NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petitions	:	DETERMINATION
of	:	TAT(H)08-79(GC) TAT(H)12-38(GC)
GERSON LEHRMAN GROUP, INC.	:	TAT(H)12-39(GC)

Bunning, A.L.J.:

The three Petitions in these consolidated cases were filed with the Administrative Law Judge Division of the New York City (City) Tax Appeals Tribunal (Tribunal). The Petition in TAT (H) 08-79(GC), dated September 23, 2008, protests a Conciliation Decision, dated September 4, 2008, upholding a Notice of Disallowance, dated October 31, 2007, of a claim for refund of City General Corporation Tax (GCT) for the 2003 year in the amount of $280,873.

The Petition in TAT(H)12-38(GC), dated December 24, 2012, protests a Notice of Determination, dated September 26, 2012, seeking to impose GCT on Petitioner for the years 2004 to 2008 in the amount of $1,843,519.44, interest computed to September 30, 2012 of $822,287.25, and penalty of $396,342.78, for a total due of $3,062,149.47. It also protests Respondent's disallowance of claims for refund of GCT for the years 2004-2008 totalling $1,935,916.85. Two refund claims were made for 2004. Respondent paid the first one, in the amount of $85,192, and seeks to recoup it as an erroneous refund shown as a deficiency on the Notice of Determination. The second refund claim for 2004, in the amount of $85,984, plus interest of $33,242.93, for a total of $119,226.93, is listed as a disallowed refund on the Notice of Determination.

The Petition in TAT(H)12-39(GC), also dated December 24, 2012, protests a Notice of Determination, dated November 30, 2012, seeking to impose GCT on Petitioner for the years 2009 and 2010, in the amount of $975,452.42, interest computed to November 30, 2012 of $175,610.59, and penalty of $341,408.44, for a total due of $1,492,471.45. It also protests Respondent's disallowance of claims for refund of GCT for the years 2009 and 2010 in the amount of $526,697.

A hearing was held before the undersigned at One Centre Street, New York, New York, on February 3, 4, 5, 10, 11, 12, April 29 and 30, and June 1, 2015, at which testimony was taken. The parties submitted a Stipulation of Facts, which stipulated to certain facts and agreed to the admission of 559 exhibits into evidence. Additional exhibits were subsequently admitted into evidence. The parties filed briefs after the hearing, the last of which was filed on February 25, 2016. The parties made additional submissions on March 3, 24, 30, and April 1, 4, and 8, 2016. Telephone conferences were held with the parties on March 23, April 12, May 18, and July 14, 2016. At the July 14, 2016 conference, Petitioner's counsel stated that documentation concerning the refund claims would be submitted the following week. When no submission was made, the Tribunal sent the parties a letter, dated August 9, 2016, informing them that the record was closed and that the cases would be decided on the testimony and exhibits in evidence.

Petitioner was represented by Richard A. Leavy, Esq. and Diane K. Kaufman, Esq. of Sidley Austin, LLP. Respondent was represented by Frances J. Henn, Esq., Senior Corporation Counsel[1], and Martin

[1] Ms. Henn represented Respondent until April 11, 2016, on which date she sent a letter advising that she was no longer assigned to the case.

Nussbaum, Assistant Corporation Counsel, with the City's Law Department.

ISSUES

1. Whether, for purposes of determining the receipts factor of Petitioner's GCT business allocation percentage, the services to be considered are, as Petitioner asserts, the consulting services rendered by Petitioner's employees and consultants, or as Respondent asserts, the services rendered by Petitioner's salespersons, who sold non-refundable subscription agreements for the expertise provided to Petitioner's clients.

2. Whether Petitioner is entitled to refunds of GCT.

FINDINGS OF FACT

A. Petitioner's Business

During the years at issue, 2003 to 2010, Petitioner, Gerson Lehrman Group, Inc. (GLG or Petitioner) provided consulting services to its clients. Its headquarters and its major sales office were in the City; other offices were located throughout the United States and the world. It engaged experts (referred to as "council members" by Petitioner and as "consultants" herein) as independent contractors who provided the expert knowledge sought by GLG's clients. Clients worked with GLG's research managers[2] to identify the relevant consultants, focus research questions, and obtain expert views. GLG's consultant managers recruited and managed the consultants.

[2] Research managers, salespeople, and consultant managers of GLG were all employees of GLG; only the consultants were independent contractors.

Clients entered into subscription agreements with GLG, generally for six to twelve months. The clients each made a lump-sum payment when the engagement commenced, for which the client received a fixed or sometimes unlimited amount of access to industry knowledge and expertise within the subscription period. If the client did not use the services for which it paid, or did not receive the level of services contracted for, no refund was generally made. There was no testimony that a client ever paid a subscription fee and did not use the service. On the contrary, there was testimony that the research managers attempted to maximize client usage of GLG services so that clients would derive the full benefit and renew their subscriptions. Once the subscription agreement was paid, all expenses, including the consultant fees, were paid by GLG.

GLG obtained clients through the efforts of its salespeople; clients did not come to GLG independently of its sales department. The salespeople were paid a base salary and a discretionary bonus based on performance. They were not commissioned sales agents. Once the subscription agreement was signed, their function was generally limited to assessment of the client's satisfaction with the service, solicitation of enhanced subscriptions, and obtaining renewals of subscription agreements, which did not renew automatically.

After the subscription agreement was in place, GLG's clients worked with its research managers to obtain the knowledge they sought. The research managers were located in GLG offices throughout the United States and outside the United States. They worked with the client to identify the client's consulting needs, focus the area of research, and formulate questions to the consultants. The research managers did not provide expert

knowledge to the client, but instead used their expertise in a particular field or industry to identify the appropriate consultants for an engagement and focus the inquiry to elicit the desired information. Each GLG client was assigned one or more research managers to assist in the delivery of consulting services within a practice area. Research managers, like the sales managers, were paid a salary and bonus.

GLG maintained a computer database of its consultants, which the research managers used to identify the appropriate consultants for a client engagement. The consultants were experts in their fields. They included medical doctors, research scientists, engineers, attorneys, and professional business consultants. Generally, a number of consultants were retained for a particular project, in order to present a variety of views (referred to as a "mosaic") to the client. The subscription agreement entitled the customer to the consultants' knowledge and experience.

Clients engaged GLG's consultant network to learn such things as the facts concerning a country's telecommunications market or the efficacy of a new pharmaceutical. There was no common database or shared knowledge among the consultants. Consultants generally worked on one or two GLG projects per year. The consultants' fees were paid by GLG. Petitioner had a network of approximately 64,000 consultants in 2004, which number increased throughout the period at issue to approximately 283,000 in 2010. Of these, it engaged and paid approximately 20,000 in 2004, increasing to approximately 47,000 in 2010. In 2004, Petitioner had approximately 200 employees, increasing to approximately 600 in 2010. In 2004, the total amount of compensation paid to consultants was equal to approximately half of the compensation paid to employees (approximately $21.5 million compared with approximately $39.3

million). For the years after 2004, the amounts paid to consultants increased more than compensation paid to employees increased. During the years 2004-2010, GLG paid approximately $402 million to consultants and approximately $392 million to employees.

Subscription agreements allowed GLG's clients to obtain the consultants' expert information in one or more of three ways. The first was oral consultation by telephone with a consultant, which generally lasted 30-45 minutes. Research managers did not participate in or monitor the oral consultations. In the majority of cases, they contacted the client afterwards to solicit feedback about the value of the consultation. Over 90% of client engagements were for these consultations.

The second method was written reports, compiled from answers to a series of short questions posed to a consultant by the client working with the research manager. The client, usually with the assistance of a research manager, developed the questions, and the responses were collected and in most cases edited by the research manager to provide a written report to the client. Reports were not reused, although a limited number were used in redacted form for marketing purposes.

The third way GLG's clients obtained information from consultants was through seminars (typically with one expert) and round tables (typically with six to eight experts)in which one or more clients met with consultants in a particular field or to discuss a particular subject matter.

Clients could access a part of GLG's database, which enabled them to keep track of their projects and the consultants with whom

they had engaged, and they could see what groups or populations of consultants the database had access to.

The consultants were paid by the hour for oral consultations, by the task for contributions to written research reports, and on a negotiated basis for participating in seminars and round tables. Each consultant set his or her rate of compensation with GLG. In most cases, the consultants performed the services connected with oral consultation and written research reports at their homes or offices.

The consultants were retained by GLG's consultant managers, who recruited, developed, and managed the consultants. The consultant manager worked with research managers to determine whether additional consultants were needed. They did not work with clients. Consultant managers, like salespeople and research managers, were compensated with salary and bonus. They were located at GLG's offices throughout the world, primarily in New York City and Austin, Texas.

