REPORT BY THE STATE AND LOCAL TAXATION COMMITTEE

RECOMMENDATIONS TO MINIMIZE STATUTORY INTERPRETATION ISSUES IN TAX LEGISLATION FOLLOWING MATTER OF WEGMANS FOOD MKTS., INC.[1]

I. INTRODUCTION

Effective tax administration requires clear laws and guidance. As such, legislatures and revenue departments should strive to ensure that tax provisions are as unambiguous as possible so taxpayers can easily determine subjectivity. Sound tax policy relies on taxpayer self-assessment and minimizing audit issues, as avoiding costly and time-consuming litigation benefits all.

Clear laws and guidance are especially important under the sales tax, where the vendor is acting as a trustee for the state and is only responsible for collecting and remitting the tax. If a vendor misinterprets a sales tax provision statute and fails to collect the proper amount of tax due from its customers, that vendor becomes obligated to pay the tax and effectively converts the vendor into a taxpayer rather than just a tax collector,[2] eating into or eliminating the vendor's bottom-line and putting its responsible officers personally at risk for any taxes due and not paid. Further, such misinterpretation could result in the vendor being named as a defendant in a class action lawsuit or *qui tam* lawsuit for underpayments or overpayments of tax.[3]

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[2] In most states, including New York, the sales tax is imposed on the purchaser, and the vendor is charged with collecting sales tax from the purchaser and remitting the tax collected to the state. In instances where the vendor fails to collect the appropriate amount of sales tax, the vendor becomes jointly and severally liable for the tax. Although the vendor may try to recoup the sales tax from purchasers, due to the passage of time between the sale and the assessment, the limited ability in many situations to contact the purchasers, and the negative impact such collection attempts would have on the business relationship, most vendors opt to pay the sales tax.

[3] *See, e.g., People v. Starbucks Corp.*, 60 Misc.3d 204, 74 N.Y.S.3d 717 (N.Y. Sup. Ct. 2018).

When faced with the task of interpreting a statute, courts and administrative agencies look primarily to the language of the statute. If the language of the statute is "plain," the reviewing body will generally (but not always) abide by that language. If the statute is not "plain," the reviewing body will attempt to glean the intent of the legislative body by evaluating legislative history to interpret the provision to effectuate the Legislature's intent. In addition, where tax statutes are found to be ambiguous, certain time-honored canons of statutory interpretation are employed. One is that tax imposition provisions are to be narrowly construed against the government because the state can take no more than has been clearly authorized by the legislature.[4] A second is that tax exemption provisions are to be narrowly construed against the taxpayer so as not to eviscerate the legislature's authorization.[5] Many tax practitioners refer to limitations ***to*** the scope of an imposition provision as "exclusions" and limitations ***from*** the scope of an imposition provision as "exemptions." However, this linguistic differentiation suffers from imprecision because the terms exclusion and exemption are often used interchangeably.[6]

The majority of the New York Court of Appeals in *Wegmans*[7] adopted an approach that failed to distinguish between exemptions and exclusions for purposes of statutory construction in connection with its review of a statute that can—at best—be described as ambiguous. The Court's statements, which arguably are *dicta*, as the concurring opinion claims,[8] refused to acknowledge historically drawn distinctions between statutory exemptions and exclusions for statutory construction purposes. However, the Court's unfortunate foot-fault was likely due at least in part to failures of the statutory provision itself.

This Report will (a) provide some historical background regarding the exclusion/exemption distinction (Part II), (b) review the statutory provision at issue in *Wegmans*, including highlighting problems with the provision (Part III), (c) explain the *Wegmans* majority decision and how it muddied the exclusion/exemption distinction for purposes of statutory construction (Part IV), (d) provide some suggestions to improve the statutory provision at issue in *Wegmans* (Part V), (e) discuss determinations and decisions since the *Wegmans* decision (Part VI),

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[4] *See, e.g.*, *Matter of Grace v. New York State Tax Comm'n*, 37 N.Y.2d 193, 196 (1975); *Good Humor Corp. v. McGoldrick*, 289 N.Y. 452 (1943).

[5] *See, e.g.*, *Matter of Mobil Oil Corp. v. Fin. Adm'r of City of N.Y.*, 58 N.Y.2d 95 (1983); *Matter of Young v. Bragalini*, 3 N.Y.2d 602 (1957).

[6] This Report addresses a number of statutory construction issues. A full discussion of applicable provisions of the State Administrative Procedure Act (New York Consolidated Laws, State Administrative Procedure Act ("SAPA"), § 102, *et. seq.*), however, is beyond the scope of the Report. Accordingly, the authors wish to emphasize that, when an agency changes a policy of general application, the change must be accomplished by rule making rather than adjudication and retroactivity is extremely disfavored. Moreover, although an agency is allowed substantial flexibility to decide between establishing policy by way of rulemaking or adjudication, discretion to choose may be abused. These and other SAPA canons of interpretation remain in full force and effect, whether as discussed herein, a given statutory interpretation falls either within the category of an "exemption" or an "exclusion"; and, no inference should be drawn from this Report that relevant SAPA provisions might not be applicable.

[7] *Matter of Wegmans Food Mkts., Inc. v. Tax Appeals Tribunal of N.Y.*, 33 N.Y.3d 587 (2019) ("*Wegmans*").

[8] As is discussed in Part VI, below, the Tax Appeals Tribunal's decision in *In the Matter of the Petition of The Walt Disney Company and Consolidated Subsidiaries*, DTA No. 828304 (NYS Tax App. Trib. Aug. 6, 2020) ("*Disney*") appears to begin the process of foreclosing the argument that this language in *Wegmans* is dicta, stating "[w]e disagree with petitioner's contention that the court's opinion in *Wegman's* [sic] on this point is dicta."

and (f) provide guidance to legislators or drafters of future tax legislation to minimize statutory interpretation issues (Part VII).

II. THE EXCLUSION/EXEMPTION DICHOTOMY IN INTERPRETING TAX STATUTES

While many rules of statutory construction apply to all statutes, certain rules have evolved that are specific to the interpretation of ambiguous tax statutes. A statute's language "is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement."[9]

Long-standing precedent provides that if a tax imposition statute is ambiguous, any reasonable doubt regarding the meaning of the statute is to be resolved in favor of those taxed.[10]

The primary basis for this rule is the principle that "[t]he government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax."[11] Moreover, courts have made clear that "[i]n the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out."[12]

In the context of taxation, a person, event, transaction or activity is often considered excluded from taxation if it is "definitionally excepted" from taxation.[13] In layman's terms a person, event, transaction or activity that is excluded from taxation was never taxable in the first place and is subject to "an unconditional, general exclusion."[14] In contrast, statutory exemptions involve properties that "meet the statutory condition precedent to regulation but are, as an act of legislative grace, nonetheless excepted,"[15] and thus, such "statutes creating tax exemptions are to

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[9] *Union Carbide Corp. v. Commissioner*, 697 F.3d 104, 107 (2d Cir. 2012) (citations omitted). *See also Matter of 1605 Book Ctr., Inc. v. Tax Appeals Tribunal*, 83 N.Y.2d 240 (1994).

[10] *U.S. v. Wigglesworth*, 2 Story 369 (1842) ("In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import. Revenue statutes are in no just sense either remedial laws or laws founded upon any permanent public policy, and, therefore, are not to be liberally construed."); *In re Enston's Will*, 113 N.Y. 174 (1889) ("the executors come into court claiming that the special taxation provided for in the law of 1885 is not applicable to them, or the property which they represent. In such a case they have the right, both in reason and in justice, to claim that they shall be clearly brought within the terms of the law before they shall be subjected to its burdens. It is a well-established rule that a citizen cannot be subjected to special burdens without the clear warrant of the law.")

[11] *People ex rel. Mutual Trust Co. v. Miller*, 177 N.Y. 51, 57 (1903).

[12] *Gould v. Gould*, 245 U.S. 151, 153 (1917).

[13] *La Guardia v. Cavanaugh*, 53 N.Y.2d 67, 80 (1981).

[14] Black's Law Dictionary 711 (11th Deluxe ed. 2019).

[15] *Matter of Grace*, *supra* note 4 at 196.

be strictly and narrowly construed and the burden of proving entitlement to an exemption rests with the taxpayer."[16]

The rationale for the strict and narrow construction of tax exemption provisions, in the context of real property taxation, was stated by the Fourth Department as follows:

> An exemption from taxation is in the nature of a renunciation of sovereignty. It relieves one class of persons or property from its obligation to bear its share of the expenses of government, no matter how deserving of assistance that class may be, and throws a correspondingly heavier burden upon all other classes, thus creating an inequality of taxation. It is for this reason that the courts have uniformly refused to favor exemptions, and have invariably construed statutes freeing property from the burden of enforced contribution to the expense of maintaining the government most rigidly against the claimant, and have declined to countenance such immunity unless the language of the statute is clear and unambiguous, and unless the purpose of the Legislature to exempt such property indisputably appears.[17]

The New York State Constitution, which was adopted in 1938,[18] provides that "[e]xemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit."[19]

During New York State's Constitutional Convention of 1938, the New York State Constitutional Committee examined the historical treatment of tax exemptions and the scope of such exemptions as they relate to real property.[20] In particular, the Constitutional Committee addressed tax exemptions for municipal property and institutions involved in "the interest of the public welfare and not for a profit."

From the colonial period until 1896, exemptions from taxation were usually granted by special laws that named the specific corporation to receive the benefit.[21] General tax statutes

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[16] *Matter of Dental Soc. of New York v. New York State Tax Comm'n*, 148 A.D.2d 791, 793 (3d Dep't 1989).

[17] *Matter of Bd. of Ed. of City of Jamestown v. Baker*, 241 A.D. 574, 575-76 (4th Dep't 1934), *aff'd*, 266 N.Y. 636 (1935).

[18] "New York has adopted four constitutions (1777, 1821, 1846, and 1894) and held eight constitutional conventions (1801, 1821, 1846, 1867, 1894, 1915, 1938, and 1967). The Constitution of 1894, revised in 1938 and amended over 200 times, remains in place today." New York State Archives, Constitutions and Constitutional Conventions, available at http://www.archives.nysed.gov/research/constitutions-and-constitional-conventions.

[19] N.Y.S. Const. Art. XVI, § 1.

[20] N.Y.S. Constitutional Convention Committee Reports (1938) at 193-230.

[21] *Id.* at 204.

enacted in 1801, 1823, and 1828 also contained exemptions from real property taxation for certain types of entities, but the special laws exempted entities not exempted under the general tax laws.[22] Recognizing the problem, the Legislature codified a new tax law in 1896 that was intended to cover all of the exemptions existing at that time and correct the "inequalities which had crept into the law . . . under the system of granting exemptions by special legislation."[23] In 1901, New York's Constitution was amended to provide that "the Legislature may not pass a private or local bill . . . granting to any person, association, firm or corporation an exemption from taxation on real or personal property."[24] Nonetheless, after the amendment to New York's Constitution in 1901, additional exemptions were enacted by general law, and an attempt to limit them failed during the New York Constitutional Convention of 1915.[25]

The list of private properties exempt from taxation continued to grow, and the 1938 Constitutional Convention again considered adding a new prohibition against adding new classes of private property to the list of exempt property because of the erosion of the real property tax base.[26] Concerns of further expansion of exemptions by legislation or interpretation were based on fairness, *i.e.*, that "[t]ax exemption is being carried beyond its legitimate limits," and "[t]ax exemptions begin seriously to infringe on the revenues required for the maintenance of local government services."[27] As noted above, New York's Constitution that was adopted in 1938, retained broad exemptions for realty used exclusively for religious, educational or charitable purposes.

Historically, New York's Court of Appeals has distinguished a general tax imposition, such as real property tax, from special taxes that affect only a special class of persons, such as the inheritance tax, and contrasted the difference between an exemption from a general tax and the scope of the imposition provision of a special tax, as follows:

> The tax imposed by this act is not a common burden upon all the property, or upon all the people within the state. It is not a general, but a special, tax, reaching only to special cases, and affecting only a special class of persons. The executors in this case do not, therefore, in any proper sense, claim exemption from a general tax or a common burden. Their claim is that there is no law which imposes such a tax upon the property in their hands as executors. If they were seeking to escape from general taxation, or to be exempted from a common burden imposed upon the people of the state generally, then the authorities cited by the learned counsel for the people, to the effect that an exemption thus claimed must be clearly made out, would be applicable. But the executors come into

[22] *Id.*

[23] *Id.* at 206.

[24] *Id.*

[25] *Id.* at 208-09.

[26] *Id.* at 210.

[27] *Id.* at 220.

> court claiming that the special taxation provided for in the law of 1885 is not applicable to them, or the property which they represent. In such a case they have the right, both in reason and in justice, to claim that they shall be clearly brought within the terms of the law before they shall be subjected to its burdens. It is a well-established rule that a citizen cannot be subjected to special burdens without the clear warrant of the law.[28]

However, as one renowned tax expert, Boris Bittker, Sterling Professor Emeritus of Law, Yale Law School, thought-provokingly explained, there is ambiguity with respect to the meaning and use of the term "tax exemption." Professor Bittker addressed tax exemptions in the context of his evaluation of an Establishment Clause[29] challenge to provisions in New York's Constitution and Real Property Tax Laws exempting from state and local property taxes real property owned by a religious corporation and used exclusively for religious purposes:[30]

> Let me start with a simple example, *viz.*, a tax on all persons and corporations whose principal activity is the exhibition of motion pictures for profit, at the rate of 10% of the price charged for admission. The statutory language contains no explicit "exemptions," but it takes little imagination to see that this levy is "really" a tax on the admission charge to public performances and that it implicitly but mistakenly "exempts" all performances other than motion pictures, such as plays, concerts, lectures, and sports events. Seen from a slightly different perspective, however, the tax is "really" imposed on passive recreation, with "exemptions" for the purchase or rental of television sets, phonograph records, books, etc. Or is it "really" a tax:
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> On frivolous expenditures, with "exemptions" for such competing amusements as jewelery [*sic*], perfume, and night clubs?
>
> On methods of transmitting ideas, with "exemptions" for newspapers, books, lending libraries, radio, and television?
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> On the fair market of cinema tickets, with an "exemption" for free tickets?

[28] *In re Enston's Will*, *supra* note 10 at 177-78 (1889).

[29] The Establishment Clause of the First Amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

[30] *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664 (1970). (The exemption did not violate the Establishment clause because the "legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility.")

> On motion picture performances, with an "exemption" for persons who do not engage in exhibiting for profit as their principal activity?
>
> On business, with an "exemption" for all business other than the exhibition of motion pictures?[31]

Whether a tax statute is viewed as carving out a person, property, event, or activity from the scope of its imposition (*i.e.*, demarcating the tax's boundaries and setting forth who by statute is denominated a taxpayer), or the person, property, event, or activity is considered subject to and then removed from the tax that would have otherwise been imposed may be one of perspective, but in the context of statutory interpretation that perspective, and the corresponding labels or words chosen to achieve those goals, has real implications when the meaning of a statute is in doubt. As is often the case, in taxation, "the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create."[32]

III. THE PROVISION AT ISSUE, TAX LAW § 1105(C)(1)[33]

New York State Tax Law Section 1105 is a sales tax imposition provision. The statute's heading is explicitly denominated "[i]mposition of sales tax." This statutory provision levies sales tax on six categories of receipts involving the sale of the following items: (a) tangible personal property; (b) gas, electricity, and other forms of energy; (c) enumerated services; (d) sales of alcoholic beverages; (e) hotel room occupancy; and (f) admission charges. Incorporated within each subsection of this imposition provision, are various references to exceptions, exemptions, and exclusions.[34] Use of such terms in a general tax imposition statute creates confusion for taxpayers, tax practitioners, and ultimately the courts attempting to discern how such a statute should be interpreted.

