

NEW YORK CITY TAX APPEALS TRIBUNAL

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In the Matter of :  
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GERSON LEHRMAN GROUP, INC. : DECISION  
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TAT (E) 08-79 (GC)  
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TAT (E) 12-38 (GC)  
Petitioner. : TAT (E) 12-39 (GC)  
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The Commissioner of Finance of the City of New York (Respondent) filed an Exception to a Determination of an Administrative Law Judge (ALJ) dated October 4, 2016 (ALJ Determination), which cancelled two Notices of Determination issued to Gerson Lehrman Group, Inc. (GLG or Petitioner) by the New York City Department of Finance (Department) asserting New York City General Corporation Tax (GCT) deficiencies. One Notice of Determination, dated September 26, 2012,<sup>1</sup> was for the calendar years ended December 31, 2004 through December 31, 2008 (2004-08 Notice of Determination), and the second, dated November 30, 2012, was for the calendar years ended December 31, 2009 through December 31, 2010 (2009-10 Notice of Determination, collectively Notices of Determination).<sup>2</sup>

The ALJ Determination also allowed Petitioner's refund claim filed for the 2003 Tax Year in the amount of \$280,873<sup>3</sup> but sustained the Department's disallowance of refund claims filed by Petitioner for each of the calendar years 2004 through 2010.<sup>4</sup>

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<sup>1</sup> The Record contains a copy of a second Notice of Determination dated September 28, 2012 covering the same tax years and for the identical amounts. There is no indication that this second notice was ever issued to Petitioner so we will ignore it for purposes of this Decision.

<sup>2</sup> The 2004-08 Notice of Determination asserted a GCT deficiency for the calendar year ended December 31, 2004 in the principal amount of \$85,192, which represented the recoupment by the Department of a refund it had paid to Petitioner. Petitioner subsequently filed a refund claim for 2004, which was disallowed by the 2004-08 Notice of Determination. *See infra* at 6.

<sup>3</sup> Petitioner asserts that a second refund claim for 2003 was not addressed by the ALJ. *See infra* at 8.

<sup>4</sup> The Department did not issue separate notices of disallowance of the refund claims for the 2004 through 2010 Tax Years but incorporated the disallowance of those claims into the Notices of Determination for those Tax Years. *See infra* at 6-8 for a detailed discussion of the various refund claims at issue.

Petitioner filed a Cross-Exception to the portion of the ALJ Determination disallowing refunds for the 2004 through 2010 Tax Years. The calendar years ended December 31, 2003 through 2010 are collectively referred to as the Tax Years.

Respondent appeared by Martin Nussbaum, Esq., Senior Counsel of the New York City Law Department. Petitioner appeared by Richard A. Leavy, Esq., of Sidley Austin LLP.

GLG is a Delaware corporation, with its headquarters<sup>5</sup> and major sales office<sup>6</sup> located in New York City (City).<sup>7</sup> GLG also has other offices located within and without the United States. Petitioner's CEO, Alexander Saint-Amand, testified that Petitioner is a subscription business.<sup>8</sup> Various job postings submitted by Petitioner describe its business as providing "a platform for independent, primary research to leading investment managers. . . ."<sup>9</sup>

During the Tax Years, Petitioner entered into subscription agreements with clients generally having a duration of six to twelve months. GLG's Basic Subscription Agreement contained an introductory paragraph that states: "Gerson Lehrman Group offers investment professionals a unique set of primary research products and services through The Councils of Advisors. . . ."<sup>10</sup> Mr. Saint-Amand testified that during the Tax Years, two-thirds of GLG's clients were from the financial services industry.<sup>11</sup> Clients subscribing to Petitioner's services received access to Petitioner's network of Council Members, who were identified by Petitioner as experts in a variety of fields that could be of interest to its clients. Mr. Saint-Amand explained how Petitioner's business was

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<sup>5</sup> Tribunal Ex. 1, Stipulation of Facts, (Stipulation), Doc. 10. The Stipulation, at ¶¶32-39, lists numerous documents provided primarily on a disk.

<sup>6</sup> Tr. 484.

<sup>7</sup> Except as otherwise noted, the ALJ's Findings of Fact, although paraphrased and summarized herein, generally are adopted for purposes of this Decision. Certain Findings of Fact not necessary to this decision have not been restated and can be found in the ALJ Determination.

<sup>8</sup> Tr. 65.

<sup>9</sup> Stipulation, Doc. 113.

<sup>10</sup> Stipulation, Doc. 457.

