does not render the audit conclusion irrational. Furthermore, disagreeing with the auditor's conclusion on taxability does not prove that the audit was flawed in method or result thereby rebutting the presumption of correctness attached to the notice.

C. The Tax Law imposes sales tax upon every retail sale, except for resale, of tangible personal property (Tax Law § 1105 [a]) and of certain enumerated services (Tax Law § 1105 [c]). Among the services subject to tax is 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 (*see* Tax Law § 1105 [c] [1]; *see also* Tax

Law § 1105 [c] [9] [furnishing information services provided by means of telephony or telegraphy or telephone or telegraph service of whatever nature subject to sales tax so long as such would be subject to sales tax pursuant to Tax Law § 1105 [c] [1] if it were furnished by one of the means enumerated therein]). The Division’s regulations 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]). Examples of taxable information services include 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 the word “assessment” as requested by customers (20 NYCRR 527.3 [a], examples 1-4).

D. In the instant matter, the Division concluded that petitioner provides an information service in the form of breakdowns (acting role descriptions) to talent representatives for a monthly subscription fee. Both parties agree that the taxability of petitioner’s service turns on its primary function. Petitioner contends that the primary function of its service is facilitating the process of casting actors in available acting roles, which is not an enumerated taxable service. The Division contends that petitioner’s primary function is providing breakdowns, not casting facilitation services.

E. As will be hereafter discussed, the services provided by petitioner are not a taxable information service. Where the service being offered is an integrated service, it is taxed according to its primary function (*see Matter of SSOV’81 Ltd.*). In *SSOV’81*, the petitioner’s purpose was to enable its members to meet with other members of their choosing. Each member

would submit a resumé describing him or herself. The resumé together with a photograph and a two or three-minute interview constituted that member's profile. The petitioner compiled and maintained a library of member profiles, which all members were able to access and review. When one member selected another member to engage with, he or she issued an invitation to connect. Upon receiving the invitation, the other member visited the petitioner's library to evaluate the inviting member's profile to decide whether to accept the invitation and engage. If the member accepted the invitation, he or she informed petitioner, who shared the inviting member's contact information with the accepting member. The petitioner then notified the inviting member that the invitation had been accepted and shared the accepting member's contact information with the inviting member so that the two members could interact. The Division conducted an audit and ultimately issued a notice of determination finding the service provided to be a taxable information service pursuant Tax Law § 1105 (c) (1). The petitioner paid the tax due and applied for a refund. The Division did not respond to the refund claim and ultimately the petitioner filed a petition appealing the denial. The administrative law judge determined that petitioner's activities constituted a taxable information service. He found that where each customer had a resumé, photograph, and videotape compiled to create a member profile, this profile constituted a report and that members received a report every time another member's profile was reviewed.

The Tribunal then reversed the administrative law judge's determination, finding that the primary function of petitioner's service was not to provide information services but to allow members to meet (date) others. The Tribunal concluded "the analysis employed by the New York courts and the 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 Contrs. Assoc. v Tully, 87 AD2d 909 [3d Dept 1982] and *Matter of Woolworth Co.*, Tax Appeals Tribunal, December 1, 1994). The Tribunal rejected the Division's argument that the means by which a service is provided is the controlling factor in determining whether the subject service is taxable and also found "[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.*).

Petitioner's casting facilitation service is similar to the dating service in *SSOV'81*. Petitioner provides a forum through which casting directors and talent representatives can connect. The record clearly shows that petitioner is involved in the entire casting process, from the posting of the breakdown through the audition. The casting facilitation service process begins with the casting director submitting a breakdown for an acting role to petitioner. Petitioner reviews the breakdown and posts it on Breakdown Express, making it available to subscribing talent representatives. The talent representatives may view every breakdown posted for the region or market to which they subscribe. Once they view the breakdowns, talent representatives follow a formal process to submit their actor clients for consideration. After reviewing the breakdown, the talent representative can review his or her actor clients' profiles to find ones who best match the breakdown. The talent representative creates and maintains his or her actor clients' profiles on petitioner's website. Petitioner's service allows the talent representative to tailor his or her clients' profile prior to the submission of same to the casting director, through petitioner, for consideration. The casting director evaluates the actor profiles submitted by the talent representatives. If the casting director wishes to invite the actor to audition, the casting director schedules an audition through petitioner. The talent representative receives a notification from petitioner indicating when and where the audition will be held and

