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Appellate Division Reverses Tribunal and Remits Case for Consideration of Sales Tax Refunds

By Hollis L. Hyans

The New York State Appellate Division, in a strongly worded opinion, reversed the decision of the Tax Appeals Tribunal denying sales tax refunds of over $100 million to New York customers, finding that the Tribunal had abused its discretion in refusing to reopen the record to allow evidence of the funding of a pre-refund escrow account set up to facilitate repayment to customers of improperly collected tax. *Matter of New Cingular Wireless PCS, LLC v. Tax Appeals Trib.*, 2017 NY Slip Op. 06010 (3d Dep't, Aug. 3, 2017).

Background. In order to resolve litigation claiming that New Cingular Wireless, now known as AT&T Mobility ("ATTM"), improperly collected and remitted sales tax on charges for Internet access, ATTM entered into a nationwide class action settlement agreeing to reimburse its customers, including New York customers, for the overcollected tax by filing refund claims for their benefit. The agreement involved the creation of escrow accounts to receive sales tax refunded by the states, with those funds to be distributed to the customers by an escrow agent under court supervision. In states like New York that require a vendor to refund the overcollected tax to its customers prior to receiving a refund from the state, ATTM agreed to fund a pre-refund escrow fund. However, ATTM had not made any payments to the pre-refund escrow fund with respect to the overcollected New York sales tax before claiming the refund for New York customers.

Decisions Below. In July 2014, an Administrative Law Judge ("ALJ") determined that, since ATTM had not repaid the tax to its customers, it could not obtain a refund, because Tax Law § 1139(a) provides that "[n]o refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the tax commission . . . that he has repaid such tax to the customer."

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A month after the ALJ decision, in August 2014, ATTM filed a motion to reopen the record for reargument, claiming that it had not previously funded the New York escrow account because the Department had informed it that the refund claim would nonetheless be denied on other grounds; that it subsequently did fund the New York escrow account; and that it could submit evidence establishing that the account had indeed been funded. The ALJ denied the motion, holding that the Tribunal's Rules of Practice and Procedure, which are patterned after the New York Civil Practice Law and Rules applicable in New York State courts, only allow the record to be reopened for newly discovered evidence, and that this evidence was not newly discovered but had not been in existence at the time of the original hearing.

The Appellate Division held that, on "the particular facts of this case," it was an abuse of discretion for the Tribunal to deny ATTM's motion to reopen the record.

The Tribunal then affirmed the ALJ on both grounds. First, it agreed that the record cannot be reopened for the admission of evidence that was not in existence at the time of the original hearing and was only created afterwards, and concluded that reopening the record would be contrary to the Tribunal's mission of providing a fair, efficient, and final hearing system. On the merits of the refund claim, the Tribunal found that the language of Tax Law § 1139(a) requires actual repayment or reimbursement to customers before a vendor may receive a refund, and that the various agreements among the parties did not constitute a legally binding promise to pay. Because it refused to reopen the record to allow evidence of the escrow account funding, the Tribunal did not address the question of whether that funding would be sufficient to satisfy the repayment requirement.

Appellate Division Decision. The Appellate Division held that, on "the particular facts of this case," it was an abuse of discretion for the Tribunal to deny ATTM's motion to reopen the record. The court noted that there was no viable alternative to reopening the record of the original proceeding to allow the evidence of the funding to be submitted. Although the Department had argued that ATTM could simply file a new refund claim relying on the funding of the account, the court recognized that there might be a statute of limitations defense to a new refund claim, which would result in what the court described as a "$106 million windfall" to the Department, a conclusion the court found the Legislature "surely did not envision." The court granted the motion to reopen the record, and remitted the case to the Tribunal for further proceedings in light of the evidence that the escrow account had indeed been funded.

While not expressly deciding the question of whether funding of the escrow account amounted to a valid refund to the customers for purposes of Tax Law § 1139(a), the court gave a very definitive indication of what it expected to happen next. It found that, pursuant to the terms of the global settlement agreement, ATTM had "unquestionably" assigned all rights in the refund amounts to the settlement class customers; the customers had already acknowledged that refunding the escrow account constitutes repayment of the taxes; and the federal court that had approved the settlement had both sanctioned the payments and retained supervision of the distribution of the refund to ATTM's customers. The court concluded its decision by finding that "all that remains is the physical act" of payment to ATTM's customers of "the moneys to which they are due," and that "the parties would be well-served to proceed in a fashion that accomplishes those tasks in as expeditious a manner as possible."