<sup>11</sup> T. 64. Members of the Council of Advisors are referred to hereinafter as Council Members.

distinct from a typical consulting firm in that its “clients prefer to get a variety of perspectives . . . rather than get one potentially biased perspective from an investment banker.”<sup>12</sup> Clients did not expect that the information provided to them by Council Members would always be correct.<sup>13</sup> The goal of clients in speaking to Council Members was best described by Dunston Almeida, who was both a GLG client and a Council Member at different times during the Tax Years. As a client, he viewed his job as requiring him to sift through the information he received from multiple experts, discern which information was useful and which was not, synthesize the useful information, and make an investment decision based on those multiple conversations.<sup>14</sup> He testified that “I tried to speak with as many people as I could to give me a diversity of opinion. . . .”<sup>15</sup>

The Council Members are not employees of Petitioner. Each Council Member enters into a contract with GLG that provides that Council Members are non-agent independent contractors and that they “shall not act on behalf of GLG in any fiduciary capacity nor have any authority to act on behalf of GLG.”<sup>16</sup> Similarly, GLG’s subscription agreements with its clients provide that: “[GLG] does not participate in any projects and is not responsible for the content of consultations and Projects arranged by [GLG]. Therefore, [GLG] cannot ensure that the information provided by Council Members is correct or complete.”<sup>17</sup> Clients did not pay Council Members for their services, rather GLG compensated its Council Members. GLG employed Consulting Managers,<sup>18</sup> whose job was to locate industry experts for client projects and recruit them as Council Members.<sup>19</sup>

Under the subscription agreements, clients generally paid a fixed upfront fee, the amount of which varied with the breadth of industries or topics on which the client wants

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<sup>12</sup> Tr. 77.

<sup>13</sup> Tr. 790-791.

<sup>14</sup> Tr. 791.

<sup>15</sup> Tr. 790.

<sup>16</sup> Stipulation, Doc. 489.

<sup>17</sup> Tr. 115; Stipulation, Doc. 457.

<sup>18</sup> Tr. 26.

<sup>19</sup> Tr. 113-14.

to access Council Members' expertise. Depending on the services purchased under the subscription agreement, the client's level of access to Council Members during the term of the subscription agreement might be limited. Some clients, generally the large consulting firms, paid a subscription fee to GLG for services on a project-by-project basis, rather than for a fixed duration, but this was less common.

GLG employed Research Managers to assist its clients in framing questions for its Council Members that elicit the information responsive to its clients' needs. Research Managers work with clients to identify the Council Members who could best provide the information of interest to the client.<sup>20</sup>

The most common way clients accessed Council Members was through an oral consultation over the telephone. Over 90% of client engagements were for these telephone conversations.<sup>21</sup> The conversations usually lasted 30-90 minutes, during which the client asked questions developed with the Research Manager to elicit the information desired for the client's particular business needs.<sup>22</sup>

GLG clients also obtained the views of multiple experts in a particular field or industry through the use of surveys. The client and its assigned Research Manager worked together to generate a set of questions focused on the particular area of interest to the client. These surveys would be sent to multiple Council Members. Their responses would give the client a broader perspective over a wider range of experts with focused answers to specific questions. The surveys did not, however, give the client the opportunity to speak with these experts and, therefore, were generally less useful to clients than telephone consultations.<sup>23</sup>

The third way clients obtained the views and information of Council Members was through small group seminars and roundtable discussions, during which multiple clients

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<sup>20</sup> Tr. 100.

<sup>21</sup> Tr. 85.

<sup>22</sup> Tr. 74, 826, 961.

<sup>23</sup> Tr. 100-104.

could meet with one or more Council Members knowledgeable about a particular industry or field. Seminars and roundtable discussions provided the additional advantage of allowing clients to hear the concerns of other clients.

Petitioner also employed salespeople. Among the salesperson's specific responsibilities were: "Presenting service to clients, along with GLG Research staff"; "Monitoring usage and, along with dedicated GLG Research staff, ensure that all potential users at [the] client become active users of GLG services."<sup>24</sup> It was the salesperson's responsibility to "manage the overall relationship with the client" and "to make sure they get what they expect and hope for out of the relationship with GLG."<sup>25</sup> Salespeople also "rescue troubled users."<sup>26</sup> The salesperson would also intervene if the client was not happy with the work of the Research Manager, and would talk to the Research Manager or "the Research Manager's boss" to improve delivery of the service.<sup>27</sup> If the client requested services in excess of those covered by the client's subscription agreement, the salesperson would take the client "to the next level of service" and sell the client a service upgrade.<sup>28</sup> Salespeople were also responsible for trying to get the client to renew its subscription, if it was not automatically renewed, and were compensated for renewals.<sup>29</sup> Salespeople received a salary plus a discretionary payment described variously in job postings as "performance-based" and as a "commission on sales."<sup>30</sup> Research managers would frequently attend "sales calls" on clients with salespeople. Zecki Dossal, as a Senior Research Manager, testified that the role of the salesperson at a sales call was "to manage the overall commercial relationship, to some degree to introduce us" and that 60-70% of his time was spent on such sales

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<sup>24</sup> Stipulation, Doc. 126. Mr. Saint-Amand testified that this document accurately describes the functions of salespeople. Tr. 212-213.