requesting confirmation that the actor will appear. The talent representative responds to the casting director through petitioner, either confirming, rescheduling the audition, or declining the audition. After the casting director auditions an actor for a role, the casting director uploads the recorded audition to Breakdown Express. Petitioner's service allows the casting director to also schedule callbacks with actors they select for audition. After the casting director uploads audition and callback recordings to Breakdown Express, the casting director presents his or her recommendations to the network, studio, producer, or director through Breakdown Express so that the network, studio, producer, or director can decide which actor to hire for the role. Clearly, the primary function of petitioner's service is the facilitating of casting actors in acting roles, which is an unenumerated, nontaxable service.

F. In asserting that petitioner's sales are sales of information services, the Division relies upon the Tribunal's holding in *Matter of Principal Connections*, Tax Appeals Tribunal, February 12, 2004. The petitioner in *Principal Connections* provided a subscription-based service featuring one of the largest listings of apartments for sale or rent in New York City. The listings were collected from its subscriber members as well as from publicly available sources. The Tribunal held that the petitioner's service was a taxable information service under Tax Law § 1105 (c) (1) because the primary function of the service was the information the petitioner transmitted to its subscribers, i.e., the rental and sale listings which were collected from its members as well as from public sources.

The present matter is distinguishable from a listing service using information from its members as well as public sources. In this case, petitioner is essential to the casting of actors in acting roles. Unlike the apartment lists in *Principal Connections*, acting role descriptions have little value to talent representatives without the ability to submit actors for those acting roles.

Finally, unlike the service in *Principal Connections*, providing breakdowns to talent representatives is only a component of petitioner's casting facilitation service. As noted by petitioner, the primary function of the service, and not the means of effectuating the service, dictates whether the service is taxable. Based upon the foregoing, it is concluded that petitioner does not provide a taxable information service as the furnishing of information is but a component of petitioner's overall service of facilitating the casting of actors in acting roles.

G. In the alternative, petitioner argues that imposing sale tax on its sale of casting facilitation services violates the federal Internet Tax Freedom Act (Pub Law 105-277, Div. C, Title XI § 1101 [Oct. 21, 1988] [enacted as a statutory note to 47 USC § 151] amended by P.L. 107-75, P.L. 108-435, P.L. 110-108, P.L. 113-235, P.L. 114-53, P.L. 114-53, P.L. 114-113, and P.L. 114-12) (ITFA). Although this argument has been rendered moot in accordance with conclusions of law E and F, it will nonetheless be addressed for sake of a complete record (*see Matter of Riehm v Tax Appeals Trib.*, 179 Ad2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992], *reargument denied* 80 NY2d 893 [1992]). According to petitioner, taxing its services that are provided over the internet, but not taxing the same services that are provided orally (*see* 20 NYCRR 527.3 [b] [3] [providing that sales tax does not apply to information services only furnished orally]), is a per se violation of ITFA's prohibition of discriminatory taxes on electronic commerce. This argument is meritless.

ITFA bars state and local governments from imposing multiple or discriminatory taxes on electronic commerce and taxes on Internet access, except for Internet access taxes allowed under grandfather clauses (*id.*). A tax discriminates against electronic commerce if it "imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means"

(IFTA § 1105 [2] [A] [iii]). Petitioner has presented no evidence that there are any businesses similar to its business that escape taxation because its information is transmitted orally. For this reason alone, petitioner's argument fails. Moreover, Tax Law § 1105 (c) is a taxing statute of general application and in no way can be said that it was intended to discriminate against electronic commerce.

H. The petition of Breakdown Services, Ltd., is granted, and the notice of determination dated March 16, 2018 is hereby cancelled.

DATED: Albany, New York
January 27, 2022

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE