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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF DYNAMIC LOGIC,

Appellant,

-against-

NO. 35

TAX APPEALS TRIBUNAL,

Respondent.

92 Court Street
Binghamton, New York
March 11, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: First case on today's
2 calendar is the matter of Dynamic Logic v. Tax Appeals
3 Tribunal. Counsel?

4 MS. ROBINSON: May it please the court. Leah
5 Robinson of Mayer Brown for Dynamic Logic. May I please
6 reserve three minutes?

7 CHIEF JUDGE WILSON: Yes.

8 MS. ROBINSON: Thank you.

9 There are two reversible errors stemming from the
10 Third Department's decision. Both of those errors are the
11 result of the Third Department skipping over words in the
12 statute. I hope to have time to address both of them. A
13 finding that either of these errors existed would result in
14 reversal here.

15 The first flaw in the imposition portion of Tax
16 Law Section 1105(c)(1), the - - -

17 JUDGE GARCIA: Counsel - - - I'm sorry. Here.
18 Before we get to the specific errors you're alleging - - -
19 excuse me. What are - - - what's the standard of review
20 for us? How are we reviewing this determination?

21 MS. ROBINSON: Sure. This is statutory
22 interpretation, so.

23 JUDGE GARCIA: It's not arbitrary and capricious?

24 MS. ROBINSON: No. The facts are not in any
25 serious contention here. The findings of fact from below,

1 you know, are not challenged by either party. This is
2 purely statutory interpretation.

3 CHIEF JUDGE WILSON: And do we give any deference
4 to the agency in its interpretation of the statute or no?

5 MS. ROBINSON: Not for statutory interpretation.
6 You know, this court has - - - or New York has guidance on
7 that. The U.S. Supreme Court just recently - - -

8 CHIEF JUDGE WILSON: A highly technical area that
9 they regulate carefully, no?

10 MS. ROBINSON: This is - - - you know, plain
11 meaning, you know, for both the imposition portion and the
12 exclusion that I'd like to discuss, plain meaning gets us
13 to the result. We can look to the legislative history that
14 supports the result. We can look to the overall statutory
15 framework that gets us to the same result. And the results
16 that I'm going to suggest are consistent with all of the
17 precedent from this court and the Third Department. No
18 deference is needed. I will actually - - -

19 JUDGE RIVERA: Isn't there some factual component
20 to the substantially incorporated analysis?

21 MS. ROBINSON: The - - - yes. But the facts
22 aren't in contention. The facts are clear in terms of the
23 substantially incorporated portion. To the extent there
24 should - - -

25 JUDGE TROUTMAN: What does substantially

1 incorporated mean?

2 MS. ROBINSON: Sure. So substantially
3 incorporated - - - sorry. Just give me one second.
4 Substantially incorporated refers to the amount of
5 information from one customer that gets incorporated into a
6 subsequent report to another customer.

7 JUDGE SINGAS: Why does it only have to do with
8 the quantity and not the quality of the information?

9 MS. ROBINSON: Well, every decision that these
10 courts have had, look to the quantity not the quality. The
11 Commissioner's own publications are very clear that it's
12 the quantity, not the quality. In fact, the Commissioner
13 has three publications that deal specifically with
14 benchmarking, which is what we're talking about here. Once
15 in 2012, once in 2016, and as recently as 2024, after the
16 Third Department's decision in this case. The Commissioner
17 put out another publication about benchmarking. All three
18 of those publications provide a very workable test, but
19 they all focus on the amount of incorporation, not on the
20 value.

21 JUDGE TROUTMAN: So what is incorporated here?

22 MS. ROBINSON: Sure. So a very easy,
23 straightforward analogy would be to class ranks, right? We
24 all went to law school. We all received a transcript.
25 Let's say in three years, six semesters we each took, say,

1 thirty law school classes, and our transcripts would each
2 have had, let's say, thirty credits.

3 JUDGE HALLIGAN: But doesn't the product as it is
4 advertised and as the contract reflects, turn in to some
5 extent, and how much I suppose we could go back and forth
6 about - - - on the comparison of the efficacy of the
7 client's metrics to other metrics. And all of that, I
8 thought, was made possible only by the inclusion of
9 everyone's data in the MarketNorms' database. So why isn't
10 that substantially incorporated?

11 MS. ROBINSON: Yeah. So for two reasons. The
12 first is that the only information one customer gets about
13 any prior studies is an aggregated, anonymized, single
14 benchmark.

15 JUDGE HALLIGAN: But are you disagreeing that it
16 is a component of what your client markets that apparently
17 has some value, because it is part of what they are telling
18 a customer they will provide?

19 MS. ROBINSON: No, I don't disagree with that. I
20 - - - I do agree - - -

21 JUDGE HALLIGAN: So - - -

22 MS. ROBINSON: - - - that it is - - - it is
23 something that they provide in every study. There is
24 testimony that it wasn't necessary. There was no extra
25 charge for it. But it does tell this customer how its



1 advertising campaign fared against all the prior campaigns
2 that - - -

3 JUDGE RIVERA: So if you didn't provide that
4 information, what service would - - - what value would it
5 be to your clients without that comparison?

6 MS. ROBINSON: You mean the rest of the study - -
7 -

8 JUDGE RIVERA: Yeah. Sure.

9 MS. ROBINSON: - - - not the benchmark?

10 JUDGE RIVERA: Yeah.

11 MS. ROBINSON: You know, in the seventy-four page
12 study that's in here, the benchmark is on two pages. In
13 the forty-page study, it's on one page. In the - - - you
14 know, it - - - all the other information. So it's the - -
15 -

16 JUDGE RIVERA: But that's not really answering my
17 question, but I appreciate the point. What else would be
18 of value to your client if there's not some comparison to
19 their competitors?

20 MS. ROBINSON: Oh, sure. The value is actually
21 everything else in there.

22 JUDGE RIVERA: Okay.

23 MS. ROBINSON: It's all the individual scores
24 that this client is getting related to how its advertising
25 campaign actually performed, based on the responses from



1 viewers.

2 JUDGE TROUTMAN: And how is that individualized
3 information utilized or shared with anyone else?

4 MS. ROBINSON: It is not. So one client's
5 information - - - and this was a clear finding of fact that
6 has not been challenged. One client's information is never
7 provided to anyone else in - - - you know, in its native or
8 raw form. That information, this client only. As well as
9 all the advice and recommendations that this client is
10 given.

11 Now, eight of the questions that are asked of
12 survey respondents - - - eight of the twenty-five or more
13 in a full study questions - - - eight related to gender,
14 household income, items like that. Those eight items go
15 into a separate database. Those eight items are never
16 accessible by anyone. But those eight items from all the
17 prior scores are used to create benchmarks. A single
18 datapoint. Not a single datapoint for each prior study,
19 but one single datapoint for the - - -

20 JUDGE CANNATARO: Counsel - - -

21 MS. ROBINSON: - - - 200 - - -

22 JUDGE CANNATARO: - - - I'd like to take you back
23 to the first set of questions because you've now spent a
24 few minutes talking about the substantiality of the data in
25 the market report and as it relates to this individual

1 report. And you started by saying this is strictly a case
2 of statutory interpretation, to which we owe no deference
3 to the taxing authority. But to me, it sounds like we're
4 arguing whether what they did here was reasonable or not.
5 And that usually implies that we give a little deference to
6 agencies that have expertise in this area. So can you
7 reconcile what I'm - - -

8 MS. ROBINSON: Sure.

9 JUDGE CANNATARO: - - - hearing with what you
10 said before?

11 MS. ROBINSON: Yeah. So I would say if you're
12 going to give any deference to the Commissioner, it should
13 be to its publications about benchmarking. Those are the -
14 - -

15 JUDGE HALLIGAN: But what do you do about
16 Wegmans? I mean, I thought Wegmans was about the same
17 provision - - - different part of it - - - that's before us
18 now, right?

19 MS. ROBINSON: Yeah.

20 JUDGE HALLIGAN: And the court there said that
21 with respect to this provision, that there was some, I
22 think the language was the presumption was in favor of the
23 taxing power? You - - -

24 MS. ROBINSON: On the exclusion portion,
25 absolutely. I mean, the - - - Wegmans - - -

1 JUDGE HALLIGAN: So you argue that the Wegmans
2 rule does not apply here, because why exactly?

3 MS. ROBINSON: Well, Wegmans focused on the first
4 half of the exclusion - - -

5 JUDGE HALLIGAN: Right. But why would the same
6 principle not apply to the second component?

7 MS. ROBINSON: It would. That - - - that the - -
8 -

9 JUDGE HALLIGAN: Okay. So - - - so it - - -

10 MS. ROBINSON: - - - the statute would be - - -
11 I'm sorry.

12 JUDGE HALLIGAN: No, go ahead.

13 MS. ROBINSON: That the exemption portion would
14 be construed in favor of the Commissioner, whereas the
15 imposition portion would be construed in favor of the
16 taxing power.

17 JUDGE HALLIGAN: And just so I'm clear. Is
18 "substantially incorporates", in your view, part of - - -
19 of which of those?

20 MS. ROBINSON: The exclusion. The imposition
21 portion which I haven't spoken to, but if there's time, I
22 would like to. The imposition portion is the - - - collect
23 is what - - - the focus has been on the collecting,
24 compiling, and analyzing piece, that is part of the
25 imposition.

1 CHIEF JUDGE WILSON: Before I - - - before you
2 get to the imposition piece, can I just ask you one more
3 thing about substantial incorporation? Do you have a view
4 about what purpose it was intended to serve?

5 MS. ROBINSON: Specifically the substantial
6 incorporation or - - -

7 CHIEF JUDGE WILSON: Yes.

8 MS. ROBINSON: - - - the overall?

9 CHIEF JUDGE WILSON: Yes.

10 MS. ROBINSON: I mean, the provision, as we know,
11 came from a New York City provision, which we know came
12 from - - - in response to the Dun & Bradstreet decision
13 from 1931. In Dun & Bradstreet off-the-shelf, mass
14 commoditized information was made available to anyone who
15 subscribed. The original provision was intended to make
16 that taxable. The court had said that wasn't taxable. To
17 make that taxable.

18 So when multiple people are getting the same
19 thing, that is what the provision is intended to tax. The
20 exclusion, which is whether it's one test or two, the
21 personal and individual nature portion, and the
22 substantially incorporated portion are the exception from
23 or help us - - - help us be aware of what isn't mass, what
24 isn't mass produced, what isn't off-the-shelf. So if it's
25 personal and individual, and only this customer is getting

1 the data, the information - - -

2 JUDGE CANNATARO: What's your best authority for
3 the statement that it needs to be widely disseminated in
4 order to fall under this provision?

5 MS. ROBINSON: Yes. I think the plain language,
6 the legislative history, and the overall construction - - -

7 JUDGE HALLIGAN: On the plain language, can you
8 be more specific?

9 MS. ROBINSON: Absolutely. So there are three
10 elements to the imposition portion of the provision. The
11 first couple of words start with the furnishing of
12 information by printing, by duplicating, mimeographing,
13 multigraphing. Those terms all relate to mass production.
14 This is not producing many copies for one person. Many
15 copies for one person is covered under a different
16 provision. That would be 1105(a), or if it's printing,
17 1105(c) (2).

18 So printing, duplicating, mimeographing - - -
19 right? The old purple machine - - - those all relate to
20 multiple copies. The "furnished to other persons", which
21 now appears twice, both in the phrase "collecting,
22 compiling, or analyzing, and furnishing reports to other
23 persons," tells us multiple people. A few words later in
24 the exemption, that it not be "substantially incorporated
25 in reports furnished to other persons", again, tells us

1 multiple copies to multiple people, taxable. Individual
2 copy to this individual person? Not covered by this
3 provision. And it is - - - well, the Commissioner has
4 argued that the first reference of "furnishing reports to
5 other persons" really means giving a report to this client.

6 That would suggest that "furnishing reports to
7 other persons," that other persons means two very different
8 things - - -

9 JUDGE HALLIGAN: Why is what's - - -

10 MS. ROBINSON: - - - right next to each other.

11 JUDGE HALLIGAN: Why is what's operative the
12 report? As opposed to the information that you gather from
13 each client and then put into the MarketNorms database?

14 MS. ROBINSON: The - - - the reports are critical
15 here because an oral report of information would not be - -
16 -

17 JUDGE HALLIGAN: I mean, with respect to the text
18 of the statute. Why should we consider the operative unit
19 here to be the physical report as opposed to the data
20 itself, which I think is arguably information?

21 MS. ROBINSON: Yeah. I think it's because the
22 statute gives us two things. It tells us what is taxable,
23 and it tells us when it's taxable. So the "what" is the
24 information; the collecting, compiling, or analyzing
25 information. That's the what could be taxable. The

1 beginning of the sentence tells us when that "what" is
2 taxable when it's furnished by printed, duplicated,
3 mimeographed.

4 This point is even clearer if we look to the
5 history. If we look to the city provision, which is the
6 origin of the state one. The City provision uses all the
7 same words or almost all the same words but presents it a
8 little bit differently. If you look at the city provision,
9 it - - - the last sentence of the City provision says, an
10 information service shall mean and include collecting,
11 compiling, or analyzing information, and furnishing reports
12 thereof to others. The beginning of the City provision
13 says, an information services taxable when it's furnished
14 by printing, mimeographed, et cetera. So there's the
15 "what" and the "when". The "what" is the information. The
16 "when" is when reports are furnished to multiple people.

17 JUDGE RIVERA: Did you preserve that argument?

18 MS. ROBINSON: We did, Your Honor. From the get-
19 go we have argued that this company's services are not
20 included in 1105(c)(1). That's been the argument from the
21 beginning. The original focus of the argument, in response
22 to the positions taken during the audit was that this is a
23 consulting service, and consulting is not a taxable
24 information service because it - - -

25 JUDGE RIVERA: How is that making an argument



1 about dissemination to multiple individuals?

2 MS. ROBINSON: Well - - -

3 JUDGE RIVERA: Or multiple clients? Let me put
4 that way.

5 MS. ROBINSON: - - - because the consulting is
6 not the mass production of data to multiple people.

7 CHIEF JUDGE WILSON: Thank you.

8 MS. ROBINSON: Oh, I I didn't see the clock.
9 Thank you.

10 MR. BRODIE: May it please the court. Frederick
11 Brodie for the Commissioner.

12 The judgment should be affirmed for two reasons.
13 First, AdIndex is a taxable information service under Tax
14 Law 1105(c)(1). Its primary function is to furnish
15 information from consumer surveys.

16 JUDGE TROUTMAN: How does the exclusion work? Or
17 is there even an exclusion?

18 MR. BRODIE: Oh, there is an exclusion.

19 JUDGE TROUTMAN: How does anyone ever meet the
20 bar?

21 MR. BRODIE: Well, they met the bar in Wegmans
22 because the information in - - - well, they didn't meet the
23 bar in Wegmans, but they met the bar here as to the first
24 element. There are two elements of the exclusion. One,
25 the information has to be personal or individual in nature.

1 And two - - -

2 JUDGE TROUTMAN: So is it - - -

3 CHIEF JUDGE WILSON: That's not in dispute,
4 right? Here?

5 MR. BRODIE: That's not in dispute. It's
6 personal or individual in nature. Two, it is not or may
7 not be substantially incorporated in reports.

8 JUDGE TROUTMAN: So the dispute is on
9 "substantially"? You can share some information?

10 MR. BRODIE: You can share some information. I'm
11 sorry I don't understand - - -

12 JUDGE TROUTMAN: Or does - - - what does
13 "substantially incorporate" mean?

14 MR. BRODIE: Well, we argued that "substantial"
15 means the same as it does in the familiar substantial
16 evidence standard. It's not necessarily a preponderance,
17 but a reasonable amount.

18 Now, in their - - -

19 CHIEF JUDGE WILSON: Let me ask you this - - -

20 MR. BRODIE: - - - reply brief - - -

21 CHIEF JUDGE WILSON: Sorry. Do you tax law firms
22 on the advice they give to clients?

23 MR. BRODIE: No. Because that's professional
24 services. And this is really - - - that touches on a
25 critical issue. The test for taxability. The test for

1 what is an information service is primary function. Both
2 sides agreed on that below. No question.

3 So - - - you know, obviously, any information
4 service could throw in a piece of advice. They could take
5 a fortune - - -

6 CHIEF JUDGE WILSON: How about a business like
7 McKinsey, let's say, that gives business consulting advice?

8 MR. BRODIE: Right. And a - - -

9 CHIEF JUDGE WILSON: Is that taxable?

10 MR. BRODIE: - - - a consultant - - - no.
11 Because a consultant could give consulting advice. They
12 could come into your offices and tell you how to run your
13 business, and they might transmit some data in the course
14 of doing that. But the transmitting data is not the
15 primary function of what the consultant does.

16 Now, we look at lawyers. Lawyers may transmit
17 data in the course of their representation of a client, but
18 their primary function is to practice a profession. It's
19 to practice the profession of law. And we know from the
20 legislative history, looking back to the New York City
21 statute on which this provision was based, that - - - that
22 consulting services and professional services were not
23 intended to be taxable.

24 JUDGE GARCIA: Counsel, do you - - -

25 JUDGE HALLIGAN: Well, what's the interplay

1 between, in your view, the primary function test and the
2 question whether the information is substantially
3 incorporated? Are they getting at the same inquiry or
4 different?

5 MR. BRODIE: It's a different inquiry because
6 primary function asks what is the main thing that the
7 activity being taxed - - -

8 JUDGE HALLIGAN: So what is the primary function
9 here in your view? It sounds like you think it is not
10 consulting; am I right?

11 MR. BRODIE: That's correct.

12 JUDGE HALLIGAN: Okay. So what is the primary
13 function?

14 MR. BRODIE: Primary function, by the way, is an
15 issue of fact.

16 JUDGE HALLIGAN: I understand.

17 MR. BRODIE: And it was found as a fact by the
18 Tribunal that the primary function of AdIndex is to provide
19 survey data.

20 JUDGE HALLIGAN: But - - -

21 JUDGE GARCIA: Counsel, do you agree with your
22 adversary that the standard of review here is purely
23 statutory interpretation, or given those comments, would
24 you see it as something else in reviewing the tax
25 determination?

1 MR. BRODIE: It is something else for a couple of
2 reasons. First, again, the primary function test.
3 AdIndex, primarily an information service. The Tribunal
4 finds that; it's a fact. Third Department confirms it. So
5 now you're reviewing a question of fact. I don't even know
6 if the court can review it. If it does, it could only
7 review it for plain error.

8 Secondly, under 1132(c), the Tax Law establishes
9 a presumption in favor of applying sales tax if it's of a
10 type mentioned in 1105. Now, you don't have to prove that
11 you fall within 1105. It just has to be mentioned in order
12 for that presumption to kick in.

13 JUDGE TROUTMAN: What would allow the exemption
14 to be applied here? What caused them to be denied the
15 exemption for?

16 MR. BRODIE: For a couple of reasons. First of
17 all, the data from MarketNorms - - - all right. I'm sorry.
18 The data from every AdIndex survey. There's up to twenty-
19 five questions in an AdIndex survey. Eight of those
20 twenty-five questions were pumped into another database
21 that - - - that Dynamic sells to other subscribers, called
22 MarketNorms.

23 JUDGE RIVERA: Was it solely about quantity?
24 Because before you answered that "substantially
25 incorporated" means a reasonable amount of information. So

1 it's quantity, not the quality, or both?

2 MR. BRODIE: Both. It - - - you could make an
3 argument that something is substantial based on quality.
4 And that's what the Tax Tribunal found. They found the
5 information was valuable, therefore substantial. But the
6 term substantial is broad enough to encompass, certainly, a
7 - - - a measure of quantity.

8 JUDGE CANNATARO: Do you have a good quantity
9 argument here? I mean, this data gets added to the data of
10 countless other clients and data sources, so it doesn't
11 seem to make up a big part of even the MarketNorms
12 database.

13 MR. BRODIE: Well, remember, Your Honor, that
14 it's not just substantial, it's substantially incorporated.
15 Now, one way of incorporating things, one definition of
16 incorporated that's in our brief and it's not disputed, is
17 to blend thoroughly so that the product is
18 indistinguishable. So that's actually a point in our favor
19 that the data are anonymized and aggregated.

20 JUDGE CANNATARO: So you're saying it doesn't
21 have to be substantial in terms of numerosity or even the
22 quality, it has to be substantially incorporated. It goes
23 into some sort of data blender and makes up part of what
24 you can get out of the MarketNorms. Is that what you're
25 saying?

1 MR. BRODIE: Right. Right. To be incorporated,
2 putting it into the blender incorporates it. So - - -

3 JUDGE SINGAS: Without the MarketNorms portion of
4 it, it wouldn't be taxable?

5 MR. BRODIE: Well, if it weren't - - - if the
6 data weren't sent to MarketNorms, then it wouldn't be
7 taxable. Because the case below was based on the fact that
8 a substantial amount or substantial in value, some
9 substantial portion of these AdIndex surveys was pumped
10 into MarketNorms and then provided to other subscribers.
11 And Your Honor - - - I'm sorry - - -

12 JUDGE HALLIGAN: If I could just ask? It seems
13 to me that part of the dispute is about what substantially
14 means, right?

15 MR. BRODIE: Right.

16 JUDGE SINGAS: And I take it you are saying some
17 combination of it actually modifies "incorporates", and
18 also in line with what the Tribunal said that it means that
19 - - - that there is something of value, quantitative and
20 qualitative. So in light of the statute itself, why is
21 your reading of the words substantially correct as opposed
22 to the reading they offer? I mean, what - - - you know,
23 signals would you point us to to suggest that that's how we
24 should read the statute if we're not going to defer to the
25 Tribunal?

1 MR. BRODIE: Well, substantially, it could mean
2 quantity, it could mean quality. It's hard to think of
3 other ways in which something could be substantial.

4 JUDGE HALLIGAN: But substantially could be - - -
5 I think it was eight out of twenty-one questions or
6 whatever it was, right? That's less than half. Obviously,
7 each single client has a relatively small chunk of the
8 total data in the MarketNorms database. So it seems to me
9 that we have to think a little bit about what substantially
10 means. And it sounds to me like you're suggesting
11 substantially means something. Whereas, it could be
12 understood to mean a pretty good amount. I'm just trying
13 to understand why we should read it your way.

14 MR. BRODIE: I - - - I think a pretty good amount
15 is good. If you look at the reply brief, they cite an
16 alternate definition that I believe says considerable in
17 amount, value, and the like. And even in that - - - under
18 that definition, it's still taxable because - - -

19 JUDGE TROUTMAN: But what do you say to the
20 argument that by the manner in which you are interpreting
21 "substantially incorporated", a taxpayer never wins?

22 MR. BRODIE: You know, the - - - New York Life
23 case I believe it is which was, I believe, affirmed on the
24 opinion below by this court, the taxpayer won. It was
25 private detective reports. And those reports - - - reports

1 were never sold to another client.

2 CHIEF JUDGE WILSON: So let me ask you this.
3 Suppose the Dynamic Logic structured its business
4 differently. So it had one team of people that was
5 building the MarketNorms database, and they did that
6 independently. And they had another team that was building
7 the AdIndex, and doing the AdIndex work, right, for
8 specific clients. And then what they did is they did all
9 the AdIndex work that comprises the first seventy pages of
10 the report, and then for a client - - - for each client,
11 let's say, they go and refer to the MarketNorms database to
12 make up that last two pages and deliver the same thing.
13 Does that still result in the AdIndex product being taxed?

14 MR. BRODIE: That sounds like what they do. I
15 mean, they - - -

16 CHIEF JUDGE WILSON: Well, I'm - - - here, I'm
17 positing that the MarketNorms database is being built
18 independently of the AdIndex. Right now they're using one
19 survey and taking some of the information from that survey
20 to put it into MarketNorms. What I'm saying is let's
21 suppose they do it differently.

22 They've got a team of people here that's working
23 just on MarketNorms, they have nothing to do with AdIndex.
24 Don't even know what the index - - - AdIndex people are
25 doing. You've got a team of AdIndex people who are looking

1 at the particular campaign for a particular shade of Chanel
2 lipstick. Right? And they send that out. They do the
3 surveys on that, but they don't ask questions that get put
4 into the MarketNorms database. Is that taxable? Is the
5 AdIndex product taxable?

6 MR. BRODIE: No.

7 CHIEF JUDGE WILSON: Why?

8 MR. BRODIE: Because material from AdIndex is not
9 substantially incorporated into MarketNorms. It's - - -
10 they're two separate things. So the case below was, look,
11 there is this material. It goes into MarketNorms. And I
12 want to stress that the phrase, "is not or may not be
13 substantially incorporated". Here, all of the AdIndex data
14 may be incorporated into MarketNorms. The AdIndex contract
15 gives Dynamic a license to copy, distribute, resell,
16 modify, and otherwise use a client's information in
17 MarketNorms. And data - - - reuse the client's data. And
18 data is a defined term in the contract, meaning all data
19 that Dynamic collects through the surveys. So everything
20 can go into MarketNorms.

21 CHIEF JUDGE WILSON: I think your reading may be
22 to mean, theoretically could be?

23 MR. BRODIE: Well, it doesn't mean theoretically
24 could be, because we know that from New York Life. There
25 - - - where New York Life, it was only speculative that the

1 private detective reports would get put into another - - -
2 would get sold to another client. There was absolutely no
3 evidence that that had ever happened or would ever happen.

4 Here it is contemplated between the parties that
5 all of the AdIndex data could go into MarketNorms.

6 JUDGE HALLIGAN: On the standard of review, are
7 you relying on the principle set forth in Wegmans? I
8 thought I heard you say instead you were relying on another
9 provision of the Tax Law?

10 MR. BRODIE: No. I - - - I would - - - yeah. We
11 are relying on Wegmans as well, and I intended to get to
12 that.

13 Wegmans says the exclusion is construed in favor
14 of the state.

15 JUDGE HALLIGAN: Okay. And your adversary
16 suggests not. Maybe you could respond to that? I took
17 their argument to be that this is about - - - I wasn't
18 entirely clear, but that it was about coverage in the first
19 instance and not an exclusion. What - - - why does the
20 Wegmans principle apply, in your view?

21 MR. BRODIE: Well, Wegmans says two things on
22 standard of review. The taxing clause is construed in
23 favor of the taxpayer.

24 JUDGE HALLIGAN: Yeah.

25 MR. BRODIE: And the exclusion is construed in



1 favor of the state. So the question as to the to the
2 taxing clause, you don't get to principles of statutory
3 construction if the statute is plain on its face. And here
4 we argue that the statute is plain on its face.

5 JUDGE HALLIGAN: If we disagree, though, and we
6 think that perhaps "substantially incorporates" is not
7 plain on its face, then how does the Wegmans principle
8 apply here?

9 MR. BRODIE: Oh, well, "substantially
10 incorporated" is part of the exclusion. So that means that
11 - - -

12 JUDGE HALLIGAN: The taxing power gets the
13 benefit of the rule in that event?

14 MR. BRODIE: Right.

15 CHIEF JUDGE WILSON: But their argument that this
16 is not an information service because information service
17 requires something in the form of mass distribution, the
18 presumption works the other way?

19 MR. BRODIE: That argument is unpreserved. And I
20 wanted to reach that. Your Honor is talking about the
21 copying argument that everything goes to duplication.
22 Dynamic did not make the statutory construction argument on
23 the administrative level, not in its ALJ submissions, not
24 in its exceptions, not in its Tribunal briefs. They argued
25 instead that under the primary function test, AdIndex was,

1 as a matter of fact, a nontaxable consulting service, which
2 was rejected as a matter of fact by the Tribunal.

3 In this court, preservation is jurisdictional. I
4 learned that recently in Sabine against State. And this
5 court has applied the preservation requirement to
6 administrative proceedings in a tax case. That's Henry
7 against Wetzler, a 1993 decision that we cite in our brief.
8 And I know Dynamic tries to distinguish that decision, but
9 we're just relying on the last sentence of the opinion.

10 JUDGE RIVERA: Presume for one moment we
11 disagreed, and we thought it was preserved. Why does it
12 fail on the merits?

13 MR. BRODIE: It fails on the merits for a couple
14 of reasons. One moment, Your Honor, and I will find the
15 couple of reasons. Sales tax applies to receipts from,
16 quote, "the following services". Those services include,
17 quote, "the furnishing of information," which in turn
18 includes, quote, "the services of collecting, compiling, or
19 analyzing information." Now, "including" is a term of
20 enlargement. It means that the tax on the furnishing of
21 information also extends to the services of compiling,
22 collecting, analyzing, and furnishing reports. So
23 collecting, compiling, and analyzing doesn't go back to
24 duplication, it goes back to furnishing.

25 CHIEF JUDGE WILSON: But on that reading you



1 would sweep in McKinsey and maybe law firms as well?

2 MR. BRODIE: No. Because it's clear that the
3 intent of the statute is not to reach consulting and
4 professional services. And if you can prove, again, using
5 the primary function test, if you can prove that your
6 principle or your primary function is a professional or
7 consulting services, you're not taxed.

8 If the legislature had meant to tax only
9 duplication, it would not have added the phrase that
10 begins, "including the services of collecting, compiling,
11 or analyzing." Dynamic reads that phrase out of the
12 statute.

13 Collecting, compiling, and analyzing are not
14 examples of duplication, as Dynamic contends. You can
15 duplicate things without having collected them, without
16 compiling them, and especially without analyzing them. The
17 Commissioner's reading, conversely, doesn't render
18 meaningless the phrase that begins by "printed,
19 mimeographed, or multigraph matter", as Dynamic also
20 argues. That phrase has a purpose. It imposes sales tax
21 on various types of duplication, but it does not limit the
22 scope of the rest of the section.

23 Now, the tax department's construction of
24 1105(c)(1) has been in place for almost fifty years. The
25 regs were filed in 1976. And the regs state that

1 collecting, compiling, or analyzing information and
2 furnishing reports thereof is a taxable information
3 service. Now, in the past forty - - - oh, and the
4 regulations go on to say specifically that product and
5 marketing surveys are taxable information services. And
6 that makes sense. You go out, you collect, you compile,
7 you analyze information, and - - - via a survey.

8 Now, neither the legislature nor the tax
9 department has ever disturbed that definition in the last
10 forty-nine years. No court, no administrative body has
11 ever adopted Dynamics' reading of the statute.

12 CHIEF JUDGE WILSON: Thank you.

13 MR. BRODIE: Thank you.

14 MS. ROBINSON: If I may just pick up with the
15 regulation? Every piece of language in the regulation,
16 every example in the regulation, multiple copies to
17 multiple persons, taxable. A copy just to this customer,
18 not taxable. We agree with the reg - - - you know, we are
19 not challenging the regulation at all here. Apply the
20 regulation. You're not bound by the regulation.

21 JUDGE HALLIGAN: On the - - -

22 MS. ROBINSON: But we're fine with the
23 regulation.

24 JUDGE HALLIGAN: - - - on the preservation point,
25 can you tell us where in the record to look to see that you

1 made the argument on - - - you know, dissemination and the
2 statutory construction argument?

3 MS. ROBINSON: Sure. The nuance of the argument
4 focusing on the word "dissemination" is - - - is not the
5 issue, that's an argument within the issue. The issue is
6 whether or not the language of 1105(c)(1) applies here. So
7 that has been preserved. It's in the petition that was
8 filed at the ALJ. The entire brief, the opening brief, the
9 reply brief, all of the briefs that - - - at every level,
10 have been consistent in Dynamic Logic, arguing that the - -
11 -

12 JUDGE RIVERA: And did the courts answer that
13 question, responding to some of the concerns raised by your
14 adversary?

15 MS. ROBINSON: So it's interesting - - -

16 JUDGE RIVERA: And how the court answered the
17 question?

18 MS. ROBINSON: Yeah. So it's interesting because
19 at the Third Department, the Commissioner fully briefed the
20 dissemination argument without raising any concerns that it
21 was a new argument. It only became a question of
22 preservation, where one line in the - - - at the end of the
23 Third Department's decision.

24 JUDGE GARCIA: The same preservation rules apply
25 in this context to the Third Department as they do to this

1 court?

2 MS. ROBINSON: Judge Garcia, I did not hear the
3 beginning of your question.

4 JUDGE GARCIA: The same preservation rules apply
5 at the Appellate Division as applied to this court?

6 MS. ROBINSON: As far as I know, yes.

7 JUDGE RIVERA: Well, they can address unpreserved
8 issues, can't they?

9 MS. ROBINSON: Absolutely. I mean, statutory
10 interpretation - - -

11 JUDGE GARCIA: Can they - - - can we?

12 MS. ROBINSON: Statutory interpretation,
13 absolutely.

14 JUDGE GARCIA: Can we address unpreserved issues?

15 MS. ROBINSON: I think it's a broad question.
16 Probably not. I would say a question of statutory
17 interpretation, when the statute has been before every body
18 dealing with this, is not an unpreserved issue. Now, if we
19 had made a separate argument, if we had suddenly said that
20 under 1115 - - - Tax Law Section 1115, we qualify for an -
21 - - a separate exemption listed in 1115 - - -

22 JUDGE RIVERA: Let me ask, allow me - - -

23 MS. ROBINSON: - - - that would be different.

24 JUDGE RIVERA: - - - just to clarify under - - -
25 better understand and clarify your argument on this. Is

1 your point that if you only give it to the one - - - you
2 make one copy, you give it to the one customer, maybe you
3 send it by email - - - for the moment, let's just try that
4 - - - that that would not be covered on the first part; is
5 that your point?