Paragraph 1105(c)(1) provides that sales tax is imposed upon "the receipts from every sale, except for resale,[35] of the following services:

> The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports

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[31] Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 Yale L.J. 1285, 1293-94 (July 1969).

[32] *Helvering v. Gregory*, 69 F.2d 809, 810-11 (2d Cir. 1934).

[33] For purposes of this report we will generally use terminology that conforms to bill drafting conventions. The levels here for N.Y. Tax Law § 1105(c)(1) are: 1105 is the section, (c) is the subdivision, and (1) is the paragraph. Levels after paragraph are subparagraph followed by clause and finally item. *See Bill Drafting Manual, A Guide to Researching and Writing Legislation for New York City* (N.Y.C. Council 2018) at 28.

[34] Section 1105 uses the word "except" 24 times, "excluding" ten times, "exclude" four times, and "exemption" twice.

[35] Even exemptions for sales for resale are referred to inconsistently within section 1105. For example, (b)(1), (b)(2), and (d)(i) refer to "other than sales for resale," while (c)(1) refers to "except for resale."

thereof to other persons, but ***excluding*** the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, and ***excluding*** the services of advertising or other agents, or other persons acting in a representative capacity, and information services used by newspapers, electronic news services, radio broadcasters and television broadcasters in the collection and dissemination of news, and ***excluding*** meteorological services."[36] (emphasis supplied.)

A. Is Paragraph 1105(c)(1) Merely an Imposition Provision or Is It Also an Exemption Provision?

Unlike the broad imposition of sales tax on sales of tangible personal property,[37] sales tax is only imposed on enumerated services. Additionally, section 1105 is explicitly an imposition provision, as provided in its heading, and subdivision 1105(c) is part of that imposition provision ("sales tax is imposed upon . . . the receipts from every sale, except for resale, of the following services"). Section headings "may clarify or point the meaning of an imprecise or dubious provision, [but] may not alter or limit the effect of unambiguous language in the body of the statute itself."[38] Thus, it is reasonable to construe the entirety of section 1105 as an imposition provision.

Further, the introductory language of section 1105 states that "there is hereby imposed and there shall be paid a tax",[39] and subdivision (c) of section 1105 includes "[t]he receipts from every sale, except for resale, of the following services",[40] and then lists ten different types of services in paragraphs (1) through (10), including information services; producing tangible personal property; installing, serving, repairing, or storing tangible personal property; interior decorating and designing services; and protective and detective services.[41] This further supports the conclusion that paragraph (c)(1) is a single imposition provision, which should be narrowly construed against the government.[42]

However, midway through paragraph (c)(1), after stating that information services are taxable, there is a shift to what appears to be a clause within the same sentence without an explicit break, conjunction, or enumeration ("but *excluding* the furnishing of information which is

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[36] N.Y. Tax Law § 1105(c)(1).

[37] "[T]here is hereby imposed and there shall be paid a tax of four percent upon: (a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article." N.Y. Tax Law § 1105(a).

[38] N.Y. Stat. § 123(b).

[39] N.Y. Tax Law § 1105.

[40] N.Y. Tax Law § 1105(c).

[41] *Id.*

[42] *Quotron Sys., Inc. v. Gallman*, 39 N.Y.2d 428, 431 (1976) (citing *American Locker Co. v. City of New York*, 308 N.Y. 264, 269 (1955) and *Matter of Holmes Elec. Protective Co. v. McGoldrick*, 262 App. Div. 514, 520 (1st Dep't 1942), *aff'd without opinion*, 288 N.Y. 635 (1942)).

personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons . . . .") (emphasis supplied).

The lack of explicit break in paragraph (c)(1) is in stark contrast to the explicit signals used in other paragraphs within subdivision 1105(c).[43] For example, in paragraph (c)(3), the main subsection details the imposition and ends with 'except' followed by a list of exceptions in subparagraphs (i)-(x). Similarly, in paragraph (c)(5), the exclusions are explicitly set out in subparagraphs (i)-(iv) to enumerate each of the exclusions. In paragraph (c)(6), the paragraph specifically states that "this paragraph shall not apply to…" and "receipts paid by members of a homeowner's association shall not be subject to the tax imposed by this paragraph." In paragraph (c)(7), there is no explicit exclusion, but interior decorating and designing services are defined to "not include" specific professions, such as architecture and engineering. These provisions all suggest that they are setting out the scope of the imposition itself rather than providing exemptions from impositions. Reading these provisions *in pari materia*,[44] supports the position that paragraph (c)(1) should also be read as defining the scope of the imposition itself.

A second option would be to interpret the "excluding" language contained in subdivision 1105(c) as separate exemption provisions, and to apply the rule that exemptions from taxation are to be narrowly construed with any doubts interpreted against the claimant.[45] While such an interpretation is not supported by the section's heading or introductory language, it is arguably supported by the *general terms* of canons of construction, which provides that terms should be given their fair and full scope without being unnecessarily limited.[46] Effectively, the majority in *Wegmans* adopted this approach, even going a step further by enunciating a rule that exclusions and exemptions are always to be interpreted identically. As discussed immediately below, notwithstanding that the Legislature used the word "excluding," the items excluded appear to be narrow exceptions to the operation of the general imposition provision or refinements of an imposition provision and should not have been interpreted against the taxpayers.

B. Does the Term "Excluding" in Paragraph 1105(c)(1) Remove an Item from a Tax That Otherwise Applies or Refine the Boundaries of a Tax That Does Not Apply?

Section 1105(c)(1) uses the word "excluding" on several occasions, but the items excluded appear to be narrow exceptions to the operation of the general imposition. Or stated differently, the use of the word "excluding" appears here to signal the scope of information services to which the tax itself applies in the first instance, rather than provide separate

[43] One common method of statutory interpretation is the related-statutes canon, which states that statutes that deal with the same subject, such as the subdivision 1105(c) imposition of sales and use tax on services, should be interpreted together as if they were one law. *See* Antonin Scalia & Bryan A. Garner, Reading Law, 199 (2012).

[44] *In pari materia* means upon the same manner or subject. N.Y. Stat. § 221. Statutes if *in pari materia* are to be "given uniformity of application and construction, and applied harmoniously and consistently." *Id.*

[45] *See, e.g., Matter of Mobil Oil Corp. and Matter of Young*, *supra* note 5.

[46] *See* Antonin Scalia & Bryan A. Garner, *Reading Law*, 101 (2012).

exemptions from the general imposition provision.[47] The danger of the majority's decision in *Wegmans* is the assertion that exemptions and exclusions are always to be interpreted identically, ignoring this type of critical analysis and distinction.

As discussed above, Section 1105 and subdivision (c) are clearly imposition provisions, as they impose tax and the only item not included is a sale for resale. Paragraph (c)(1) begins by listing the services on which sales tax is imposed (furnishing information and collecting, compiling, or analyzing information), then it refines the imposition by listing specific examples of services that are not subject to sales tax, such as furnishing "information which is personal or individual in nature," which is the subject of the *Wegmans* decision. As is discussed above, imposition provisions are to be narrowly construed against the government because the state can take no more than has been clearly authorized by the legislature.[48] Therefore, if 1105(c)(1) is a refinement of an imposition provision, then the taxes imposed therein should be narrowly construed.

C. Does Paragraph 1105(c)(1) Have Three or Four Exclusions?

The "excluding" language in section 1105(c)(1) is neither explicit nor distinct, making it unclear whether there are three or four exclusions, thereby creating even more confusion. The first[49] and fourth[50] exceptions are overt, but unclear drafting have muddled the exclusion(s) in the middle.

Specifically, it is unclear whether "the services of advertising or other agents, or other persons acting in a representative capacity, and information services used by newspapers, electronic news services, radio broadcasters and television broadcasters in the collection and dissemination of news" is a single exclusion, or whether "the services of advertising or other agents, or other persons acting in a representative capacity," is one exclusion and "information services used by newspapers, electronic news services, radio broadcasters and television broadcasters in the collection and dissemination of news" is a second exclusion. This ambiguous drafting, where two seemingly distinct exclusions ("services of advertising or other agent…" and "information services used by newspapers,") appear to be conflated into one exclusion and leads to further problems interpreting the subsection, and is discussed in Part IV, below.

IV. THE *WEGMANS* DECISION

On June 27, 2019, the New York State Court of Appeals held that the Tax Appeals Tribunal rationally determined that the information services that Wegmans Food Markets Inc. ("Wegmans

[47] Since *Wegmans* states that exemptions and exclusions are to be interpreted identically, this point appears to be moot. *See Disney*, *supra* note 8 ("Indeed, *Matter of Wegman's* [sic] appears to render meaningless any argument over a statute's classification as an exclusion or exemption.")

[48] *See Matter of Grace* and *Good Humor Corp.*, *supra* note 4.

[49] The first exception reads "the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons." N.Y. Tax Law § 1105(c)(1).

[50] The fourth exception is for "meteorological services." N.Y. Tax Law § 1105(c)(1).

Markets") purchased and used to price its goods cannot be excluded from New York's sales tax on information services.[51]

As is common in many industries, such as supermarkets, Wegmans Markets tracks its competitors' prices to ensure that its prices are not too high or too low. To accomplish this, Wegmans Markets engaged RetailData, LLC ("RetailData") to perform competitive price audits ("CPAs") to monitor the prices of specific products at its competitors. To perform the CPAs, RetailData's data collectors traveled to specific competitors, scanned prices for specific items, compiled and organized the data in the format requested by Wegmans Markets, and transmitted the data to Wegmans Markets. The New York State Department of Taxation and Finance ("DTF") audited Wegmans Markets and determined that the data RetailData sold to Wegmans Markets as part of the CPAs was taxable under paragraph 1105(c)(1). Wegmans Markets argued before the Division of Tax Appeals that the services performed by RetailData were "personal and individual in nature," and therefore not subject to sales tax. The Administrative Law Judge denied Wegmans Markets' petition, concluding that the information services provided did not qualify for the exclusion under paragraph 1105(c)(1) because the data in the CPA reports is widely available and not confidential, and therefore the information could not be personal or individual in nature. The Tax Appeals Tribunal affirmed.