<sup>25</sup> Tr. 418-419.

<sup>26</sup> Tr. 131.

<sup>27</sup> Tr. 469.

<sup>28</sup> Tr. 471-472.

<sup>29</sup> Tr. 389.

<sup>30</sup> Stipulation, Docs. 111, 113. Zecki Dossal, who held a variety of positions at Petitioner including as a salesperson, testified that the discretionary part of his compensation was commission-based, Tr. 386, and Mr. Saint-Amand also implied that a part of a salesperson's compensation is commission-based. Tr. 134-135.

calls.<sup>31</sup> A significant role of both salespeople and Research Managers was to regularly monitor a client's usage of GLG's services and to "drive usage."<sup>32</sup>

In calculating the percentage of entire net income allocable to the City on its original GCT returns for the Tax Years 2003 and 2004, GLG allocated its business receipts within and outside the City based on the office locations of its salespeople.<sup>33</sup> Under this method, GLG allocated 96.2% of its receipts to the City in 2003 and 76.89% to the City in 2004. In 2007, GLG filed an amended 2003 GCT return (Amended 2003 Return) on which it allocated 39.92% of its receipts to the City, using 100% of the compensation paid to its Council Members, 100% of the salaries paid to its Research Managers and Consulting Managers, and 50% of the salaries paid to its IT personnel. The Amended 2003 Return claimed a refund of \$280,873. The Department disallowed the 2003 refund claim by a Notice of Disallowance dated October 31, 2007.

In 2008, using the same methodology as it used on the Amended 2003 Return, Petitioner filed an amended 2004 GCT return and a refund claim for 2004 in the amount of \$85,192, which was paid by the Department.<sup>34</sup>

GLG filed GCT returns for the Tax Years 2005 through 2010 adopting the same receipts allocation methodology it used when filing its amended 2003 and 2004 GCT returns.<sup>35</sup>

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<sup>31</sup> Tr. 350.

<sup>32</sup> Tr. 357, 367, 852, 900-01.

<sup>33</sup> Stipulation, Doc. 510; Tr. 1472. A more detailed discussion of the allocation of entire net income for GCT purposes appears *infra* at 10-11.

<sup>34</sup> The 2004 amended GCT return reported an overpayment of \$116,263 but the 2004 refund claim was for \$85,192. The difference is explained by a credit towards the 2005 estimated GCT reported on the original return but not reflected on the amended return and a small penalty of \$737 for understatement of estimated GCT reported on the amended 2004 return, which was apparently abated by the Department. This explains why the Department's payment of the refund was made in two installments, one for \$84,455.02 and one for \$737.43. Stipulation ¶¶ 16, 17.

<sup>35</sup> In 2011, Petitioner filed an amended GCT return for the 2007 Tax Year, which allocated 30.14% of receipts to the City reduced from the 55.47% reported on the original 2007 GCT return, as indicated on an audit worksheet included in the Department's audit file. Stipulation, Doc. 510. The amended 2007 GCT return is described in the Department's audit file as having been filed as a result of a federal change and not an audit. However, we can find no explanation for the modification of the allocated receipts on the 2007 amended return. The original 2007 GCT return does not appear to be included in the Record.

The 2004-08 Notice of Determination asserted a GCT deficiency for the Tax Years 2004 through 2008 in the principal amount of \$1,843,519.44, plus interest and penalties for substantial understatement of tax and late payment. The GCT deficiency asserted by the Department for the 2004 Tax Year was in the amount of the \$85,192 refund the Department had paid. The Explanation of Adjustments section of the 2004-08 Notice of Determination stated:

“The taxpayer used a cost of performance hybrid method of allocating receipts to NYC. The department does not agree with this position. The department position is [that] the receipts are for services performed in the City by nature of the salespersons being located in NYC. The department is allocating receipts to NYC based on total revenue from NYC based salespersons.”

The 2009-10 Notice of Determination asserted a GCT deficiency in the principal amount of \$975,452.42 plus interest and penalties for substantial understatement of tax and late payment. Again, the deficiency was based on allocating receipts using the location of salespeople.