6 MS. ROBINSON: Yes.

7 JUDGE RIVERA: Okay. So let's say I am that
8 customer, and I say we're going to have a meeting with your
9 analysts because I know you provide meetings. Bring
10 another copy for - - -

11 MS. ROBINSON: Yeah. That would be fine.

12 JUDGE RIVERA: - - - for who's at the meeting.
13 Are you now covered?

14 MS. ROBINSON: You are still covered. It's the
15 language in the statute that refers to reports furnished to
16 other persons. Meaning not the customer. So you can give
17 your customer - - -

18 JUDGE RIVERA: Where does it say not the
19 customer?

20 MS. ROBINSON: It says to other persons. And
21 there's no reason to think that the legislature needed to
22 say this is taxable when you give it to your customer.
23 That doesn't make sense. They don't use that language with
24 respect to tangible personal property or any of the other
25 services that are taxable.

1 JUDGE RIVERA: Regardless of how many copies you
2 would make for that client, it wouldn't matter because it's
3 the one client?

4 MS. ROBINSON: Correct.

5 JUDGE RIVERA: You're never covered, in other
6 words?

7 MS. ROBINSON: You're never covered.

8 JUDGE RIVERA: You're never covered. Because you
9 always have just one client, right?

10 MS. ROBINSON: I'm not following what you mean by
11 "you're never covered".

12 JUDGE RIVERA: Well, it must be because I'm not
13 understanding the argument. And that's on me, not on you.
14 So I'm just a little unclear. If I'm understanding your
15 argument, your model - - - your business model means you
16 would never be covered because it's always one client
17 regardless of how much material and how many copies of that
18 material you are providing to the one client. Yes?

19 MS. ROBINSON: Yes. Just like with a law firm.
20 I could give my client twenty copies of an opinion. The
21 statute is not looking to how many copies the particular -
22 - -

23 JUDGE RIVERA: So who does this cover then? What
24 business model would this cover?

25 MS. ROBINSON: In terms of being taxable - - -



1 JUDGE RIVERA: Yes, yes, yes.

2 MS. ROBINSON: - - - or in terms of being
3 excluded?

4 JUDGE RIVERA: Yes. Yes.

5 MS. ROBINSON: Taxable?

6 JUDGE RIVERA: Yes. Yes.

7 MS. ROBINSON: Well, we can - - - we can look at
8 the long line of cases that were taxable, so Twin Coast
9 Newspapers, Allstate, Towne-Oller, or Wegmans. All of
10 those are situations where the information was effectively
11 in some version of a common database to be distributed to
12 anybody who asks them for that information. And anybody
13 who asks them for that information is going to get the same
14 information.

15 Here, you can look - - -

16 JUDGE RIVERA: But it's always one person at a
17 time in those examples, no?

18 MS. ROBINSON: Yes. I think the answer is yes.
19 Dun & Bradstreet, which is an example that I just answered.
20 But Dun & Bradstreet was - - - you know, it was a
21 subscription with multiple customers who, at the same time,
22 all get - - - got multiple copies. But most of the
23 examples were an individual request, but the information
24 was then capable of being given to others.

25 I do want to just - - -

1 JUDGE SINGAS: At that meeting, the information
2 is the analysis of the data and the comparison? Otherwise,
3 I don't know what your service looks like without that.

4 MS. ROBINSON: Yeah. I mean the comparison is
5 one datapoint in - - - you know, a twenty or two datapoints
6 in a seventy-page presentation. It just lets that customer
7 know how their campaign did against a whole bunch of prior
8 campaigns. It's not what they're actually seeking, though.
9 What they're seeking is what do we do to make our campaign
10 better? These are ongoing - - -

11 JUDGE HALLIGAN: Well, we don't - - -

12 JUDGE SINGAS: They're seeking, how do I compare
13 it to my competitors in this industry? I think that's
14 exactly what they're looking for.

15 MS. ROBINSON: It is one datapoint that they can
16 - - - if that's all they want, they could just subscribe to
17 the MarketNorms database separately if they just wanted
18 that datapoint. The customers for AdIndex want the full
19 study. They have ongoing campaigns that they're spending
20 lots of money on, and they want to know what do we do to
21 make it better.

22 JUDGE RIVERA: So take - - - so taking the
23 example in your brief, let's go with Clinique for one
24 moment. So Clinique wants to know. I've got this
25 particular cream, I want to know if I'm reaching the target

1 group. Maybe there are other target groups I should get
2 to. What's their reaction to it? Is it positive? Is it
3 negative? Is it - - - you know, they don't care. How do I
4 get them to buy my product? That's all that's about - - -

5 MS. ROBINSON: In - - - in addition - - -

6 JUDGE RIVERA: - - - right? So you're doing
7 that?

8 MS. ROBINSON: - - - do - - - do they - - - do
9 they see my ad - - -

10 JUDGE RIVERA: Yes.

11 MS. ROBINSON: - - - and remember my product when
12 they go to the store?

13 JUDGE RIVERA: Yes. But given the industry that
14 will only help them so far, because there could be another
15 wonderful company that makes a very similar product. And
16 they want to know, as Judge Singas is mentioning, how can
17 they compete against that product?