Additional Insights

The Appellate Division could not have made its view on this case more clear: sales tax had been improperly collected from New York State customers by ATTM, ATTM had acknowledged the overcollection and set up a mechanism to refund the tax under the supervision of a federal district court, and the customers — not the Department of Taxation and Finance — are entitled to receive those refunds forthwith. While both the ALJ and the Tax

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Appeals Tribunal had considered the position of the two litigating parties before it, the court's primary concern appears to have been the position of the New York State customers, who had incorrectly paid more than a hundred million dollars in tax that the Department was now trying to keep.

Tribunal Holds That Insurance Payments Paid to Captive Insurance Company Are Not Deductible

By Michael J. Hilkin

In *Matter of Stewart's Shops Corp.*, DTA No. 825745 (N.Y.S. Tax App. Trib., July 27, 2017), the New York State Tax Appeals Tribunal affirmed the decision of an Administrative Law Judge that a corporation operating a convenience store chain could not deduct on its corporate tax returns insurance payments made to its wholly owned captive insurance company, because the payments did not qualify as valid insurance premiums under federal income tax law.

Facts. Stewart's Shops Corp. ("Stewart's Shops") owns and operates over 300 convenience stores in New York and Vermont. In the face of increasing insurance costs for its operations, Stewart's Shops started self-insuring certain risks in 1992. In late 2003 to early 2004, Stewart's Shops decided to create a captive insurance company, Black Ridge Insurance Corp. ("BRIC"), to insure some of its self-insured risks. BRIC received authorization to operate as a captive insurance company licensed by the New York State Insurance Department ("Insurance Department"), and provided Stewart's Shops coverage for: (1) losses incurred within the threshold deductible amounts and in excess of the maximum losses covered by its outstanding policies with third-party insurance companies; (2) its self-insured risks and claims from periods before the formation of BRIC ("loss portfolio transfer"); and (3) other risks, including pollution, identity theft, and crime, for which it did not have any insurance at the time of the formation of BRIC.

In the months prior to the formation of BRIC, William Dake, Stewart's Shops' president, engaged in discussions with the Insurance Department's captive insurance group. Mr. Dake testified that, as a result of these discussions, he understood that insurance payments paid to a New York captive insurance company would be deductible for New York corporate tax purposes. However, an Insurance Department representative involved in the discussions with Mr. Dake testified that he could not recall representing that the payments were deductible.

BRIC filed annual statements with the Insurance Department, and was never contacted by the Insurance Department with any concerns about the annual statements. BRIC also paid New York insurance premiums tax on the insurance payments from Stewart's Shops. In response to a 2004 tax refund claim from BRIC related to payments received for the loss portfolio transfer coverage, in 2005 the Department issued a letter stating such payments were properly classified as taxable "premiums" for insurance company tax purposes.

In 2010 and 2011, the New York State Department of Taxation and Finance audited BRIC and Stewart's Shops. The Department concluded that BRIC was properly subject to the insurance company tax and therefore could not be included in Stewart's Shops' combined corporate tax returns. However, the Department disallowed Stewart's Shops' deductions for insurance payments to BRIC, concluding that, because the payments would not be valid deductions for federal income tax purposes, they could not be deducted for corporate tax purposes either.

Corporate Tax Law. For the tax years in issue, when computing a corporation's tax on entire net income ("ENI"), ENI was defined as being "presumably the same as" a corporation's federal taxable income. Tax Law § 208(9). While the statute includes numerous adjustments and modifications to federal taxable income, none of the adjustments were relevant to Stewart's Shops' insurance payments to BRIC.

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The ALJ Decision. The ALJ concluded that Stewart's Shops' insurance payments to BRIC were not deductible for corporate tax purposes. In reaching her decision, the ALJ closely analyzed federal case law to support her conclusion that BRIC did not provide insurance to Stewart's Shops under federal income tax principles, which require, among other things, evidence of risk shifting and risk distribution, and further rejected Stewart's Shops' contention that the federally established criteria for determining the existence of insurance was not controlling for New York purposes.

