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COURT OF APPEALS

STATE OF NEW YORK

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WEGMANS FOOD MARKETS, INC.,

Respondent,

-against-

NO. 56

TAX APPEALS TRIBUNAL OF THE STATE OF  
NEW YORK,

Respondent,

-and-

COMMISSIONER OF TAXATION AND FINANCE  
OF THE STATE OF NEW YORK,

Appellant.

-----

20 Eagle Street  
Albany, New York  
June 6, 2019

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 56, the  
2 Matter of Wegmans Food Markets v. the Tax Appeals Tribunal.

3 Good afternoon, counsel.

4 MR. BRODIE: Good afternoon, and may it please  
5 the court, Frederick Brodie for the Commissioner. I'll  
6 reserve three minutes for rebuttal.

7 CHIEF JUDGE DIFIORE: Three.

8 Mr. [inaudible], does it matter that the  
9 contracted-for reports are prepared and presented in a very  
10 tailored and specific way to the client?

11 MR. BRODIE: It does not, Your Honor.  
12 RetailData's processing of the information did not make its  
13 sales nontaxable. Collecting and processing information  
14 are, in fact, taxable services.

15 1105(c)(1) taxes the furnishing of information.  
16 Furnishing includes the services of collecting, compiling,  
17 or analyzing information. And that's an inclusive  
18 definition; it's not exclusive.

19 So the fact that RetailData collected prices,  
20 checked them for accuracy, and compiled them into Wegmans'  
21 format, actually makes its services taxable.

22 JUDGE GARCIA: So counsel, what's your test for  
23 meeting the - - - the exclusion? What would the test be?

24 MR. BRODIE: Well, information that's individual  
25 in nature relates - - -



1 JUDGE GARCIA: What does that mean? I mean,  
2 that's kind of the same way of saying the test, right? The  
3 language of the statute.

4 So how is a court, looking at any of those  
5 things, going to tell if this is personal or individual in  
6 nature? What's the test we apply?

7 MR. BRODIE: Well - - - well, I think stepping  
8 back for a moment, if the legislature had wanted to exclude  
9 supermarket pricing data from sales tax - - -

10 JUDGE GARCIA: No, but let's - - - let's get away  
11 from - - - even from the facts of this case. But I'm  
12 having a hard time understanding, as a court, what's the  
13 test I'm going to apply. I mean, I know, there are  
14 examples given. We can point to this department doing this  
15 in this case and this department doing it in that case.  
16 But I have a hard time figuring out what's your rule.

17 MR. BRODIE: Well, let's start where the parties  
18 agree. Information that's personal in nature, relates to a  
19 particular person and his or her characteristics - - - the  
20 parties agree on that in their briefs.

21 So we argue that information that's individual in  
22 nature relates to a particular thing or entity. It's the  
23 analog of personal information for nonpersons.

24 JUDGE GARCIA: Which entity or which thing?

25 MR. BRODIE: It's - - -



1 JUDGE GARCIA: So is it the person asking you for  
2 the information or is it the person you're collecting  
3 information on or the thing you're collecting information  
4 on?

5 MR. BRODIE: It's the subject matter of the  
6 information. Because, remember, nature applies to  
7 information. So the information has to be personal or  
8 individual in nature. It shouldn't matter who buys the  
9 information.

10 JUDGE FAHEY: So is the distinction the collating  
11 of data or the creation of data?

12 MR. BRODIE: It - - - it's neither.

13 JUDGE FAHEY: Um-hum.

14 MR. BRODIE: It - - - it's the data itself. What  
15 is - - - what is the subject matter of the data.

16 JUDGE FAHEY: So every factual point, every  
17 specific item is in the public realm and that would mean  
18 that every polling - - - political polling data that's  
19 taking place, each individual would not be included under  
20 this. That would not be a - - - personal or individual in  
21 nature, if you were conducting a political poll? Is that  
22 right?

23 MR. BRODIE: Well, right, because those are  
24 aggregate statistics. And like, for instance,  
25 macroeconomic statistics, they don't focus on a particular



1 person.

2 And - - - and Tax Department Regs illustrate  
3 this. The example for individual information is an  
4 automobile damage appraisal.

5 JUDGE FAHEY: Um-hum.

6 MR. BRODIE: You're talking about a particular  
7 car that is - - - suffers unique damage. And the  
8 Commissioner's view of "individual" complies with the  
9 canons of statutory construction. You're supposed to  
10 construe words in a way that's similar to adjacent words.  
11 Now - - -

12 JUDGE GARCIA: So it seems like in that example -  
13 - - and I know the example that's often given is the  
14 private investigator who looks at these candidates for  
15 insurance or whatever it may be - - - so is it that the  
16 person collecting the data has to add something to the  
17 equation, some - - - you know, an assessment of damage?  
18 You're - - - you're looking at what anyone can see, but  
19 you're taking your own expertise and saying, okay, this  
20 damage is X amount? Or you're looking at different factors  
21 and you're coming to a conclusion about the risk of this  
22 person for insurance purposes? Is it that type of a test?

23 MR. BRODIE: Well - - - well, certainly, when  
24 someone renders professional services like legal advice or  
25 risk analysis on a particular person or a particular



1 business to acquire, that is focusing on the person that is  
2 the subject matter of the data. And sometime when you're  
3 doing consulting and - - - and the Westwood case - - -

4 JUDGE WILSON: Well, what about if - - - what if  
5 there are three potential targets to a merger? Does that  
6 then transform it to not individual?

7 MR. BRODIE: I - - - I think if you're dealing  
8 with each target separately and not - - -

9 JUDGE WILSON: What if you're dealing - - -

10 MR. BRODIE: - - - aggregating information - - -

11 JUDGE WILSON: - - - with a single - - - single  
12 report? You're looking at a single report and saying  
13 here's five different potential tar - - - acquisition  
14 targets. We've evaluated and ranked them on a bunch of  
15 dimensions, and here's what we recommend.

16 MR. BRODIE: Well, that would - - - that would  
17 not be a focus - - -

18 JUDGE WILSON: That's not individual.

19 MR. BRODIE: - - - on the aggregate. That would  
20 be a focus on the individual for each of the five targets.

21 JUDGE WILSON: Let me ask - - -

22 MR. BRODIE: But here - - - here you don't have -  
23 - -

24 JUDGE WILSON: - - - let me ask you something - -  
25 - let me ask you something different.



1           Can you - - - is there anything you're aware of  
2           that would help us figure out what the legislature meant by  
3           these words? So I've looked at not every but a lot of the  
4           cases cited, and I can't find any one of them that goes  
5           back and says here's something in the legislative history  
6           that helps us decide what these words mean. Do you know of  
7           anything?

8           MR. BRODIE: Yes, I do.

9           JUDGE WILSON: Okay.

10          MR. BRODIE: The exclusion originated in a New  
11          York City tax regulation, not - - - not the Tax Code, but a  
12          regulation that was adopted in 1956. It was Article 98 of  
13          the New York City Regs on Sales and Use Taxes, adopted  
14          January 5th of 1956.

15          And that regulation gave two examples of  
16          information that was personal or individual in nature.  
17          First, an investment counselor's report recommending a  
18          portfolio of securities based on the investment needs of a  
19          particular client; and second, the investigative report of  
20          a private detective.

21          Again, you're looking at a focus on the  
22          individual level, not the macro level. The investment  
23          counselor is looking at their particular client and making  
24          a recommendation that focuses on that particular client.

25          JUDGE RIVERA: So does it matter if the - - - the



1 person who buys - - - the buyer, Wegmans - - - can  
2 disaggregate the data? Does it matter, if when they get  
3 the report, they can disaggregate based on information that  
4 they have?

5 MR. BRODIE: Well, in this case, it does not  
6 matter, because the prices purchased by Wegmans were  
7 economic data about mass-produced goods. When asked what  
8 specific information re - - - from RetailData was of value  
9 to Wegmans, the store's pricing manager testified, "the  
10 pack, the price, the indicator."

