



This Week in State Tax (TWIST)

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New York: State High Court Finds Ad Measurement Service Not Exempt as Information Is Incorporated into Reports to Others

The New York Court of Appeals recently affirmed a Tax Appeals Tribunal decision holding that a taxpayer's service which helped clients measure the effectiveness of their digital advertising campaigns was a taxable information service under New York law. The measurement service involved surveying persons that had been exposed to the advertisement, compiling and analyzing the survey responses, benchmarking the results against a database of similar campaigns maintained by the taxpayer, and providing the customer with a report presenting the results and providing recommendations. The Department of Taxation and Finance determined on audit that the entire service was taxable. After unsuccessful administrative appeals, the taxpayer appealed to the Tax Appeals Tribunal.

New York law (N.Y. Tax Law § 1105(c)(1)) imposes sales and use tax on the furnishing of information by various means, including collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to persons by any means. It excludes, however, "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...." Before the Tribunal, the taxpayer made two arguments: (a) its service was not an information service as it primarily involved the provision of recommendations to clients; and (b) the information gathered was not "substantially incorporated" in reports to others. The Tribunal found that any recommendations provided by the taxpayer were "ancillary to the data collection and analysis" performed by the taxpayer. Further, the subsequent inclusion of the data that was collected for each customer in the benchmarking database used to prepare reports for future clients disqualified the service from the exclusion.

In its opinion, the state high court agreed with the Tribunal that the primary function of the taxpayer's service "fit comfortably" within the definition of information services as its primary function was the collection and analysis of information, and other features of the report were ancillary to the core purpose of data analysis. The second issue addressed in the court's determination was interpretation of the phrase "substantially incorporated". The court reviewed several definitions based on other authorities such as a U.S. Supreme Court holding that "substantially justified" does not mean "justified to a high degree" but rather "justified in substance." Black's Law Dictionary defined "substantial" as "of real worth" or "worth while" (sic) as distinguished from something "without value or merely nominal." Consequently, the court agreed with the Tribunal that inclusion of the data gathered in a database used to benchmark other customers is sufficient to be considered "substantially incorporated in reports furnished to other persons" and precludes the taxpayer from qualifying for the exclusion. For question on [Matter of Dynamic Logic v. Tax Appeals Tribunal](#), please reach out to [Judy Cheng](#) and [Jenn White](#).

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