During the audit of its GCT returns for the 2009 and 2010 Tax Years, GLG filed worksheets with the auditor requesting refunds for the Tax Years 2004 through 2010, based upon two alternative receipts allocation methodologies, distinct from the methodology GLG had used on its amended 2003 and 2004 GCT returns and on its original GCT returns for the 2005 through 2010 Tax Years. The first alternative method removed from the computation the salaries of the Consulting Managers, Research Managers and IT staff leaving only the compensation paid to Council Members.<sup>36</sup> The total refund asserted for the Tax Years 2004 through 2010 based on that method was \$2,092,337.<sup>37</sup> The 2004-08 Notice of Determination disallowed the refunds claimed

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<sup>36</sup> The Consulting Managers and IT staff are referred to as Council Management and Engineering in the worksheets.

<sup>37</sup> Stipulation, Doc. 510. It is not clear when the first worksheet asserting refunds for the 2004 through 2010 Tax Years was submitted using this method. Petitioner's Ex. W includes a series of e-mails between Petitioner and the Department's auditor including worksheets asserting refunds using both alternative methods but only for the 2005 through 2010 Tax Years.

under that method for the 2004 through 2008 Tax Years. The 2009-10 Notice of Determination disallowed the refunds claimed under that method for the 2009 and 2010 Tax Years.

The second alternative method removes from the computation only the salaries of the Consulting Managers and IT staff, which would result in a refund of \$913,710 for the 2005 through 2010 Tax Years. The Record does not include any computation of a refund for the 2004 Tax Year under this second alternative method.

In its Cross-Exception, Petitioner refers to an additional claim for refund for the 2003 Tax Year in the amount of \$41,017 based on an affidavit of Thomas Hutzel dated January 6, 2010 submitted to the then Chief ALJ in connection with Petitioner's motion for summary judgment.<sup>38</sup> This additional refund claim is based on an allocation of the 2003 receipts using a methodology taking into account only the compensation of the Council Members and Research Managers, which is the second alternative method proposed in the worksheets for the 2005 through 2010 Tax Years. This refund claim was not addressed by the ALJ.

To summarize, the first alternative method uses only the compensation of the Council Members as the basis for allocating receipts, while the second alternative method uses the compensation of the Council Members and Research Managers. In its Cross-Exception, it appears that Petitioner is abandoning any argument based on the first alternative method and is requesting refunds based only on allocating the receipts using the second alternative method.<sup>39</sup> In any event, Mr. Saint-Amand's own testimony contradicts any notion that the Council Members alone provide the value to the clients. He testified that "our research professionals are a strong point of value. . . . The client

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<sup>38</sup> Supplemental Affidavit of Thomas Hutzel in Support of Petitioner Gerson Lehrman Group Inc.'s Motion for Summary Judgment, Stipulation, Doc. 558.

<sup>39</sup> Cross-Exception at 2-3. Petitioner acknowledges that no refund using this second alternative method has been calculated for the 2004 Tax Year. Cross-Exception, n1.

can't engage the [Council Member] without going through the research professional. . .

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All of GLG's refund claims for the Tax Years were based on the salaries and compensation paid to Council Members, Research Managers, Consulting Managers and IT staff. The Record does not appear to contain information regarding the hours worked by any of Petitioner's employees during the Tax Years. While Council Members were frequently paid on an hourly basis, the payment records for Council Members provided indicate that this was not the only method.<sup>41</sup>

Respondent argues that the service being provided is that of Petitioner's employees who find, engage and manage the Council Members<sup>42</sup> and not the service of providing the information those experts impart to the client.<sup>43</sup> Respondent argues that the services of Council Members should be disregarded in allocating GLG's service receipts because the Council Members did not perform their services on behalf of GLG. Rather, Respondent argues, they generate receipts for themselves.<sup>44</sup>

Respondent bases its position largely on GLG's disclaimer in its subscription agreements that it is not responsible for the advice rendered by Council Members and on the provisions of the contracts with the Council Members under which they agree that they cannot act on behalf of Petitioner. Respondent's position is that GLG's receipts should be allocated according to the activities of GLG's employees, including but not limited to, its salespeople,<sup>45</sup> that those activities were primarily performed out of GLG's City sales office during the Tax Years,<sup>46</sup> and that the ALJ erred in excluding the salespeople from the allocation of GLG's receipts.<sup>47</sup> On audit, the Department concluded

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<sup>40</sup> Tr. 69.