The Tribunal Decision. The Tribunal upheld the entirety of the ALJ's decision. At the outset, the Tribunal determined that the ALJ properly concluded that the insurance payments at issue were not deductible for federal income tax purposes, and that "[f]ederal law controls for the purpose of defining 'entire net income'" unless there is a specific state departure (quoting *Matter of Dreyfus Special Income Fund, Inc. v. N.Y.S. Tax Comm'n*, 126 A.D.2d 368 (3d Dep't 1987)).

Stewart's Shops did not dispute that its insurance payments to BRIC did not constitute insurance premiums for federal income tax purposes, or that the Tax Law provided no explicit deduction for insurance premiums. Nevertheless, it argued that authorization of the deduction "may be inferred from the structure of the captive insurance laws . . . and the Legislature's intent to provide favorable tax treatment for captive insurance companies through those laws." Specifically, Stewart's Shops cited legislative history to support its position that the Legislature intended to tax captive insurance premiums only once, either under the general corporate tax regime (Article 9-A of the Tax Law) or under the insurance company tax regime (Article 33 of the Tax Law). As BRIC was classified as a captive insurance company under New York Insurance Law, it was statutorily required to file insurance company tax returns and, on such returns, it included the insurance payments by Stewart's Shops in its taxable base. Therefore, Stewart's Shops maintained that it was entitled to a deduction for those same insurance premiums on its corporate tax returns.

The Tribunal rejected Stewart's Shops' position and upheld the ALJ decision. The Tribunal stated that the burden to establish a right to a statutory tax deduction is on the taxpayer, and that a deduction "must clearly appear" in the taxing statute. In this case, Stewart's Shops was relying on a statutory inference to overcome the lack of an enumerated deduction under New York law, pointing to, among other things, the structure of the State's captive insurance company laws and portions of legislative history related to such laws. The Tribunal, however, concluded that, if anything, "the absence of express statutory language" in the Tax Law "indicates that the Legislature did not intend to create" the deduction claimed by Stewart's Shops.

The Tribunal . . . concluded that, if anything, "the absence of express statutory language" in the Tax Law "indicates that the Legislature did not intend to create" the deduction claimed by Stewart's Shops.

Stewart's Shops contended that the ALJ's interpretation of New York law would lead to the "absurd result" that the insurance payments would be treated as insurance premiums under the State's insurance company tax regime, but not under the State's general corporate tax regime. While the Tribunal did not seem particularly convinced by this argument, it nonetheless pointed out that such inconsistency had been eliminated because the Department had previously indicated (and reaffirmed in its briefs to the Tribunal) that it would refund the insurance premiums tax paid by BRIC.

The Tribunal also rejected Stewart's Shops' claim that the Department was equitably estopped from denying the claimed deductions. While the Department had previously taken the position on audit of BRIC that the insurance payments were taxable premiums under the insurance company tax, the Tribunal concluded that such position did not address the deductibility of the insurance payments in calculating federal taxable income or ENI under the corporate tax regime. Further, the Tribunal rejected Stewart's

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Shops' claim that the Insurance Department provided advice that the insurance payments would be deductible from ENI.

Additional Insights

The *Stewart's Shops* decision, which is subject to appeal by the taxpayer, is notable because it is the first Tribunal precedent examining the deductibility of insurance payments to a captive insurance company. The decision confirms that, because there is no specific provision in the Tax Law providing a deduction of insurance payments in calculating ENI, insurance payments to captive insurance companies will not be deductible unless they are properly classified as insurance premiums under federal income tax law.

New York State Precludes Broker-Dealer Sourcing for Associated Persons of a Registered Broker-Dealer

By Irwin M. Slomka

The New York State Department of Taxation and Finance has issued a *Tax Guidance* that limits the availability of broker-dealer sourcing under Article 9-A for tax years beginning before 2015 in situations involving partnerships and other flow-through entities. *Receipts Factor Methodology for the Owners of Single Member Limited Liability Companies That Are Registered Broker-Dealers*, NYT-G-17(2)C (N.Y.S. Dep't of Taxation & Fin., Aug. 2, 2017). The pronouncement concludes that a limited liability company's status as a registered broker-dealer does not entitle its indirect owner to qualify for broker-dealer sourcing, even though the LLC is a disregarded entity for income tax purposes.

Background. The ownership structure covered in the *Guidance* is as follows: "Brokerage," a single-member LLC, is registered with the Securities and Exchange Commission ("SEC") as a securities broker-dealer. For income tax purposes, it is a disregarded entity and its income and activities are considered the income and activities of its 100% owner, "Partnership D," which is not a registered broker-dealer.