GLG's subscription agreements stated that GLG "helps clients find, engage, and manage experts . . . through the Gerson Lehrman Group Councils, a network of industry professionals, consultants and other individuals ('council members') who are industry consultants to our firm and clients." GLG did not verify the consultants' biographical information.

The subscription agreements also provided that GLG "is not responsible for the content of Projects or the quality of Council Member [consultant] services." They provided that GLG,

> "cannot ensure that the information provided by Council Members is correct or complete, and shall have no

liability whatsoever arising from the actions or omissions of Council Members including, but not limited to claims by third parties relating to the actions or omissions of Council Members, the sole exception being Gerson Lehrman Group may be liable to you to the extent of its recklessness or willful misconduct in carrying out its responsibilities as set forth in the Responsibilities sections of the GLG section of this Agreement."

B. Petitioner's Tax Filings, Refund Claims, and Audit

During the years at issue, 2003-2010, Petitioner did business both within and outside the City. On its original City GCT returns for 2003 and 2004, it allocated its business receipts based on the office locations of its salespeople. This resulted in a receipts allocation to the City of 96.20% in 2003 and 76.89% in 2004.

Petitioner filed amended City GCT returns for 2003 and 2004 using a different methodology to compute its receipts factor. The amended computation was based on the locations of its consultants, research managers, consultant managers, and information technology (IT) personnel. The salespeople were not considered in this computation. The amended returns for 2003 and 2004 computed the receipts factor by considering 50% of the salary paid to the IT employees and 100% of the compensation paid to the remaining independent contractors and employees mentioned above. This reduced its receipts factor to 39.92% in 2003, and 40.06% in 2004. Based on the reduced receipts factor, Petitioner requested refunds of $280,873 for the 2003 year and $85,192 for the 2004 year.[3]

[3] The amended 2004 return requests a refund of $116,263. However, the parties' Stipulation of Facts states at paragraph 15 that "In connection with the 2004 Amended Return, Petitioner requested a refund of GCT in the total amount of $85,192."

Respondent disallowed GLG's refund claim for 2003. The audit report for 2003 noted that GLG "is an investment research consulting company . . . engaged in the activity of providing consulting services on a subscription basis." It stated:

> "Receipts Factor - The main issue regarding this refund request is the proper way to allocate the New York City receipts factor. When originally filed, the taxpayer based the allocation of all receipts on New York City regulation sub section 11-65(a)(2)(ii). The taxpayer filed a refund request for this period recalculating the receipts factor using New York City regulation sub section 11-65(b)(1). Based on this regulation the taxpayer feels that the proper way to allocate is based on where the services are performed."

The audit report for the 2003 refund claim recited that to determine where the services were performed, GLG used all expenses that it believed made up the service being provided to the client. It states, "I have reviewed the taxpayer's methodology and found all figures being used to be accurate as they relate to the books and records." The 2003 audit report disallowed the refund claim and determined that the original return was correct as filed:

> "However, we do not agree that a methodology that ignores salespeople whose job is to find the client, sell a subscription package, renew the subscription and ignores senior management whose job function is to oversee the salespeople, as well as all individuals involved in the preparation of the service being provided to the client is correct. As such we do not agree in the change of the receipts factor as filed by the taxpayer in their refund request."

Respondent sent a Notice of Disallowance of the 2003 refund claim, dated October 31, 2007. On February 20, 2008, GLG filed a request for conciliation conference with Respondent's Conciliation Bureau. The Conciliation Bureau proposed a resolution reflecting disallowance in full of GLG's claim for refund, with which GLG

disagreed. By notice dated September 4, 2008, the Conciliation Bureau discontinued the proceeding.

Respondent paid GLG's 2004 claim for refund in 2008.[4]

Petitioner filed GCT returns for the years 2005-2010 using the same receipts allocation methodology that it employed for the 2003 and 2004 amended GCT returns, i.e., it considered the compensation paid to consultants, research managers, consultant managers, and 50% of the compensation paid to IT personnel.