11 Now, pack, price, and indicator are identical, for  
12 every similar item on the store's shelves, and I'll add,  
13 back in their warehouse. So they're not individual in  
14 nature.

15 I would urge the court to consult pages 562 to  
16 646 of the record, which are an example of RetailData's  
17 output. The sole content is generic economic data. Even  
18 if you disaggregate it to the point of saying one can of  
19 peas at this store costs this much, you're still talking  
20 about a can of peas that is duplicated numerous times on  
21 the shelf and in the warehouse.

22 And Wegmans required that RetailData check prices  
23 in multiple competing supermarket chains and multiple  
24 locations within each chain. So it was not looking for  
25 individual information.



1 JUDGE FAHEY: So - - - and your time's almost up.  
2 If it's all right with the Chief Judge - - - is - - - is it  
3 - - - however we rule, is it important for us to  
4 distinguish exemptions versus exclusions, or can we just  
5 assume here that this is an exclusion that that distinction  
6 actually exists?

7 MR. BRODIE: We are argue that there is no  
8 distinction between exemptions and exclusions. That's what  
9 the court held in Mobil - - -

10 JUDGE FAHEY: Are you talking about Mobito (ph.)?  
11 Is that what you - - -

12 MR. BRODIE: Mobil Oil.

13 JUDGE FAHEY: Mobil Oil. Oh.

14 MR. BRODIE: And - - - and if I - - - if I may -  
15 - -

16 JUDGE FAHEY: So if we - - -

17 JUDGE STEIN: What about Fairland - - -

18 JUDGE FAHEY: - - - if we - - - I'm sorry, Judge.

19 JUDGE STEIN: What about Fairland? I'm sorry.

20 MR. BRODIE: Okay, well, Fairland Amusements  
21 concerned whether a general sales tax excluded certain  
22 sales simply because it didn't mention them.

23 So the case didn't apply a broad statutory term  
24 to a particular set of facts, like in AT&T, like in Great  
25 Lakes, like in this case. There was no term to apply.



1           Now, Mobil Oil itself involved an exclusion from  
2           the components of rent. And both of the cases cited in  
3           Mobil Oil also concerned exclusions. Young involved former  
4           Tax Law 386-g, which excluded items from allocated income;  
5           and Schwartzman involved former Labor Law 502(1), which  
6           stated that employment shall not include certain things.

7           And in reality, they're the same thing.

8           JUDGE FAHEY: Well - - -

9           MR. BRODIE: Exemptions and exclusions are both  
10          statutory provisions - - -

11          JUDGE FAHEY: - - - that's not the way I - - -  
12          that is - - - I agree with you, that's what Mobil Oil says.  
13          I think you're right. And they may have conflated those  
14          terms. And the question is was that a mistake or not?

15          But the way I understand the distinction is an  
16          exemption you can't tax, but you could tax it. An  
17          exclusion is you can't tax it. It's not included in the  
18          income.

19          And - - - and that distinction seems to be a  
20          pretty consistent distinction across states, in the Second  
21          Department, in departments throughout the country. It  
22          seems to be a pretty common definition.

23          And - - - and you're saying that New York has a  
24          special rule that conflates those two?

25          MR. BRODIE: Well, I - - - let me - - - let me go



1 first to the first part of your question and - - - and  
2 register respectful disagreement. In our reply brief, we  
3 note that the federal circuits - - -

4 JUDGE FAHEY: Um-hum.

5 MR. BRODIE: - - - all say there is no difference  
6 between how you view - - - construe exemptions and  
7 exclusions.

8 And as to the other states, appellee found four  
9 states - - - respondent found four - - - found, I'm sorry,  
10 three states, including one lower court from Pennsylvania.  
11 We found the highest court of four states.

12 So if you're counting beans, we have one more  
13 bean than the other side.

14 JUDGE FAHEY: So if - - - if - - -

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 Counsel?