Partnership D is 95% owned by "Investment Advisor," a limited partnership that is a registered investment advisor but not a registered broker-dealer. For SEC purposes, however, Investment Advisor is entitled to conduct broker-dealer activities under Brokerage's license. Under that license, Investment Advisor and its employees qualify as "associated persons" of Brokerage. This allows Investment Advisor to engage in SEC-regulated broker-dealer activities, despite not being itself a registered broker-dealer.

Investment Advisor is 60% owned by "Taxpayer," a corporation that is also not a registered broker-dealer. Taxpayer is subject to Article 9-A, and computes its tax using the "aggregate method" — that is, it reports its distributive share of the income and apportionment factors of Investment Advisor, including the income and factors through its indirect interest in Partnership D (which includes Brokerage's income and factors). Investment Advisor, a partnership, receives transaction fees, monitoring fees, and management fees from the funds and accounts that it manages. Under the aggregate method, Taxpayer includes its proportionate share of those fees in its own receipts factor.

Issue. The question presented was whether Taxpayer should be considered a registered broker-dealer and therefore qualify for broker-dealer receipts factor treatment for all purposes — including for its distributive share of fees earned by Investment Advisor — for tax years prior to 2015, even though it is not itself registered as a broker-dealer. Under the Tax Law in effect prior to 2015, a "registered securities or commodities broker or dealer" was entitled to source specified types of income based generally on customer location. Taxpayer contended that because Investment Advisor, for SEC purposes, is an "associated person" of Brokerage (a registered broker-dealer), Investment Advisor should qualify as a registered broker-dealer and that Taxpayer, as a partner in Investment Advisor, should also qualify for broker-dealer sourcing.

Guidance. The Department concluded that since Investment Advisor was not a registered securities broker-dealer its receipts do not qualify for broker-dealer sourcing. Therefore, Taxpayer, as a partner in Investment Advisor, is only entitled to

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broker-dealer sourcing for its proportionate share of Partnership D's receipts that represent Brokerage's receipts from its broker-dealer activities. In other words, it is only because of the application of the aggregate method that Taxpayer may utilize broker-dealer sourcing, but limited to its proportionate share of Partnership D's receipts from Brokerage's broker-dealer activities.

Under the *Guidance*, Taxpayer does not qualify for broker-dealer sourcing with respect to any other receipts — that is, neither for its share of receipts from Investment Advisor and Partnership D (other than receipts from Brokerage), nor for Taxpayer's own receipts. By not treating Taxpayer and Investment Advisor (a limited partnership) as a registered broker-dealer, Taxpayer's proportionate share of transaction, monitoring, and management fees directly earned by Investment Advisor will not qualify for broker-dealer sourcing under the new *Guidance*.

[T]he *Guidance* (like the New York City *Update*) reflects a retroactive and somewhat questionable hardening of the State and Citypositions on broker-dealer sourcing . . . that disregards the effect of business carried out through flow-through and disregarded entities.

The *Guidance* notes that the Department has previously concluded that a taxpayer that was not a registered broker-dealer, but was either a single member of several LLCs that were registered broker-dealers but were disregarded entities for tax purposes, or a partner that was a single member of such LLCs, was "deemed" to be a registered broker-dealer, and thus allowed to use the production credit method to source gross income from principal transactions available only to registered broker-dealers. *Advisory Opinion*, TSB-A-13(11)C (N.Y.S. Dep't of Taxation & Fin., Dec. 20, 2013). *The Guidance* states that the *Advisory Opinion* did not address whether the taxpayer was a registered broker-dealer with respect to its own receipts. As for the *Advisory Opinion* having stated that the taxpayer was "deemed" to be a registered broker-dealer through its partnership interest, the *Guidance* now concludes that "the better view . . . is that the partner may compute its distributive share of the partnership's receipts as if the partner was a registered securities broker-dealer." (Emphasis in original.)

Additional Insights

The type of advice issued, a *Guidance* (sometimes referred to as an NYT-G), is an informational statement of the Department's interpretation of the law, regulations, and policies, and is often issued when a taxpayer withdraws a request for an Advisory Opinion, but where the Department believes that its interpretation should nonetheless be made available to the public. This appears to have been the case here.