The Appellate Division, Third Department, reversed the decision of the Tax Appeals Tribunal, stating that "in the event of ambiguity . . . an exclusion . . . must be strictly construed in favor of the taxpayer."[52] Further, the Third Department stated that the data that RetailData sold was "uniquely tailored to [Wegmans Markets'] specifications" and was therefore "personal or individual in nature."[53]

The Court of Appeals reversed, holding that Wegmans Markets did not prove that the information that was sold to Wegmans Markets was personal or individual in nature.[54] The Court's decision called into question the ground rules for statutory interpretation, stating that there is no distinction between tax exclusions and exemptions, and in both situations the statutes are to be narrowly construed, with the burden of proving entitlement resting on the taxpayer.[55]

The Court issued four opinions. The majority opinion, authored by Judge Feinman and joined by Chief Judge DiFiore and Judges Rivera and Garcia, made three statements: (1) New York never differentiated between exemptions, exclusions, and deductions;[56] (2) it adopted a functional analysis that affords a singular and workable rule for construing exemptions, exclusions, and deductions, each of which operate to negate the taxpayer's obligation to pay the otherwise

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[51] *Wegmans, supra* note 7. The factual narrative is taken from *Wegmans* and the determinations and decisions below. For purposes of brevity, repeated "*id."* references are omitted.

[52] *Matter of Wegmans Food Mkts., Inc. v. Tax Appeals Tribunal of N.Y.*, 155 A.D.3d 1352 (3d Dep't 2017) (internal quotation marks and citation omitted).

[53] *Id.* at 1355-6.

[54] *Id.*

[55] *Wegmans, supra* note 7.

[56] *Id.* at 593.

applicable tax;[57] and (3) interpreting exclusions and exemptions in favor of the taxing authority is correct as a matter of legislative grace.[58] Judge Stein issued an opinion concurring in the result, but observing that the majority effectively overruled long-standing precedent established by *Grace*,[59] which had upheld the distinction between exemptions and exclusions from tax, to the effect of establishing a new rule, "in New York, the taxpayer always loses."[60] He also stated that the "new rule" was "not only wrong, but completely unnecessary" and constituted dicta since it was not a determination that was necessary to reach its decision.[61]

Two dissenting opinions were also issued, one by Judge Fahey and another by Judge Wilson. Similar to Judge Stein's concurrence, Judge Fahey criticized the majority's adoption of a new standard for interpreting statutory exclusions. Judge Wilson also agreed with Judge Stein that the majority created a rule that "taxpayers should lose whenever the language of a tax statute is unclear" and elaborated by saying "you show me a legislator who says, 'when I write tax laws, I want courts to construe ambiguities so that 'the taxpayer always loses'' [and] I will show you a legislator who will be, very shortly, legislative history."[62]

The focus of Judge Wilson's dissent was an examination of the legislative history of paragraph 1105(c)(1). Judge Wilson observed that the "fixed star in our statutory construction constellation" is to effectuate legislative intent, and called to task the majority, the Third Department, and the Tax Appeals Tribunal for not attempting to determine what the Legislature meant when it used the phrase "personal or individual."[63]

Judge Wilson's comprehensive discussion of the legislative history began with the enactment of New York's statewide sales tax in 1965. The text of present paragraph 1105(c)(1) is identical to the 1965 version, with the exception of the additional language addressing "meteorological services" that was adopted in 1995.[64]

Judge Wilson observed that New York City's sales tax on information services served as the model for New York's new taxing provision.[65] In particular, New York City regulations contained language addressing the treatment of information services that are personal or individual in nature.[66] The New York City regulations provided, "[t]he furnishing of information, including a written report, to a person which is personal or individual in nature and which is not or may not

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[57] *Id.*

[58] *Id.* at 598.

[59] *Matter of Grace*, *supra* note 4 at 196.

[60] *Wegmans*, *supra* note 7, at 596 (J. Stein, concurring).

[61] *Id.* at 601 (J. Stein, concurring).

[62] *Id.* at 622 (J. Wilson, dissenting).

[63] *Id.* at 603 (J. Wilson, dissenting).

[64] *Id.* at 612 (J. Wilson, dissenting).

[65] *Id.* at 613 (J. Wilson, dissenting).

[66] *Id.* at 614-15 (J. Wilson, dissenting).

be substantially incorporated in reports furnished to other persons is not deemed to be an information service within the meaning of the law, and is not subject to the tax."[67]

Judge Wilson's opinion delved into an analysis of the New York City legislative history to determine the City's intent when it first subjected information services to sales taxation in 1952, finding that the intent was to tax "information services whose published reports had been excluded from the existing tax on retail sales of personal property" by the Court's 1937 opinion in *Dun & Bradstreet, Inc. v City of New York*, 276 N.Y. 198 (1937):

> The intent of the 1952 law, then, was to tax the "information services" that the Court excluded from taxation in Dun & Bradstreet, even though those services provided information that, because of a contractual provision preventing the subscriber from sharing the contents of the books, was "confidential and personal in character". . . .[68]

According to Judge Wilson, this legislative history helped resolve the meaning of paragraph 1105(c)(1) because it revealed that "the legislature was not concerned with the public nature of the information gathered by an information service provider or whether the information was transferred in some manner, but rather whether the report delivered was custom—personal or individual for the client—or generic—sold or potentially sold to others."[69] Arguably, the New York City regulation highlighted by Judge Wilson also demonstrates that the tax was never intended to embrace information services that are personal and individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, rather than that such services fell within the ambits of the law and were nevertheless excepted as a matter of legislative grace.