17 MR. HARRADINE: Good afternoon, Your Honors.

18 Jeffrey Harradine on behalf of respondents, Wegmans. May  
19 it please the court.

20 Counting the beans - - -

21 JUDGE FEINMAN: Why don't you start right where  
22 he left off. You know, your position is that Mobil Oil is  
23 explainable as a syntactical error. What - - - what's your  
24 basis for saying that?

25 MR. HARRADINE: My basis for that is - - - well,



1 several, actually, Your Honor. To start off with, I - - -  
2 I respectfully disagree with my colleague. The cases cited  
3 by Mobil Oil dealt with exemptions, not exclusions. That's  
4 been understood in the Third Department and on down for  
5 many years.

6 JUDGE FEINMAN: If - - - assuming for a moment  
7 that you're correct, if we look at whether they function in  
8 an equivalent manner, what difference does it make?

9 MR. HARRADINE: An ex - - - they do function in  
10 different manners, Your Honor. Exclusion, think of it - -  
11 - we'll take the example of a 1040, since that's something  
12 that I certainly can appreciate better. An exclusion is a  
13 - - - is a - - - is something that is not taxed ab initio:  
14 Welfare payments, child support payments, that sort of  
15 thing. They're never taxed in the first place.

16 Exemptions are things that fall within the tax  
17 bucket but then can be pulled out. Think of the personal  
18 exemption that we all have on our federal and state taxes.

19 JUDGE FEINMAN: For purposes of statutory  
20 construction, why should they be treated - - - I mean, I  
21 understand the definitional difference that you're giving  
22 me. But why would it matter for purposes of statutory  
23 construction as to who has the burden of - - - of proving  
24 its applicability? Why does that matter?

25 MR. HARRADINE: Well, because a base law - - - or



1 rule of tax law is that the government can only take what  
2 the legislature authorizes to take.

3 In the case of an exclusion, the legislature says  
4 you shall not tax that. In the case of an exemption, the  
5 legislature has said you can tax that unless you meet some  
6 criteria.

7 JUDGE GARCIA: What are - - - for example, in  
8 this case, they could have easily made this an exemption.  
9 I mean, there's - - - the overarching definition of these  
10 transactions is so broad, it clearly encompasses this. And  
11 then they exempted it or they excluded it. What's the  
12 difference? It's just - - - it's just the language of the  
13 statute. It has no meaning other than that.

14 MR. HARRADINE: Well, I think, Your Honor, it - -  
15 - it does, to the extent that there's an ambiguity that  
16 needs to be construed. If we're - - -

17 JUDGE GARCIA: Right. But that gets to how do we  
18 construe it. But I'm talking about what is the basis for  
19 treating them differently? Because in this - - -  
20 particularly this statute, this could easily have been an  
21 exemption.

22 Your definition, overarching, very broad taxing  
23 authorities given by the legislature. And then they  
24 "exclude it", because they use the term "exclude". But  
25 they could have just said it's exempted. What's the



1 difference?

2 MR. HARRADINE: It's - - - it was a decision made  
3 by the legislature, we presume, understanding the  
4 difference between an exclusion and an exemption.

5 JUDGE STEIN: How - - - how long has this  
6 difference been - - - this distinction been made in the  
7 Third Department, which is where the vast majority of these  
8 tax cases are heard?

9 MR. HARRADINE: I don't want to say forever, Your  
10 Honor, because that's imprecise. But a very, very long  
11 time.

12 JUDGE FEINMAN: Well - - -

13 JUDGE RIVERA: But - - - but counsel - - - but  
14 counsel, it seems to me what you are asking the court to do  
15 is to ignore its precedent and to recognize what is  
16 ostensibly an unworkable rule.

17 Judge Garcia has already pointed out, you can  
18 call it this, you call it that, at the end of the day, the  
19 only question is whether or not a person is going to pay  
20 the tax. Right?