The *Guidance* follows on the heels of a recent New York City Department of Finance audit pronouncement concluding, contrary to prior letter rulings, that an owner of a registered single-member LLC entity that is disregarded for income tax purposes may not apply the broker-dealer sourcing rules, except with respect to its receipts earned by the disregarded LLC in its capacity as a broker or dealer. *Update on Audit Issues*, "Business Income Taxes, Income Allocation" (N.Y.C. Dep't of Fin., Nov. 25, 2016), discussed in the January 2017 issue of *New York Tax Insights*.

To many taxpayers and practitioners, the *Guidance* (like the New York City *Update*) reflects a retroactive and somewhat questionable hardening of the State and City positions on broker-dealer sourcing for tax years prior to corporate tax reform (customer-based sourcing is the general rule starting in 2015) that disregards the effect of business carried out through flow-through and disregarded entities. The *Guidance* states that the Department's interpretation regarding qualifying as a registered broker-dealer "has always been its position." While this may be technically correct, in at least one prior instance the Department invoked its discretionary authority to adjust a taxpayer's business allocation percentage by permitting a taxpayer to utilize broker-dealer sourcing for its proportionate share of receipts from an entity

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that was not itself a registered broker-dealer, but that was an "associated person" of a registered broker-dealer, to avoid an improper reflection of the taxpayer's income. Even if the *Guidance* is correct in concluding that only *registered* broker-dealers qualify for broker-dealer sourcing, there may still be grounds for obtaining comparable results under the Department's discretionary authority.

New York State Issues Memorandum on 2017 Budget Legislation Tightening Rules for Sales Tax Exclusions

By Irwin M. Slomka

One aspect of the New York State Budget Bill enacted this past spring, intended to close sales and use tax "loopholes," involved the narrowing of both the resale exclusion for certain related entity transactions and the exclusion for purchases made by nonresident businesses, applicable to transactions and purchases on or after April 10, 2017. Part CC, Chapter 59, Laws of 2017. The Department of Taxation and Finance has now issued a Technical Memorandum discussing those new provisions. *Technical Memorandum*, "Amendments Regarding Sales Tax Rules for Transactions between Certain Related Entities and for Purchases Made by Nonresident Businesses," TSB-M-17(4)S (N.Y.S. Dep't of Taxation & Fin., Aug. 14, 2017).

Transactions Between Certain Related Entities. The definition of a "retail sale" of tangible personal property has been expanded to include sales of tangible personal property: (i) to a single-member LLC or its subsidiary, disregarded for federal income tax purposes, for resale to a member or owner; (ii) to a partnership for resale to one or more of its partners; or (iii) to a trustee of a trust for resale to one or more trust beneficiaries. The purpose of this enactment was to discourage taxpayers from buying tangible personal property and claiming resale treatment by then leasing the property to such an entity, thereby avoiding (or at a minimum delaying) the payment of sales tax on the purchase.

The Technical Memorandum contains an example in which a New York City resident purchases artwork for lease to its newly formed single-member LLC that is disregarded for income tax purposes. The example makes clear that the purchase by the New York City resident no longer qualifies as a purchase for resale, and that the lease to the LLC is also a taxable retail sale (*i.e.*, sales tax is ultimately due twice). If the single member purchased the artwork directly, sales tax would only be due once.

Narrowing of Use Tax Exclusion for Purchases by Nonresident Business Entities. The sales tax law was also amended to eliminate the exemption from use tax for property or services purchased outside New York State but brought into the State by a nonresident unless the nonresident has been "doing business" outside the State for at least six months prior to the date the property or services are brought into the State.

The Technical Memorandum defines "doing business" as actively engaging in normal operating activities, such as hiring employees, having a payroll, and making routine purchases and sales; it then sets out several examples. The examples make clear that the business must have been actively conducted for at least six months prior to when the property or services are brought into New York. There is no requirement, however, that the property actually be used outside the State by the nonresident business in order to qualify for the exclusion.

In one example (Example 4), a corporation in New York forms a subsidiary on May 1, 2017. On June 1, 2017, the subsidiary purchases a sculpture for installation in the lobby of the parent's New York City office building. On February 1, 2018 — more than six months after the subsidiary was formed — the subsidiary brings the sculpture into New York to be installed. Under the example, the subsidiary will owe use tax when it brings the sculpture into New York because, although it has been in existence for more than six months when it brings the sculpture into the State, it has not been "doing business" for the requisite six months. The Technical Memorandum makes clear, however, that this new use tax restriction does not apply to individuals who bring property or services into New York.