<sup>41</sup> Petitioner's Ex. K, Ex. B contains an Excel spreadsheet identified as "Payments 2003 – 2007". In the column labeled "hours" the entry "Null" appears often.

<sup>42</sup> Respondent's Brief in Support of Exception (Respondent's Br.) at 27.

<sup>43</sup> *Id.* at 28, 30-31.

<sup>44</sup> *Id.* at 39-40

<sup>45</sup> *Id.* at 32-33.

<sup>46</sup> *Id.* at 43-45.

<sup>47</sup> *Id.* at 33.

that the personnel in Petitioner's City office generated the receipts from customers in New York, New Jersey, Pennsylvania and Connecticut.<sup>48</sup>

GLG's position is that only the Council Members and its Research Managers perform services for clients and, therefore, only their compensation should be taken into account in allocating its receipts.<sup>49</sup> GLG asserts that its salespeople engage in marketing and solicitation but do not perform or contribute to the performance of services for which GLG is compensated.<sup>50</sup>

GLG asserted that the ALJ erroneously denied its refund claims for the 2004 through 2010 Tax Years on the grounds that the refunds were "without substantiation or computations showing how the amounts were derived."<sup>51</sup> GLG makes essentially two arguments in its Cross-Exception, arguing first that there was sufficient evidence in the Record to calculate its refund. Its second argument is that, even if the Record was insufficient to support its refund claims, the ALJ agreed to allow the Parties to perform a computation of Petitioner's refunds for each of the Tax Years in accordance with the ALJ Determination under a procedure analogous to Tax Court Rule 155, under which the ALJ would retain jurisdiction after issuing the ALJ Determination to ensure that the Parties performed the computation accordingly.<sup>52</sup> GLG asserts that it relied to its detriment on an "on-the-Record agreement" between GLG, Respondent and the ALJ that would allow the Parties to perform such a post-determination computation.<sup>53</sup>

For the following reasons we modify the ALJ Determination and remand the matter to the ALJ Division for further proceedings consistent with this Decision.

For the purpose of calculating the GCT during the Tax Years, Administrative Code §11-604.3(a) allocates a taxpayer's business income to the City based upon the

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<sup>48</sup> Exception at 4. Respondent's Br. at 44.

<sup>49</sup> Petitioners Brief in Opposition to Exception (Petitioner's Br.) at 30-44.

<sup>50</sup> *Id.* at 46-49.

<sup>51</sup> Cross-Exception at 1.

<sup>52</sup> *Id.* at 10-12.

<sup>53</sup> *Id.* at 13.

average of the percentages within the City that a taxpayer's property, receipts and payroll bear to the total of the taxpayer's property, receipts and payroll everywhere.<sup>54</sup> These three percentages are commonly referred to as allocation factors. In the present case, there is no dispute regarding Petitioner's property and payroll factors during the Tax Years.<sup>55</sup> The sole issue concerns the proper method for calculating GLG's receipts factor for the Tax Years.

Administrative Code §11-604.3(a)(2)(B) provides that receipts from "services performed within the city. . . ." are allocated to the City but does not provide any guidance as to how to determine when services are considered to be performed in the City. Title 19, Chapter 11 of the Rules of the City of New York under the GCT (GCT Rules) provide some guidance. Under GCT Rule §11-65(b)(1):

"(b) *Compensation for services.*

"(1) Receipts from services performed within New York City are allocable to New York City. All amounts received by the taxpayer in payment for such services are so allocable, irrespective of whether such services were performed by employees or agents of the taxpayer, by subcontractors, or by any other persons. It is immaterial where such amounts were payable or where they actually were received.

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"(3)(i) Where a lump sum is received by the taxpayer in payment for services within and without New York City, the amount attributable to services within New York City is to be determined on the basis of the relative values of, or amounts of time spent in performance of, such services within and without New York City, or by some other reasonable method."

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<sup>54</sup> For the Tax Years 2003 through 2008, each of the three percentages is given equal weight. Beginning with Tax Year 2009, the relative weight assigned to each of these three percentages is adjusted to gradually phase out the property and payroll percentages for the years 2009 through 2017. (Administrative Code §11-604.3(a)(10), as added by L 2009, ch 201, §34.)

<sup>55</sup> ALJ Determination at 19. The ALJ stated "The salary and payroll factors are not in dispute in this proceeding." We assume that he meant the property and payroll factors. Nothing in the Record suggests that there is any dispute as to the property factor for any of the Tax Years.