Respondent issued a Notice of Determination for the 2004[5]-2008 years, dated September 26, 2012, and a second Notice of Determination for the 2009-2010 years, dated November 30, 2012, asserting additional tax due based on Petitioner's initial methodology, that is, allocating receipts based on the location of Petitioner's salespeoples' offices. The Notice of Determination for 2004-2008 states:

> "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 the receipts are for services performed in the City by nature of the sales persons being located in NYC. The department is allocating receipts to NYC based on total revenue from NYC based sales persons."

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[4] The audit supervisor testified that, "It's customary policy to issue the refund to avoid the accrual of interest" (Tr 1283:22-23). The Audit Comments state that the first 2004 refund was paid to limit interest. However, the audit file contains a memorandum dated November 5, 2008 which states that "Gerson Lehrman Group Inc., has requested a refund of $85,192.00 year ending 12/31/04. The refund is based on amended return filed 9/15/08. The auditor has informed me, that the return under audit will be accepted as filed. Please issue the refund." This discrepancy is not material because the amount of the refund was shown as a deficiency in tax on the Notice of Determination and therefore is before the Tribunal.

[5] The deficiency asserted for 2004 is $85,192, the amount of the refund claim paid for that year.

The Audit Comments for 2004-2008 note that GLG's "principal business activity is consulting." They contain these remarks:

> "Prior to 2005, the taxpayer filed its returns allocating receipts based on the location of all the sales people. In 2005, a new management team changed the method of allocation using a cost of performance basis in accordance with regulation section 11-65(b)(1). This change resulted in a reduction of the Business Allocation Percentage from over 80 percent approximately in earlier years to appx 40-60 percent in later years. The department disagrees with this method. The department[']s position is that of the legal department[']s position who is currently litigating the 2003 refund request. The department believes that the proper method of allocating is the same as the original method used prior to 2005, where the sales people are located. This is in accordance with regulation 11-65(a)(1)(ii)."

The Notice of Determination for 2009-2010 states:

> "Per prior audit, an adjustment was made to correct the manner in which the taxpayer calculates receipts to NYC from Hybrid method established by the taxpayer to the manner prescribed in the regulations and advocated by Legal based on salesman location. Adjustment was made in accordance with regulation section 11-65(a)(1)(ii)."

The Audit Comments for 2009 and 2010 state once more that GLG's "principal business activity is consulting." They also provide:

> "The Business Allocation Percentage was reviewed in depth. The focus of the audit was on the receipts factor. The taxpayer has filed a [claim for] refund for 2004 based on a change in the way they allocate receipts. Refund was originally paid to limit interest. This change in allocation has also affected all other years in the audit."

The statements in the 2004-2008 Audit Comments regarding GLG's change in its method of allocation were repeated.

The audit supervisor testified that the amount of the deficiency was determined for each of these years by adding GLG's revenues from clients located in New York State, New Jersey, Connecticut, and Pennsylvania, attributing those receipts to the efforts of salespeople located in the City, and using this number as the numerator of the receipts factor. Respondent did not consider where the work was performed. Respondent explained that it equated the efforts fo the City sales office with customers in these four states because GLG did not respond to requests for information requesting the number of salespeople, research managers, and information technology personnel in each office. Respondent disregarded the work of the consultants (who were independent contractors) because it took the view that GLG did not itself provide the expert information, but instead merely identified the appropriate consultant.

The City asserted that City GCT Regulation (19 RCNY) § 11-65 (b)(1) considers the efforts of independent contractors "only where an independent contractor or a subcontractor generates receipts for the taxpayer. In this instance, they do not. They generate receipts for themselves. The taxpayer's generation of receipts is by selling subscriptions to clients that give them access to consultants' expertise."[6]

[6] Testimony of Michael Newmark, Director of Respondent's Tax and Advocacy Unit, Tr 1877: 10-17.

The Audit Comments for the 2009 and 2010 years also state:

> "REFUND REQUEST-
> The taxpayer filed work papers with the auditor requesting a refund before interest in excess of 2 million dollars. The basis of the refund is changing the allocation of receipts based on where the consultants, which is the main service performed according the taxpayer, are located."

Petitioner made alternative refund claims for the 2005 to 2010 years using analyses that based receipts solely on the locations of, alternatively, (i) its research managers and consultants, and (ii) only its consultants. Both analyses disregarded the location of its consultant managers and IT personnel, which had been considered in preparing the original returns for these years. No formal claims for refund were filed. Instead, GLG submitted summaries indicating the amount of refunds due under these two alternative scenarios.