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New Commissioner Appointed to the New York State Tax Appeals Tribunal

Anthony Giardina has been appointed as a Commissioner of the New York State Tax Appeals Tribunal, replacing Commissioner James H. Tully, Jr., who retired in April. He joins President and Commissioner Roberta Moseley Nero and Commissioner Dierdre K. Scozzafava. Commissioner Giardina previously served as Executive Director of the State Athletic Commission, Executive Deputy Secretary of State, and Assistant Secretary for Economic Development in the Executive Chamber. We extend our best wishes to Commissioner Giardina in his new position.

INSIGHTS IN BRIEF

ALJ Holds that Division of Tax Appeals May Review Discretionary Act of the Department

Reviewing simultaneous motions for summary judgment made by the taxpayers and by the Department of Taxation and Finance, a New York State ALJ has held that the Division of Tax Appeals has jurisdiction to review the Department's adjustment of Qualified Empire Zone Enterprise ("QEZE") credits claimed for real property taxes, and found that a full hearing will be necessary to resolve factual issues. *Matter of Schahet et al.*, DTA Nos. 827351-54 (N.Y.S. Div. of Tax App., July 27, 2017). The petitioners, all members of an LLC that was certified as a QEZE, argued that the Department's refusal to permit them to retroactively disregard negative adjustments to the LLC's federal tax basis for purposes of the QEZE credits was arbitrary and capricious, while the Department argued that its exercise of discretionary authority to make adjustments was not reviewable by the Division of Tax Appeals. The ALJ rejected the Department's arguments as being "without merit," holding that the Division of Tax Appeals has jurisdiction to review discretionary acts by the Department where the notices that are the subject of the taxpayers' protest were, as in this case, directly impacted by the Department's actions.

Tribunal Upholds ALJ's Determination of Tax Liability and Fraud Penalty

Affirming the decision of an ALJ, the New York State Tax Appeals Tribunal has held that the doctrine of collateral estoppel precluded the taxpayers from contesting the amount of personal income tax assessed by the Department of Taxation and Finance. *Matter of Frank S. and Christina Yerry*, DTA No. 827291 (N.Y.S. Tax App. Trib., Aug. 10, 2017). The Tribunal found that Mrs. Yerry had pleaded guilty in a previous criminal proceeding and signed a restitution agreement acknowledging the amount of the funds she had illegally obtained using forged checks, and agreeing to make restitution. The Tribunal concluded that the previous criminal matter "conclusively established both the fact and the amount" of the larceny; that since stolen money is income, the asserted deficiency was "plainly rational"; and that Mrs. Yerry's plea to attempted grand larceny also justified the imposition of a fraud penalty.

Couple's New York City Apartment Found to Be a Permanent Place of Abode, Causing Them to Be Statutory Residents

A New York State ALJ granted the Department's summary judgment motion, finding that a married couple, who were domiciled in New Jersey but maintained an apartment in New York City and were present in the City for more than 183 days each year, were statutory residents of the State and City. *Matter of John D. Radice and Lee S. Shearer*, DTA No. 827213 (N.Y.S. Div. of Tax App., July 20, 2017). The taxpayers had argued that, because they leased their New York City apartment solely due to the wife's residency and fellowship training as a doctor at New York Presbyterian Hospital, the apartment was only temporary in nature and not a permanent place of abode. The ALJ held that the language in the regulations regarding presence in New York on a temporary basis for a particular purpose was removed in December 2008, prior to the years in issue.

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Furnishing of Custom Satellite Imaging Reports Found to Be a Nontaxable Information Service

The Department of Taxation and Finance has concluded that the furnishing of custom reports on business facilities by a satellite imaging analysis provider is not subject to sales tax because, while it constitutes an information service, the report service is personal or individual in nature and may not be substantially incorporated into reports furnished to others. *Advisory Opinion*, TSB-A-17(12)S (N.Y.S. Dep't of Taxation & Fin., July 31, 2017). The Department based its conclusion on the fact that the provider is precluded by contract from furnishing the images or its analysis to other customers, and that the provider may not reuse its analysis or materials for other customers. Moreover, the facility images are specially ordered, and do not come from a common source or database.

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