21 When - - - when we say that our law favors the  
22 government on the tax, that's once the legislature has  
23 decided to tax. There's no doubt here that the legislature  
24 has decided to tax. That is off the table now. And  
25 whether or not you call it an exemption or an exclusion,



1 it's just whether or not they're going to pay the tax.

2 MR. HARRADINE: Well, the distinction between  
3 exemptions and exclusions are well-settled in New York and  
4 - - - and elsewhere.

5 JUDGE RIVERA: Yeah, but you're inviting the next  
6 litigation, which is going to be yes, we know. We know the  
7 legislature called it that, but it really functions  
8 differently. And the court has now drawn this distinction.  
9 And - - - and given it - - - rarefied it and given it real  
10 meaning. And now we're going to be about the business of  
11 courts saying well, this is really an exemption or this is  
12 really an exclusion, regardless of what the legislature  
13 calls it.

14 JUDGE STEIN: Coun - - -

15 MR. HARRADINE: Well - - -

16 JUDGE STEIN: Go ahead, sorry.

17 MR. HARRADINE: I'm sorry, Your Honor.

18 JUDGE STEIN: No, answer - - - answer Judge  
19 Rivera's question.

20 JUDGE RIVERA: How do we avoid that? Because  
21 that strikes me as the problem that you're creating.

22 MR. HARRADINE: Well, I don't think,  
23 respectfully, Wegmans is - - - is creating any problem. I  
24 mean, the - - - the fact of the matter is, is that when the  
25 legislature adopts an exclusion, whether in name or in



1 substance, it's making a decision that that particular  
2 service or good, as the case may be, there's something  
3 about it that you're not going to tax it in the first case,  
4 whereas when you're talking about an exemption, it's  
5 something that would be taxed in the ordinary course, but  
6 there may be special circumstances, which is what - - -

7 JUDGE FAHEY: Well, isn't it a policy choice?  
8 The legislature says they can tax all of my salary, but  
9 they make a policy choice - - - they say if you have a  
10 child, we give you an exemption and we can't tax a certain  
11 portion of your child - - - of your - - - of your income,  
12 because we do that. However, that - - - that's entirely  
13 different from an exclusion. An exclusion is - - - is  
14 income that I receive from somewhere that isn't taxable at  
15 all.

16 MR. HARRADINE: Yes, Your Honor, that's the  
17 policy. And - - - and I don't want to lose the fact that  
18 we are talking about sales tax here. So an exclusion  
19 versus an exemption, the question becomes whether the  
20 service provider is going to charge that sales tax in the  
21 first place.

22 JUDGE STEIN: Do we need to make that  
23 determination to decide the merits of this case?

24 MR. HARRADINE: You know, Your Honor - - -

25 JUDGE STEIN: Is that - - - is that necessary for



1 your argument?

2 MR. HARRADINE: I don't think that you do. And  
3 the reason I say that is while the Third Department did  
4 recite the rule, the balance of the judgment below doesn't  
5 indicate that Wegmans took any great benefit from the  
6 interpretative preference that we're now arguing for.

7 JUDGE STEIN: And in either case, Wegmans  
8 ultimately bears the burden of proving entitlement to the  
9 exception, correct?

10 MR. HARRADINE: Absolutely, Your Honor. The  
11 taxpayer always bears the burden. If the question - - -  
12 the distinction comes into play when we're talking about  
13 interpretation.

14 JUDGE FAHEY: So I thought the burden shifted  
15 between - - - you can correct me if I'm wrong - - - between  
16 exemptions and exclusions.

17 MR. HARRADINE: The initial burden of proving  
18 entitlement to either always falls to the taxpayer, Your  
19 Honor. The - - - the burden differentiates depending on  
20 whether it's an exclusion or exemption when it comes to who  
21 gets the benefit of an ambiguity. In the case of an  
22 exclusion like this one, it's to be strictly construed in  
23 Wegmans' favor as the taxpayer, whereas if it was an  
24 exemption, it would fall to the government's - - -

25 JUDGE FAHEY: So if it's an exclusion, you



1 benefit by it?