The audit file for the 2004-2008 tax years contains emails from a GLG representative to the auditor transmitting the refund claim summaries. The summaries were not attached to the emails. A series of telephone conferences was held after the hearing to discuss the computation of the refund claims, and GLG submitted copies of the summaries referenced in the emails. These provide dollar values for services performed within and without the City, without explanation or substantiation of the source of these numbers. Respondent stated in its letter to the Tribunal of March 30, 2016 that it had no objection to the spreadsheets being provided to the Tribunal. There being no objection, these

documents are admitted into evidence.[7] These documents and the audit file establish the following.

On July 3, 2012, the auditor sent an email stating in part, "Can you please contact me to discuss the refund request that Gerson is supposed to make with me[?]" GLG's representative wrote back the same day, requesting an exit conference and stating that the refund request "should be finished early next week."

On July 31, 2012, an employee of GLG sent an email to the auditor with a "a summary regarding the refund computations for 2005-2010 as discussed." The attachment has dollar values of each of the three factors as filed, as amended, and a total percentage for the three factors. The refund claims for 2005-2010 total $913,710.

On August 3, 2012, the same employee sent the auditor an email stating in part, "please find attached updated file." Similar summaries were enclosed, with a total refund of $1,007,380 requested for 2005-2010. Three minutes later he sent another email to the auditor stating,

> "By the way, I think Richard wanted me to submit a second version of the refund claim as well. I've attached both here for your easy reference:
>
> "1. Remove Council Mgmt and Engineering from the cost of performance calculation: estimated refund of $1.0M[.]
>
> "2. Remove Research Mgmt, Council Mgmt and Engineering from the cost of performance calculation (leaves just CM fees): estimated refund of $2.0M[.]"

[7] The series of emails and summaries concerning the refund claims for 2005-2010 was submitted by Petitioner's counsel under cover of letter dated April 1, 2016, and is admitted into evidence as Petitioner's Exhibit W.

Two refund summaries are included for 2005 to 2010, one in the total amount of $1,007,380, the other in the total amount of $2,006,353. The auditor disallowed the refund claims and included the summaries of the $2,006,353 refund claim provided by GLG in the audit file and in the Notices of Determination. Further, the audit workpapers show a second refund claim for the 2004 year (in addition to the one which was paid), computed in the same fashion as the larger refund claim for 2005 - 2010, i,e, considering only the consultants.[8] The amount sought is $85,984 plus interest of $33,242.93, for a total of $119,226.93, which is the amount of the refund claim for 2004 disallowed by the Notice of Determination for 2004 to 2008.

In the case of both the original returns for 2005-2010, and the claims for refund, GLG used the relative values of the cost of performance because it did not monitor time spent by employees and consultants.

The parties cross-moved for summary determination and the motions were denied by order dated June 30, 2011.

C. Ultimate Findings of Fact

The parties agree that Petitioner provides a service. The parties disagree about what that service was. Petitioner contends that it was a consulting service provided by its research managers and consultants. Respondent argues that Petitioner was a "matchmaker" or something akin to an executive search firm, which located the appropriate experts. It further argues that the

[8] The receipts factor in this second 2004 refund claim is reduced from 40.06% to 10.62%; in the first refund claim for 2004, it was reduced from 76.89% to 40.06%.

service was selling a subscription, and that the salespeople were solely responsible for business receipts, which were received before any services were rendered and were generally non-refundable.

Based upon the extensive testimony at hearing, which was not contradicted, it is found as that the service at issue was providing expert knowledge. GLG's service was not merely locating consultants. After the appropriate consultant was identified, Petitioner worked with the client and the consultant to obtain the required information in the form desired by the client. This might be oral consultation, answers to written survey questions which research managers then incorporate into a report, or appearances at seminars and meetings.

Furthermore, Petitioner - and not its client - engaged and paid the consultant. The service the client paid for was the package of focused expert knowledge provided by the consultants and elicited with the research managers' assistance in identifying and communicating with the consultant. Petitioner's finding the right consultant or consultant for the client was the beginning, not the end, of the service, as it would be if it were an executive search firm or a "matchmaker."

