

NY High Court To Review Tax On Co.'s Ad Analysis Services

By **Paul Williams**

Law360 (June 20, 2024, 6:09 PM EDT) -- New York's highest court agreed Thursday to hear a research company's appeal of a lower court's finding that its services that measure the effectiveness of advertising campaigns constitute taxable information services.

The New York Court of Appeals granted Dynamic Logic's appeal of a February ruling from the Supreme Court Appellate Division, Third Judicial Department, that upheld a state Tax Appeals Tribunal decision that said the company's services were subject to sales and use tax. The lower court rejected Dynamic Logic's arguments that its service that uses customer surveys to gauge the effectiveness of advertisements for clients was a nontaxable consulting service.

Dynamic Logic argued in its motion for leave to appeal in April that the case offered the state's highest court a chance to expand its jurisprudence on information services. The last case that the court took to address the subject, *Matter of Wegmans Food Mkts., Inc. v Tax Appeals Trib. of State of N.Y.* in 2019, didn't analyze the definition of an information service or one of the statute's prongs that provides a tax exemption for it, Dynamic Logic said.

"This case addresses the two parts of [the information service statute] left open after *Wegmans* and provides the court with an opportunity to complete its guidance in this important area," the company said in its motion.

Dynamic Logic's counsel Leah Robinson told Law360 that she was pleased the court agreed to hear the case.

A representative of the New York State Department of Taxation and Finance did not respond to a request for comment.

The appellate court held that the services were taxable information services in part because the "primary function" of the company's services was to collect and analyze information. The primary function test determines whether a service that includes taxable and nontaxable components is subject to sales and use tax by analyzing which element of the service a customer is primarily buying.

According to court documents, Dynamic Logic measures an advertisement's effectiveness by surveying customers or internet users and comparing those responses with answers from individuals who had not seen the advertisement. The company then provides a report analyzing those responses to its clients.

The appellate court also rejected Dynamic Logic's argument that even if the company provided information services, it qualified for an exemption in the statute for information that is "personal or individual in nature" and "is not or may not be substantially incorporated in reports furnished to other persons."

The court said that exemption didn't apply because benchmarking data in a database that the reports were compared with was "qualitatively valuable" to the reports' analysis. Therefore, the information in those reports "can fairly be regarded as 'substantially incorporated' into the reports furnished to others," the court said.

But in its petition, Dynamic Logic said the appellate court's qualitative analysis approach was novel and inconsistent with how the statute's exemption was previously determined.

The appellate court limited the exclusion by "effectively removing the term 'substantially,' from the statute and reasoning that if information has any value, the exclusion does not apply," the company said.

"The court dramatically expanded the scope of what can be an information service, pulling in professional services that render advice and recommendations simply because such advice is based on information," the company added in its motion.

Liz Cha, a partner at Eversheds Sutherland who isn't involved with the case, said that the department has been aggressive in its assessments of what services should be classified as taxable information services and that the case could provide some clarity on the primary function test. She said "there are concerns that courts have not applied the test consistently."

"It's been a while since the New York Court of Appeals has weighed in on applying the primary function test to the taxation of information services and additional guidance would be helpful in this area," Cha said.

Dynamic Logic is represented by Leah Robinson and Michael Kerman of Mayer Brown LLP.

The department is represented by Frederick A. Brodie of the New York Attorney General's Office.

The case is In the Matter of Dynamic Logic Inc. v. Tax Appeals Tribunal of the State of New York, case number 2024-284, in the New York Court of Appeals.

--Editing by Roy LeBlanc.