

# Company's 'Uniquely Tailored' Price Audits Excluded From Sales Tax, New York Court Rules

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Customized competitive price audits acquired by grocery store chain Wegmans Food Markets Inc. are personal and individual in nature and therefore excluded from sales taxes, a New York appellate court ruled November 22.

The New York Supreme Court, Appellate Division, Third Judicial Department's [ruling](#) overturns prior decisions by the [Division of Tax Appeals](#) and the [New York Tax Appeals Tribunal](#) that said the third-party audits Wegmans used to examine the pricing structure of its competitors were not eligible for a tax exclusion under New York Tax Law section 1105(c)(1) because the information was derived from a common database available to the public.

“Under the tax law, a service is treated as a taxable information service if it is not personal or individual,” Timothy Noonan of Hodgson Russ told Tax Analysts November 27. “And under the ‘common database test,’ if the information or data comes from a central source or database, it is not personal or individual even if the data is provided only to one customer.”

New York’s intermediate court, however, found that the information provided by RetailData LLC, the third-party audit company, was personal and not derived from a central source. “Based on its own unique and confidential pricing strategy, petitioner provided RetailData with its collection criteria for the audits to be performed,” the court said, including requests for the pricing data of specific stores and the frequency with which the audits should be conducted. The court further said pricing information for Wegmans’ competitors fluctuated and therefore “there was no singular preexisting common source or data repository” RetailData could access to compile its report in a timely fashion.

Marc Simonetti of Eversheds Sutherland (US) LLP applauded the court’s decision, highlighting what he said is an important part of the opinion.

“The Supreme Court Appellate Division held that this is an exclusion from tax as opposed to an exemption from tax,” Simonetti said. “That distinction is extremely important because it means that any ambiguity in the statute must be interpreted in favor of the taxpayer.”

Simonetti explained that the Department of Taxation and Finance’s interpretation is given great weight in cases involving statutory ambiguity related to a tax exemption. “In this case, where the department is trying to limit the exclusion from tax, the statutory ambiguity is interpreted in favor of the taxpayer,” Simonetti said. “The department has to show that their justification for not recognizing the exclusion is within the confines of the statute, when it is interpreted in favor of the taxpayer.”

The court said the department's effort to impose a sales tax on the information sold to Wegmans went too far. "Ultimately the court found that the department's interpretation of the exclusion was too narrow, in fact so narrow it would eliminate the exclusion itself," Simonetti said.

## Providing Clarity

The appellate court's decision could curtail the department's ability to impose sales taxes on the growing business of data information services. Noonan said he was "pleasantly surprised" by the court's decision, adding that it was a "reasonable restriction on the scope of information services."

The court's opinion bucked a trend of previous tax court rulings in New York favoring the department's stance that "anytime you're aggregating from a single source or single database, the department argued that it isn't personal or individual in nature," Simonetti said.

The court's decision could help taxpayers determine whether information services are excluded under certain circumstances. "The court's decision suggests that when such information is processed in some way — synthesized, organized, or formatted — that the personal information service exclusion may apply," Simonetti said.

With the uptick in information services known as "Big Data" in the age of the internet, Simonetti expects the decision to affect industries other than retail. "We're also seeing it in the financial services industry, where over the past five years a number of advisory opinions have been requested from the department by taxpayers," he said.

Although the department could appeal the case, the ruling is likely a final decision on the matter, according to Noonan. "There is no appeal 'as of right' to the Court of Appeals on an issue like this, so the high court would have to agree to take the case," he said. "My guess is that it won't take it."