Respondent asserted during the hearing and in its post-hearing briefs that Petitioner had not supplied all requested information, which assertion Petitioner contested, introducing evidence to show the extent of its document production. With one exception, which Respondent dealt with, it is not clear that

Petitioner did not submit all of the information requested by Respondent.[9]

Moreover, review of the Notices of Determination and audit comments, quoted above, do not reference any lack of information from Petitioner. On the contrary, these documents indicate that Respondent reached its position because of its belief that the salespeople generated the receipts and that the consultants' services should not be considered. This position was not based on a lack of documentation, but on the City's understanding of GLG's business. Thus, any deficiency in Petitioner's production of information during the audit is irrelevant to Respondent's position or the determination of this proceeding.

POSITIONS OF THE PARTIES

With respect to the refund claim for 2003, the first refund claim for 2004, and the Notices of Determination, Petitioner asserts that receipts should be allocated based on an examination

[9] The auditor was not present at the hearing, and the audit supervisor's testimony was inconclusive about whether requested information was not supplied. Respondent's other witness, the director of its Taxpayer Advocacy Unit, Michael Newmark, testified that he had reviewed "hundreds of records" of Petitioner (Tr 1783:21) but did not recall seeing a response to an information document request for the wages for consultants, salespeople and account managers in the City and everywhere, a breakdown of the receipts factor in the City and everywhere, and total hours worked by consultants, salespeople and officers. Mr. Newmark testified to some degree of miscommunication with the auditor as to what information he asked the auditor to request. Petitioner submitted two affidavits and two cartons of documents that it says it produced during the course of the audit. These documents were not in the audit file, which for this and other reasons (including the absence of the attachments to the emails concerning the refund claims) does not appear to be complete. From all of this, it is difficult to draw the conclusion that Respondent's audit was impaired by a lack of information supplied by Petitioner. It does appear that Petitioner failed to produce information showing how many of each kind of employee and independent contractor it had in each office or state, but Respondent dealt with this by using receipts in New York, New Jersey, Pennsylvania, and Connecticut as a proxy for City sales activity.

of where the services were provided by consultants, research managers, consultant managers, and information technology personnel (at 50%). With respect to the second refund claim for 2004 and the refund claims for 2005-2010, Petitioner argues that the allocation should be made by looking solely at the services performed by its research managers and consultants.

Respondent asserts, with respect to the 2003 and 2004 years, that GLG's initial filing position (using an allocation based on the location of office where the sales were made) is correct. With respect to the later years, 2005-2010, Respondent makes the same assertion, using revenues from clients located in New York State, New Jersey, Pennsylvania, and Connecticut as a measure of sales generated by GLG's New York City office. It bases this position on two arguments. First, Respondent argues that the non-refundable lump-sum subscription agreements are fully performed when the payment is made, not when the contracted-for services are rendered, and therefore must be sourced to the location of the office in which the salespeople responsible for the subscription agreements were located. Its second argument is that consultants are independent contractors working for themselves rather than GLG and should therefore be excluded from the allocation analysis.

CONCLUSIONS OF LAW

City Administrative Code (Code) § 11-603 imposes GCT on corporations "for the privilege of doing business, or of employing capital, or of owning or leasing real property in the city in a corporate or organized capacity, or of maintaining an office in the city." For corporations doing business both within and outside the City during the years at issue, the GCT was allocated on a three-factor formula, which considered (1) business receipts

within the City compared with total business receipts, (2) wages and salary paid for services performed within the City compared with total wages and salary, and (3) property in the City compared with total property. The salary and payroll factors are not in dispute in this proceeding. The only issue is how the receipts factor is to be calculated.

Code § 11-604.3 (a)(2) provides rules to allocate receipts from sales of tangible personal property, sales of services, rentals from use of property in the City, royalties and copyrights from the use of property in the City, and a catch-all provision for other receipts earned within the City. Code § 11-604.3 (a)(2)(B) and (D) provide that the receipts factor is to be computed by

> "ascertaining the percentage which the receipts of the taxpayer, computed on the cash or accrual basis according to the method of accounting used in the computation of its entire net income, arising during the period from: . . . (B) services performed within the City. . . and (D) all other business receipts earned within the city, bear to the total amount of the taxpayer's receipts, similarly computed, arising during such period from all sales of its tangible personal property, services, rentals, royalties and all other business transactions, whether within or without the city ...."

City GCT Regulation (19 RCNY) § 11-65 (a) provides:

> "General. (1) The percentage of the taxpayer's business receipts within New York City is determined by
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> "(i) ascertaining the taxpayer's business receipts within New York City during the period covered by the report and

"(ii) dividing the sum of such receipts by the taxpayer's total business receipts within and without New York City during such period."