We disagree with Respondent's characterization of GLG's business as a mere intermediary matching clients with the appropriate Council Member, along the lines of a broker, but which itself provides no substantive services to clients and does not sell the services of the Council Members.<sup>56</sup> Respondent asserts that the services of the Council Members cannot be taken into account under GCT Rule §11-65(b)(1) because Petitioner expressly disavows any responsibility for the information provided by the Council Members, including their biographical information, and clients agree that they are solely responsible for any losses they might incur in reliance on that information. Respondent also relies on the fact that the contracts with the Council Members require the Council Members to agree that they cannot act on behalf of Petitioner in any capacity. Respondent argues, therefore, that the Council Members are not acting as agents or subcontractors or any similar persons within the meaning of GCT Rule §11-65(b)(1).<sup>57</sup> We disagree. The Council Members do not collect their fees from GLG's clients, and GLG does not act as a mere broker between the Council Members and GLG's clients. GLG is a principal, not a mere agent, in these transactions. GLG, not the Council Members, bears the risk of loss if its payments to Council Members, together with other costs GLG incurs to deliver its services to clients, exceeds its revenues from subscription agreements.<sup>58</sup> Council Members generate subscription revenue for GLG, not for themselves.

However, we also reject Petitioner's contention that only the Council Members and Research Managers should be taken into account in calculating the receipts factor.<sup>59</sup> We agree with Mr. Dossal's characterization of the service provided by Petitioner as "a combination of the research, professional services layer, plus this network plus all this

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<sup>56</sup> Respondent's Br. at 31-33, 37-39.

<sup>57</sup> *Id.* at 27-28.

<sup>58</sup> Tr. 83.

<sup>59</sup> While during the Department's audit, Petitioner made refund claims based on alternative approaches including allocating receipts solely on the basis of the location of the Council Members (ALJ Determination at 27), in its Cross-Exception, Petitioner asserts that the receipts factor should be calculated based on the efforts of the Council Members and Research Managers. Petitioner's Br. at 15-16.

infrastructure. . . .”<sup>60</sup> Petitioner is not a consulting firm that clients pay for its own expertise. Petitioner sells subscriptions to its services. But rather than subscriptions to a publication where all subscribers receive the same service, Petitioner’s clients each receive a unique service tailored to their specific needs. That service is more than the conversations, seminars or written information provided by the Council Members. Those contacts are the end product of the work of several categories of Petitioner’s employees. Petitioner provides its clients with access to a vast network of experts in a variety of fields assembled by the Consulting Managers and other staff and maintained in a database by Petitioner’s IT staff. That access is customized by the Research Managers who select the specific Council Members for the client to speak to and who help formulate the questions to be asked.

Petitioner’s clients understand that Petitioner has no responsibility for: (i) the accuracy of any information provided by Council Members; (ii) the accuracy of the biographical information for any Council Member; or (iii) any loss suffered by the clients as a result of their reliance on the information obtained from the Council Members. For these reasons, we disagree with Petitioner’s comparison of its services to those of a law firm or accounting firm.<sup>61</sup> We also disagree with the ALJ’s conclusion that “GLG’s clients pay for a package of information provided by the consultants and Research Managers.”<sup>62</sup> GLG’s clients do not pay for specific information but for an opportunity to speak to Petitioner’s proprietary network of knowledgeable people in a particular field to compile an array of data and viewpoints on which to base the clients’ own conclusions.

Petitioner’s clients pay a fixed price for a subscription providing customized access to unfiltered information from specific individuals in Petitioner’s network of experts. That access is provided through a package of services including the efforts of the Research Managers who identify the appropriate Council Members and work with the

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<sup>60</sup> Testimony of Zecki Dossal, Tr. 369.

<sup>61</sup> Petitioner’s Br. at 69.

<sup>62</sup> ALJ Determination at 26.

clients to frame questions for the Council Members. However, the clients also are paying for the efforts of the Consulting Managers in recruiting Council Members and the efforts of Petitioner's IT staff who maintain the 'Knowledge Logistics' platform,<sup>63</sup> which is not only used by Research Managers in identifying Council Members for clients to contact but also is available to at least certain clients for their own search through the database.<sup>64</sup> The Basic Subscription Agreement also gives clients access to a database of "Custom Surveys."<sup>65</sup>

Finally, while we disagree with Respondent's contention that it is solely the salespeople whose efforts generate Petitioner's service receipts, we do agree that the salespeople play an integral role in generating service receipts. Not only do they solicit sales, upgrades and renewals and help drive clients' usage of the service, but they also provide quality control. The salespeople assure that the clients are happy with the service and the salespeople intervene to improve service quality. As noted above, it was the salesperson's responsibility to "manage the overall relationship with the client" and "to make sure they get what they expect and hope for out of the relationship with GLG."<sup>66</sup> We conclude that the services performed by salespeople, who were directly concerned with achieving client satisfaction and maximizing use of GLG's service, also must enter into the calculation of GLG's receipts factor. The ALJ's statement that salespeople merely "solicit and receive the subscription payment"<sup>67</sup> is contrary to the Record.