V. SUGGESTIONS TO CLARIFY PARAGRAPH 1105(C)(1)

As discussed above, it appears that the Legislature intended that paragraph 1105(c)(1), similar to the other paragraphs of subdivision 1105(c), specify the scope of each of the impositions on the enumerated services. Clarification of the paragraph could be achieved through the addition of separately lettered sections that address each limitation to the scope of the imposition provision and make clear that the statute does not intend to apply to such limitations, and therefore, if there is any ambiguity in their interpretation, such provision should be narrowly construed against the government. As shown on the following page, this can be achieved by including specific language that makes clear that the "taxable furnishing of information does not include" the enumerated items set forth in the section, or that "taxable information services does not include" the enumerated items set forth in the section.

Amendments to the statute can also make clear that the services described in section (B) appear to identify two different types of services: those services *provided by* agents and those

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[67] *Id.* at 615 (J. Wilson, dissenting), citing Administrative Code of City of N.Y. § N46-2.0 (5-a) (adopted by Local Law No. 78 (1952) of City of N.Y. (July 1, 1952), as renum. by L 1963, ch. 100, § 1428).

[68] *Id.* at 617-18 (J. Wilson, dissenting).

[69] *Id.* at 622 (J. Wilson, dissenting).

services *used by* outlets in the collection and dissemination of news. In regulations, the Department has also recognized each of these services separately.[70] The four different categories of services could be separately identified with the following lettered sections:

> (1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons. Taxable furnishing of information does not include (A) the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons; (B) the services of advertising or other agents, or other persons acting in a representative capacity; (C) information services used by newspapers, electronic news services, radio broadcasters and television broadcasters in the collection and dissemination of news; and (D) meteorological services.

If lettered sections are acceptable, then even more clarity could be provided with separate subparagraphs, as follows:

> (1) The furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons. Taxable information services does not include:
>
> > (A) the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons,
> >
> > (B) the services of advertising or other agents, or other persons acting in a representative capacity,
> >
> > (C) information services used by newspapers, electronic news services, radio broadcasters and television broadcasters in the collection and dissemination of news, and
> >
> > (D) meteorological services.

[70] *See* 20 N.Y.C.R.R. 527.3(b)(4) and (b)(5).

VI. RECENT DETERMINATIONS AND DECISIONS

In the two years since the *Wegmans* decision, there have been a number of cases, decisions, and determinations that have built on the *Wegmans* court's decision. Most merely mention *Wegmans* when discussing the standard of review, but others go further and discuss *Wegmans*' effect and whether parts of the decision were, as posited in this report, and as concluded by Judge Stein in his concurring opinion, dicta.[71]

In *Matter of XO Commc'ns Servs.*, the Appellate Division, Third Department stated that the Court of Appeals clarified that there is a "singular and workable rule for construing exemptions, exclusions[,] and deductions."[72] In *Matter of Level 3 Commc'ns*, the Appellate Division, Fourth Department agreed with the Third Department, rejecting the taxpayer's "contention that a different result is required on the ground that [the statutory provision] sets forth an exclusion from the tax rather than an exemption."[73]

The New York Tax Appeals Tribunal has cited *Wegmans* in a number of decisions, including the recent *Disney* decision.[74] In *Disney*, the Tribunal stated that the statutory construction rule for "exemptions and exclusions" is that they should be "interpreted strictly" against the taxpayer and in favor of the "taxing power."[75] The Tribunal continued, stating that the Court of Appeals' assertion that exemptions and exclusions should be interpreted in the same manner was not dicta,[76] and concluding that "*Wegman*s appears to render meaningless any argument over a statute's classification as an exclusion or exemption."[77] In *Transcanada Facility USA, Inc.*,[78] the Tribunal stated that there are different rules for a statute that imposes taxes than statutes that impose either exclusions or exemptions from tax.[79]

The determination in *Penzer Foundation* did not discuss whether exemptions and exclusions should be interpreted consistently, instead confirming exemption and deduction

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[71] We note that the distinction between a holding and dicta are not always easy to discern. *See generally* Judith M. Stinson, *Why Dicta Becomes Holding and Why it Matters*, 76 Brook. L. Rev. 219 (2010). Here, the Court of Appeals decision that the information services at issue were taxable was based on the facts as interpreted by the Court although the Court's decision addressed a larger issue of general applicability, namely the import of the distinction between the scope of an imposition provision and an exemption from a tax as imposed. Judge Stein, who was perhaps in the best position to evaluate whether the "new rule" was dicta or a holding, determined it to be dicta.

[72] *Matter of XO Commc'ns Servs., LLC v. Tax Appeals Tribunal of N.Y.*, 182 A.D.3d 717, 718 (3d Dept. 2020) (citing *Wegmans* at 593-594).