2 MR. HARRADINE: Yes, Your Honor.

3 JUDGE FAHEY: All right.

4 JUDGE FEINMAN: So I want to go back to this - -  
5 - this idea of where this all comes from. Your adversary  
6 mentioned that it develops out of the New York City Tax  
7 Regs of 1956. You know, I - - - I have to confess, I  
8 wasn't around in 1956. But I'm wondering if there are any  
9 decisions interpreting the New York City Tax Regulations  
10 that we should be looking at to help us figure this out.

11 MR. HARRADINE: Well, Your Honor, I wasn't around  
12 in 1956, either, so I'm with you on - - - on that one. But  
13 - - -

14 JUDGE STEIN: It was a good year.

15 MR. HARRADINE: I'm sorry?

16 JUDGE FAHEY: It was a good year that year. It  
17 was a great year.

18 MR. HARRADINE: I kind of walked into that one,  
19 didn't I? I'm sorry, Your Honor.

20 We have looked high and low for any interpretive  
21 guidance, whether it be legislative history or - - - or  
22 judicial or administrative decisions, and I'm afraid we  
23 don't have it. It is - - - we've had to really always go  
24 back to the legislative language to really make - - - make  
25 sense of this.



1 JUDGE WILSON: And I take it, then, your answer  
2 to my earlier question - - - the answer you just gave  
3 probably answers my earlier question, which is at least as  
4 far as all the judicial decisions that I've looked at, I  
5 can't see one that points to something that I would say is  
6 an investigation of the legislature's intent in drafting  
7 these words.

8 MR. HARRADINE: No, Your Honor. We have  
9 documented in our brief some secondary sources, articles  
10 that were contemporaneous with the adoption, but that's - -  
11 - you know, these were - - -

12 JUDGE WILSON: But as far as judicial decisions  
13 go, no?

14 MR. HARRADINE: No, Your Honor. No, Your Honor.  
15 So that's why we encourage the court to look to the  
16 statutory language, and specifically the word "furnish".

17 I - - - I'd like the chance to answer Judge  
18 Garcia's question that he - - - he began with. You know,  
19 how do you determine what is "individual"?

20 The statute directs us to the - - - the  
21 information, service furnished to the taxpayer, not the raw  
22 data, but what is provided. And we've explained in our  
23 brief the - - - the multiple levels of how this entire  
24 service was, from the get-go, tailored to Wegmans' specific  
25 needs. It would only exist because of Wegmans' unique



1 pricing strategy that was implemented.

2 The data was collected only for Wegmans. It was  
3 put into a work component, only for Wegmans. It was  
4 curated only for Wegmans.

5 JUDGE FEINMAN: So - - - so you want us to focus  
6 on the deliverable, I think is the term you used?

7 MR. HARRADINE: Yes, Your Honor. And I think you  
8 have to. Because even in the Commissioner's own  
9 regulations - - -

10 JUDGE FEINMAN: So - - - so what exactly in the  
11 statute directs you to that definition?

12 MR. HARRADINE: The word "furnishes". If the  
13 legislature wanted to exclude services that were created  
14 out of publicly available information, it certainly could  
15 have done so.

16 I don't want to lose sight of the - - - of the  
17 Commissioner's regulation number 4, which talks about news  
18 - - - a service that would collect newspaper articles.  
19 Public information, to be sure, yet the Commissioner even  
20 concedes, that could be personal or individual. The  
21 question is what is being furnished? That is the question  
22 that must occupy the court - - -

23 JUDGE RIVERA: Yeah, but it also says the  
24 services of collecting, compiling, analyzing. That's all  
25 the background work that goes into it, right?



1 MR. HARRADINE: Yes, Your Honor. So the question  
2 really is, what - - -

3 JUDGE RIVERA: So - - - so doesn't this section  
4 presume that you're going to take raw data and do something  
5 with it? Not always. Not always.

6 MR. HARRADINE: Not always.

7 JUDGE RIVERA: But it includes - - - that's why  
8 it's inclusive?

9 MR. HARRADINE: Yes. So the question is whether  
10 what you do with it is - - - I see my time is expired, may  
11 I answer?