It is evident that, in concluding that Petitioner did not provide substantiation for its refund claims for the 2005 through 2010 Tax Years, the ALJ gave Petitioner ample opportunity to provide the requested documentation after the hearing.<sup>68</sup> We agree that Petitioner did not provide information enabling the ALJ or the Tribunal Commissioners to identify the source of the figures used in its summary worksheets for those Tax Years.

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<sup>63</sup> Petitioner's Br. at 51.

<sup>64</sup> Mr. Almeida testified that as a client, he used the database. Tr. 850-51, 904. *See also* Tr. 117.

<sup>65</sup> Respondent's Ex. 1.

<sup>66</sup> Tr. 418-419.

<sup>67</sup> ALJ Determination, at 24.

<sup>68</sup> ALJ Determination at 2.

Petitioner argues that there is sufficient information in the Record to support its refund claims.<sup>69</sup> While there is no question that the Record contains thousands of pages, Petitioner had not identified where in the Record the support for the summary worksheets exists in a form readily usable by the ALJ or the Tribunal Commissioners. Petitioner has not pointed to, and we have been unable to locate, any documents connecting the volumes of data provided to the figures included in the summary worksheets.

Petitioner further asserts that the Parties agreed that, even if the information in the Record was insufficient, following the hearing under a procedure analogous to Tax Court Rule 155, it would be permitted to work with the Department to compute any refunds due once a methodology was established by the ALJ.<sup>70</sup> The ALJ concluded that while he had authority to direct the Parties to do computations based on a methodology determined by him, he did not have the authority to reopen the Record for the submission of additional information.<sup>71</sup> Petitioner did not make a motion to reopen the Record. Generally such a motion will be granted where there is evidence that could not have been discovered before with diligence. (*Matter of Reeves*, 2004 WL 2016218 [NY St Div of Tax Appeals DTA No. 819086, September 2, 2004].) In the present case, Petitioner has not asserted that any information that it might have produced after the hearing in connection with any such computations could not have been discovered prior to or during the hearing. In fact, Petitioner asserts that all of the necessary information is in the Record although it has failed to identify where, among the thousands of pages, it exists. For the foregoing reasons, we decline to allow Petitioner time to present additional information to support its refund claims.

As explained above, we conclude that Petitioner's receipts take the form of a flat payment for a subscription service that is the product of the efforts of Petitioner's employees as well as its Council Members performed within and without the City. We

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<sup>69</sup> Cross-Exception at 6-8.

<sup>70</sup> *Id.* at 10-11.

<sup>71</sup> ALJ Determination at 28.

find that the methodologies for calculating Petitioner's receipts factor advanced by Respondent and Petitioner, as well as the methodology adopted by the ALJ, all are incorrect. Section 168(a) of the New York City Charter provides that "In rendering its decisions, . . . the tribunal shall have the same power and authority as the commissioner of finance to impose, modify or waive any taxes within its jurisdiction. . . ." Therefore, we conclude that GCT Rule §11-65(b)(3) authorizes us to determine a method for allocating those receipts based on "the relative values of, or amounts of time spent in performance of, such services within and without New York City, or . . . some other reasonable method."

Having concluded that no further time should be allowed for Petitioner to provide additional information, we have calculated a receipts factor for each of the Tax Years as indicated in Table 2 below using the following methodology: For each of the Tax Years, we have determined the amount of compensation paid to Council Members in the City as a percentage of compensation paid to Council Members worldwide. For the Tax Years 2003 through 2007, we have used the Excel spreadsheets included in Petitioner's Exhibit K, Exhibit B, titled "Payments 2003 – 2007" to identify payments to those Council Members located in the City using the city, state and zip code of the recipient.<sup>72</sup> For the Tax Years, 2008 – 2010, we have used the information for Council Member payments contained in Exhibit B tables identified as "State Sales Allocation" for each of those years.<sup>73</sup> For the Tax Years 2006 – 2010, we have used the amounts listed for "Council Mgmt/Research", "Sales", "Sales Assistants", "Research Ops", and "IT" in the tables listed under "Comp by Location" to compare the salaries for those titles in New York (assumed to refer to the City headquarters) and everywhere (*see* Table 1 below). Unfortunately comparable tables for the years 2003 – 2005 were not provided. For that reason, we have used the payroll factors for each of those years, which are not in dispute, as the best available substitute for the more detailed salary information. We note that the

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<sup>72</sup> We have made every effort to take into account those neighborhoods of the City, in Queens primarily, listed under "city" and misspellings in those spreadsheets.