[73] *Matter of Level 3 Commc'ns, LLC v. Erie County*, 174 A.D.3d 1497, 1500, 108 N.Y.S.3d 246 (4th Dept. 2019) (citing *Wegmans* at 591).

[74] *Disney*, *supra* note 8.

[75] *Id.* at 20 and 26.

[76] *Id.* at 26.

[77] *Id.* at footnote 6.

[78] *In the Matter of the Petition of Transcanada Facility USA, Inc.*, DTA No. 827332 (NYS Tax App. Trib. May 1, 2020).

[79] *Id.* at 11.

provisions should be construed in favor of the taxing authority.[80] In *M&Y Developers*, the New York Division of Tax Appeals determined that exemptions and exclusions from tax are to be strictly and narrowly construed against taxpayers.[81] However, in *Lender Consulting Services*, *Wegmans* was cited for the proposition that "where the issue is the imposition of a tax, the statute cannot be read to allow the government to tax anything more than the clear terms of what the statute allows."[82] Further, *MarketShare Partners* cited *Wegmans* to support the proposition that granting access to a digital platform could be considered a taxable sale.[83]

VII. RECOMMENDATIONS

In addition to the Legislature revising paragraph 1105(c)(1) to clarify its scope as discussed in Part V, the Committee recommends that the DTF (1) issue guidance to inform its auditors and taxpayers that, consistent with Judge Stein's concurring opinion, the DTF recognizes that *Wegmans* prescription of a new rule by the majority was *dicta*; and, accordingly, [84] ambiguous provisions that determine the scope of the imposition of a law will continue to be construed in favor of taxpayers (even in the apparent form of a tax exclusion), while offsets from imposition provisions (i.e., exemptions) will be construed in favor of the government; (2) that it will support legislative proposals that would clarify ambiguous statutory language in regard to the scope of impositions versus exemptions from impositions; and (3) it will review proposed legislation with an eye toward ensuring that potential confusion be eliminated.

Further, in drafting legislation the Committee urges the Legislature to be crystal clear as to whether particular provisions are imposition, exception, or exclusion provisions, as well as whether the taxing authority or the taxpayer has the burden of proof when the provision needs to be interpreted. This is necessary to ensure that taxpayers, the DTF, and courts have a clear path in interpreting the tax law and its implementing regulations.

The construction of tax laws that puts the burden of proving an item is not taxable on the taxpayer subjects taxpayers to a Hobson's Choice – they either must risk a finding by the tax department that they have not proven the exclusion, or collect and remit tax and be subject to a class action or other proceeding claiming overcollection of tax. The policy implications of what

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[80] *In the Matter of the Petition of Jacob and Anita Penzer Foundation, Inc.*, TAT(H)18-18(RP) (NYC Tax App. Trib. Admin. Law Judge Div. Jul. 31, 2019). The Administrative Law Judge who issued the determination, ALJ David Bunning, is a member of the Committee and took no part in this report whatsoever.

[81] *In the Matter of M&Y Developers, Inc.*, DTA No. 828404 (NYS Div. of Tax App. Sept. 26, 2019) (citing *inter alia Wegmans* and *Matter of Grace*), *aff'd,* the NYS Tax App. Trib. Mar. 1, 2020).

[82] *In the Matter of Lender Consulting Services, Inc.*, DTA No. 829198 (NYS Div. of Tax App. Dec. 2, 2021). This determination looked to the primary purpose of the services provided in determining whether the services were taxable.

[83] *In the Matter of MarketShare Partners, LLC*, DTA No. 828562 (N.Y.S Div. of Tax App., Dec. 3, 2020). *Marketshare Partners* was decided based on the primary purpose of the software and service sold, and as such any further discussion is beyond the scope of this report.

[84] As noted above, the Tax Appeals Tribunal's decision in *Disney* maintains that the "new rule" treating exclusions from imposition provisions in the same manner as exemption provisions was not dicta. *Disney*, *supra* note 8. *See* fn. 21. Presumably, if the Court of Appeals had truly meant to overrule long-standing and well-regarded precedent it would have been more explicit. Further, the Tribunal's view that the "new rule" was not dicta, is arguably itself dicta.

the dissent in Wegmans characterizes as "the taxpayer always loses"[85] is apt. Whatever course of action is taken by a vendor—either not collecting sales tax on an item thought to be excluded and being subsequently required to pay tax, or collecting and remitting the tax and subjecting itself to potential claims for overcollection—the risks are real and have substantial economic consequences.

At the very least, should the Legislature not be inclined to clarify the tax law to provide that exclusions from tax are construed against the tax authority, it should consider precluding class actions against a vendor for overcollection where the sales tax has been collected and remitted to the tax authority in good faith.

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We respectfully urge the New York State tax authorities and the New York State Legislature to adopt the recommendations above with respect to Tax Law Section 1105(c)(1). We also urge the Legislature to distinguish imposition, exception or exclusion provisions when drafting new legislation imposing tax burdens (or amending existing tax laws), and to clarify whether the taxing authority or the taxpayer has the burden of proof when there is ambiguity in the statute. We also would welcome the opportunity to meet with legislators, regulators and/or legislative staff to discuss these recommendations and/or offer our assistance in whatever way may be helpful toward effecting these objectives.

State and Local Taxation Committee
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[85] *Wegmans*, *supra* note 7, at 596 (J. Stein, concurring).