12 Thank you.

13 The question is what are you doing, and are you  
14 doing something that is de - - - designed for a specific  
15 taxpayer, one shot, and that's it, or is this something  
16 that can be for the benefit of several?

17 That's why, when you talk about the history of  
18 this statute or the predecessors of this statute - - - I  
19 can go back even further to 1931. We're talking about  
20 reference manuals. On-the-shelf, predetermined, pre-  
21 collated information on a take-it-or-leave-it basis.

22 What was done here was the creation of something  
23 wholly new.

24 JUDGE WILSON: So you're saying it's the output  
25 that's determinative, not the input?



1 MR. HARRADINE: Yes, Your Honor.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 MR. HARRADINE: Thank you.

4 CHIEF JUDGE DIFIORE: Counsel?

5 MR. BRODIE: There is no difference between  
6 exemption and exclusion. Both part - - -

7 JUDGE WILSON: And so, then, how does the rule of  
8 lenity apply, if that's true?

9 MR. BRODIE: Well, you'll - - - you'll have to  
10 help me with the rule of lenity. But there is a provision,  
11 1132(c)(1), in the Tax Code, that establishes a presumption  
12 - - - a presumption in favor of applying the sales tax. So  
13 when we apply 1132(c)(1), which is cited in our briefs, you  
14 - - - you ask yourself, well, how should we look at this  
15 exclusion and apply it in order to promote the collection  
16 of the sales tax.

17 It's a revenue-raising measure.

18 JUDGE WILSON: And that's - - - that's a - - - is  
19 that - - - do you read that as a presumption in favor of  
20 requiring the merchant to collect it, or - - - or actually  
21 a presumption in favor of its payment?

22 MR. BRODIE: It - - - it is in favor of - - -  
23 construing the statute so as to promote the collection of  
24 the tax.

25 JUDGE WILSON: "Collection", though, meaning the



1 physical act of collecting? Because the sales tax has to  
2 be collected by somebody as opposed to who owes it?

3 MR. BRODIE: Well, I think in the context used in  
4 that provision, it means "getting".

5 JUDGE WILSON: Getting, okay.

6 MR. BRODIE: And - - - and - - - but the point I  
7 wanted to make is that both exemptions and exclusions are  
8 statutory provisions that narrow the tax space. You can't  
9 get around that.

10 With respect to furnishing, the tax - - - the  
11 sales tax actually taxes furnishing. It taxes the  
12 furnishing of information. And it defines "furnishing" as  
13 including collecting, compiling, and analyzing the  
14 information.

15 So if you say well, Wegmans went out - - - I'm  
16 sorry - - - RetailData went out and specially collected  
17 data for Wegmans and specially compiled it into a database  
18 and specially sent it over to Wegmans in - - - in  
19 compliance with Wegmans' instructions, well, that's  
20 taxable.

21 And if you interpret what Wegmans did - - - the  
22 collecting, the compiling, the analyzing - - - as somehow  
23 defeat - - - as somehow bringing the exclusion into play,  
24 then you've defeated the application of the tax. You've  
25 made the statute self-defeating. And I would urge the



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court not to do that.

With respect to the standard of review, when the  
Commissioner - - - we - - - we - - - also I want to - - -

CHIEF JUDGE DIFIORE: Please continue.

MR. BRODIE: I - - - I'll just - - - I'll just  
finish this point. When the Commissioner - - - we also  
cite another line of cases that say when the Commissioner  
takes a broad statutory term like "personal" or  
"individual", and applies it to specific facts, the court  
need only decide whether the Commissioner's decision is  
rational. That's AT&T. That's Great Lakes. That's Colt  
Industries. All of those are cited in our brief.

I would urge reversal. Thank you.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)



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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Wegmans Food Markets, Inc. v. Tax Appeals Tribunal of the State of New York and Commissioner of Taxation and Finance of the State of New York, No. 56 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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