18 MS. ROBINSON: The benchmark does not give them
19 that information at all. All the benchmark does - - -

20 JUDGE RIVERA: But doesn't the benchmark tell
21 them how that other product is doing?

22 MS. ROBINSON: No. It tells them how the thirty
23 other beauty products, which might be lipstick, might be
24 deodorant - - -

25 JUDGE RIVERA: Yeah.



1 MS. ROBINSON: - - - it just tells them how the
2 campaigns for these prior thirty did on average.

3 JUDGE RIVERA: You're saying it'll refer to any
4 product in that same industry?

5 MS. ROBINSON: In the category. So for example,
6 in the - - -

7 JUDGE RIVERA: How would they disaggregate for it
8 to be of value to them? Right? If they're interested in
9 this example in the cream, they're not necessarily caring
10 how someone is selling a lipstick. Although, people get
11 brand-associated, so maybe they care on some level that
12 someone really likes that lipstick, because maybe then
13 they'll buy the cream. I get that. But how, if any way,
14 can they make use of that aggregated data? Because it
15 sounds like then it's not useful at all, and yet people
16 want it.

17 MS. ROBINSON: Yeah. I mean, the aggregated data
18 just tells them, are they doing - - - you know, they're - -
19 - they're getting a score.

20 JUDGE RIVERA: Yes.

21 MS. ROBINSON: So let's say on brand awareness,
22 they get a score of 3.3.

23 JUDGE RIVERA: As in Clinique? Forget the cream.

24 MS. ROBINSON: Yes.

25 JUDGE RIVERA: Just Clinique.

1 MS. ROBINSON: This particular one for eighteen
2 to - - - you know, ages eighteen - - -

3 JUDGE RIVERA: Okay.

4 MS. ROBINSON: - - - to thirty-four, women in
5 that group, the - - - the score was a 3.3. Okay. Is it
6 3.3 good or bad? That's what the benchmark tells them.
7 The benchmark - - - and we can look at the copy and the
8 record. The benchmark tells them that the average was
9 actually a 2 or the average was a 4. So you've done better
10 than average or worse than average. It doesn't tell you
11 how some other company's lipstick did. It doesn't tell you
12 how - - - you know, what to do differently. It doesn't
13 inform this customer on what they need to do. It just
14 tells them is - - -

15 JUDGE RIVERA: But it does put them on notice
16 that perhaps they're not doing so well?

17 MS. ROBINSON: Or that they're doing fantastic.

18 JUDGE RIVERA: Or that they're doing great,
19 correct.

20 MS. ROBINSON: Yes.

21 JUDGE RIVERA: Correct.

22 MR. BRODIE: Like the law school GPA, right? You
23 find out that you are in the top ten percent of your class.
24 You're in the top one percent of your class. You now know
25 how you compare to the others, but you don't know anyone

1 else's grade in con law. You don't know anyone else's GPA.
2 You don't know what you should have studied differently.
3 It doesn't tell you anything other than - - - against this
4 one score that is the average of everything else, it just
5 tells you - - -

6 JUDGE RIVERA: It might not tell you that
7 minutiae. I get your point there. Now I better understand
8 it. Thank you for that. But it does tell you that there
9 is a measure, this GPA measure, that you're referring to.
10 It shows that there are others who have done better in some
11 way to get that number than you, or there are others who
12 have not done as well numerically to get a lower number.
13 Right? Than you. So that has tremendous value, at least
14 potentially, to an employer. Does it not?

15 MS. ROBINSON: We don't argue on value. We agree
16 there is some value here.

17 JUDGE RIVERA: You don't argue on value?

18 MS. ROBINSON: We think the test - - - we think a
19 value test would be completely unworkable. How - - - you
20 know, anything that you put into a report, as a seller,
21 anything you put into your report you think is valuable.
22 So if value - - - if just any mere scintilla of value is
23 enough, then you've read the word out - - -

24 JUDGE RIVERA: But that - - - isn't that where
25 the "substantially" is - - -

1 MS. ROBINSON: So I - - -

2 JUDGE RIVERA: - - - helping us address? I mean,
3 "substantially" is modifying "incorporated", so it's really
4 about the incorporation. I don't know if it's really so
5 much about anything else. But fine, you're making your
6 argument.

7 MS. ROBINSON: Yeah. I mean, the Commissioner
8 gives us a very easy and workable rule on "substantially"
9 with respect to benchmarks, and that's the advisory opinion
10 I mentioned that was just issued in July of 2024. They - -
11 - between the four, the one in 2012, 2016, and 2024, very
12 workable rule that wasn't applied in this case. But in
13 that workable rule, one of the specific examples that the
14 Commissioner gives is a benchmark study - - - I'm sorry. A
15 study where the benchmarking data appears on one out of
16 four pages. That's twenty-five percent. And the
17 Commissioner said that did not take the company out of the
18 exception. That twenty-five percent of the report being a
19 benchmark was not enough to make that taxable. That's the
20 Commissioner's own advisory opinion.

21 And I realize I'm out of time, but there's just
22 one thing I'd like to also say about that. There was an
23 assertion that because here the information could be
24 provided, because there's language in the contract that
25 says it could be provided, that that kills any entitlement

1 to the exemption. One, the findings of fact here, findings
2 of fact 15 and 17 are very clear on only those eight are
3 included.

4 And I would refer you back to those advisory
5 opinions. In one of those three advisory opinions in the
6 example, the vendor had the right to use a hundred percent
7 of the information and provide it to others. And yet the
8 Commissioner still found that that was not a taxable
9 information service because that was not substantial
10 incorporation.

11 CHIEF JUDGE WILSON: Thank you.

12 MS. ROBINSON: Thank you very much.

13 (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Dynamic Logic v. Tax Appeals Tribunal, No. 35 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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