

Say It Ain't So: Do Taxpayers Always Lose in New York?



Timothy P. Noonan is a partner in the Buffalo and New York City offices of Hodgson Russ LLP.

In a decision out of New York's highest court in 2025, Judge Shirley Troutman began her dissenting opinion in a sales tax case by harkening back to an ominous proclamation by one of her fellow judges about five years ago: "The majority today declares a new rule: in New York, the taxpayer always loses."⁵⁹

What set of circumstances could cause two New York judges to make such a declaration, and is this a trend that should worry practitioners in the new year?

Both opinions were issued in New York sales tax cases involving the scope and extent of the sales tax on information services. That tax is imposed on charges for the furnishing of information, including the service of "collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons."⁶⁰ And the issue in both cases was the application of the statutory exclusion to this tax, which excluded 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."⁶¹

In the 2019 *Wegmans* case, the New York Court of Appeals focused on the first clause of that exclusion, finding that the reports purchased by the taxpayer did not meet "personal or individual" exclusion because they

included a compilation of publicly available data, that is, the prices of goods on supermarket shelves.⁶² And in the more recent *Dynamic Logic* case from 2025, the court of appeals seemingly gutted the second part of the exclusion, holding that the inclusion of mere benchmark data in what otherwise were obviously personalized reports caused an advertising consulting service to fall within the scope of the tax. In the process, the majority in both cases created what appears to be a new statutory construction principle, which is that an *exclusion* from tax could be construed against the taxpayer. This is a departure from what the rule was up until recently, which was that only *exemptions* from tax could be construed against the taxpayer. And the results in both cases were disconcerting enough to lead well-respected judges on New York's highest court to make the pronouncement that, in sales tax cases, taxpayers always lose.

For what it's worth, sometimes I think they might have a point! Just this past fall, the New York Tax Appeals Tribunal held that charges for what otherwise would have been a nontaxable facilities management service were subject to sales tax because the customers were also given access to a software application that allowed the parties to communicate, send and receive invoices, and input and resolve service requests.⁶³ And to get there, the tribunal held that the "primary function" test — which has long been used by tax departments and courts in sales tax cases to determine the primary purpose or true object of a transaction — was inapplicable when part of what the customer received was tangible personal property. The authority for that conclusion, however, is highly questionable. But it's New York, right, where the taxpayer always loses?

Fortunately, though, that's not always true. As reported in a December 2025 installment⁶⁴ of Noonan's Notes, my *Tax Notes State* column, our firm was involved in a sales tax case in which not

⁵⁹ *Dynamic Logic Inc. v. Tax Appeals Tribunal*, 2025 NY Slip Op. 02262, at 6 (N.Y. Apr. 17, 2025) (Troutman, J., dissenting) (quoting *Wegmans Food Markets Inc. v. Tax Appeals Tribunal*, 131 N.E.3d 876, 882 (N.Y. 2019) (Stein, J., concurring)).

⁶⁰ N.Y. Tax Law section 1105(c)(1).

⁶¹ *Id.*

⁶² *Wegmans*, 131 N.E.3d at 880-881 (majority opinion).

⁶³ *Matter of FacilitySource LLC*, DTA Nos. 829500 and 829501 (N.Y. Tax App. Trib. Sept. 18, 2025).

⁶⁴ Timothy P. Noonan and Noah S. Chase, "New York Personal Income Tax Cases: A Year in Review," *Tax Notes State*, Dec. 22, 2025, p. 875.

only did the taxpayer succeed in invalidating an assessment, but was also able to recover attorney fees from the tax department on the basis that the position taken by the auditors was wrong and not even “substantially justified.”⁶⁵ That kind of result is extremely rare, but sometimes good things happen to good people! And, maybe sometimes, taxpayers in New York can win.

Sure enough, in a December 2025 declaratory judgment action brought against the tax department directly in the New York Supreme Court, an Albany County judge held for the taxpayer, finding that the tax department was without legal authority to determine that services provided by the taxpayer on construction sites were subject to sales tax as “protective and detective services” under N.Y. Tax Law section 1105(c)(8).⁶⁶ What’s especially unusual about this case isn’t just that the taxpayer won, but also the procedural posture in which it was brought. In almost all New York sales tax cases, taxpayers are forced to go through the administrative appeals process to protest a tax assessment or the tax department’s position on a particular issue. However, in this case the taxpayer used one of the important exceptions to this rule, which is that taxpayers are not required to exhaust their administrative remedies if their claim is that the tax asserted is “wholly inapplicable” to the taxpayer.⁶⁷ Making this argument allowed the taxpayer to achieve a speedier remedy through the New York courts, without resorting to its administrative remedies in the Division of Tax Appeals.

So despite the extremely valid concerns raised by judges on New York’s highest court, taxpayers don’t always lose in New York. But we New Yorkers must be persistent and realize that the only way a taxpayer always loses is if they don’t try in the first place!

⁶⁵ *Matter of 74 Wythe Restaurant Co. LLC*, DTA Nos. 830441 and 850382 (N.Y. Div. Tax App. June 18, 2025).

⁶⁶ *Site Safety LLC v. N.Y. Department of Taxation and Finance*, No. 908673-23 (Sup. Ct. Albany County Dec. 2, 2025).

⁶⁷ See, e.g., *Site Safety LLC v. N.Y. State Department of Taxation and Finance*, 233 N.Y.S.3d 783, 787 (App. Div. 3d Dep’t 2025) (collecting cases).