<sup>73</sup> Those same tables were not provided for 2003 through 2007.

amounts for the salaries of the identified titles represent almost 74% of all salaries in New York in 2006 declining to 63.8% in 2010 and note that the payroll factor excludes general executive officers. Our recalculated receipts factor for each of the Tax Years is shown in Table 2 below.

year	total NY sales comp***	total sales comp***	NY CMR, RO, IT***	total CMR, RO,IT***	Total NY sales, CMR, RO & IT	Total sales, CMR, RO & IT
2006	7,021,924	13,642,527	19,703,804	31,049,284	26,725,728	44,691,811
2007	9,221,632	18,372,244	24,136,920	40,932,161	33,358,552	59,304,405
2008	10,832,768	20,322,472	24,659,956	45,853,713	35,492,724	66,176,185
2009	8,430,133	16,706,099	21,337,555	41,900,366	29,767,688	58,606,465
2010	8,415,649	17,627,403	19,328,493	42,840,406	27,744,142	60,467,809

CM = Council Member  
 Sales = Sales and Sales Assistants  
 CMR, RO = Council Management, Research Op

year	NYC CM payments*	total CM payments*	NYC Payroll ** (2003-5) or NYC sales, CMR, RO & IT (2006-10) from Table 1	Total payroll ** (2003-5) or Total sales, CMR, RO & IT (2006-10) from Table 1	Total NYC CM + NYC Payroll (2003-5) or total NYC CM + Sales, CMR, RO & IT (2006-10)	Total CM + Payroll (2003-5) or total CM + Sales, CMR, RO & IT (2006-10)	recalculated NYC receipts factor (before weighting)
2003	\$593,351	\$10,983,429	\$11,111,082	\$12,781,292	\$11,704,433	\$23,764,721	49.25%
2004	\$1,331,993	\$21,659,448	\$27,373,937	\$31,141,073	\$28,705,930	\$52,800,521	54.37%
2005	\$2,028,778	\$37,640,308	\$29,728,489	\$40,161,636	\$31,757,267	\$77,801,944	40.82%
2006	\$2,561,880	\$53,292,100	\$26,725,728	\$44,691,811	\$29,614,524	\$97,983,911	30.22%
2007	\$3,703,089	\$66,584,511	\$33,358,552	\$59,304,405	\$37,061,691	\$125,888,916	29.44%
2008	\$3,996,647	\$78,687,279	\$35,492,724	\$66,176,185	\$39,489,371	\$144,863,464	27.26%
2009	\$3,818,995	\$69,461,720	\$29,767,688	\$58,606,465	\$33,586,683	\$128,068,185	26.23%
2010	\$4,691,575	\$78,372,126	\$27,744,142	\$60,467,809	\$32,435,717	\$138,839,935	23.36%

\* Petitioner's Ex. K, Ex. B disk, "Payments 2003-2007" & "State Sales Allocation"

\*\* From 2003-2005 GCT Returns. For 2004 reflects payroll on amended return

\*\*\* Petitioner's Ex. K, Ex. B disk, "Comp by Location"

Accordingly, the ALJ Determination is modified and the matter is remanded to the ALJ Division for further proceedings solely for the purpose of recalculating Petitioner's GCT liability for the Tax Years using the above recalculated receipts factors to determine any deficiencies or overpayments and resulting interest.<sup>74</sup> We note that for the 2003 Tax Year, Respondent has asserted no deficiency so any recalculated GCT liability for that Tax Year is limited to a determination as to whether any overpayment exists equal to or less than the amounts of the two refunds claimed by Petitioner for that Tax Year. We note further that for the Tax Years 2004 through 2010, any recalculated GCT liability is limited to the amount of any deficiency asserted by Respondent or overpayment claimed by Petitioner in each of those Tax Years. Finally, we abate all penalties asserted in the Notices of Determination. Although Respondent requests that the Notices of Determination be reinstated, Respondent has not expressly addressed the issue of penalties.

Commissioner Frances J. Henn did not participate in this Decision.

Dated: December 28, 2017  
New York, NY

/s/

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Ellen E. Hoffman  
President and Commissioner

/s/

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Robert J. Firestone  
Commissioner

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<sup>74</sup> We have considered all of the other arguments of the Parties and find them unpersuasive.