Regulation § 11-65 (b)(1) governs the allocation of receipts for compensation for services. It states:

"Compensation for Services. 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."

Section 11-65 (b)(2) provides for commissioned sales agents as follows:

"Commissions received by the taxpayer are allocated to New York City if the services for which the commissions were paid were performed in New York City. If the taxpayer's services for which commissions were paid were performed for the taxpayer by salesmen attached to or working out of a New York City office of the taxpayer, the taxpayer's services will be deemed to have been performed in New York City."

Section 11-65 (b)(3)(i) provides a rule for the allocation of lump sump payments:

"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."

Finally, Section 11-65 (e)(1) governs the allocation of other business income. It provides:

> "Other business receipts. (1) All business receipts earned by the taxpayer within New York City are allocable to New York City. Business receipts are not considered to have been earned by the taxpayer in New York City solely by reason of the fact that they were payable in New York City or actually were received in New York City."

In construing a statute, courts are to discern and give effect to the Legislature's intent, and the starting point is the language of the statute. The statute must be construed as a whole and its various sections must be considered together with reference to one another (*Matter of Shannon*, 25 NY3d 345, 351 [2015]). This rule applies to the interpretation of regulations (*Matter of Tocqueville Asset Management*, TAT [E] 10-37 [UB] [City Tax Appeals Tribunal, 2015], *confirmed*, 141 AD 3d 420 [1st Dept 2016]). "'The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction'" (*Frank v Meadowlakes Dev. Corp.*, 6 NY3d 687, 692 [2006] quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 94).

Where the interpretation or application of a statute involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the agency charged with the responsibility for its administration, and if its interpretation is not unreasonable or irrational, it will be upheld. However, where the question is purely one of statutory reading and analysis, there is little basis to rely on any special expertise or competence of the agency (*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009]; *Matter of Trump-Equitable Fifth Ave. Co. v Gleidman*, 57 NY2d 588 [1982]).

The statute and regulation base receipts from services on where the services are performed. Reading their plain language, the service to be considered is the service rendered by Petitioner to its clients. The definition of service is "[l]abor performed in the interest or under the direction of others; specif., the performance of some useful act or series of acts for the benefit of another, usu. for a fee" (Black's Law Dictionary, 10th ed., 2014).

The service GLG provided to its customers was that of providing expert knowledge, analysis, and views. GLG rendered this service through its consultants, with the guidance and assistance of its research managers. For GCT allocation purposes, the focus is on the services provided to the client, and determining which individuals provide them, and where they are provided (*Matter of The McGraw-Hill Companies, Inc.*, TAT(E)10-19(GC)[City Tax Appeals Tribunal, 2015][receipts from Standard & Poors ratings services properly allocated based on the place of performance of the services]).

The subscription agreements are lump-sum payments, which are to be allocated "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" (Regulation § 11-65 [b][3][I]).

Respondent points to a letter ruling it issued (FLR 064846-006 [June 28, 2006])[10] which dealt with the allocation of receipts from the services of drawing blood, which was performed in the City, and analyzing blood, which was performed outside the City. The invoices broke out the standard charges for each of these services. The ruling concluded that the receipts from drawing blood were to be allocated to the City, and that the receipts from blood analysis were to be allocated outside the City, because this is where the services were performed. This non-binding ruling considers where the services were rendered, not how or when payment was made.

No other City tax authority was found on this issue. The parties point to advisory opinions rendered by the New York State Department of Taxation and Finance,[11] which are asserted to be relevant here because the relevant City Code and regulations are the same as the State Tax Law and regulations.[12] These advisory opinions are not binding here.[13] Some of them are irrelevant,

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[10] "A ruling represents an expression of the views of the Department of Finance as to the application of law, regulations and other precedential material to the set of facts specified in the ruling request. A ruling shall be binding upon the Department of Finance only with respect to the person to whom the ruling is rendered, provided that the facts are as stated in the ruling request. A taxpayer may not rely on a ruling issued to another taxpayer." 19 RCNY § 16-05 (a).

[11] *Insight Management, Inc.*, TSB-A-95(5)C; *Christopher Doyle*, TSB-A-95(11)C; *Alan Langer*, CPA, TSB-A-92(9)C; *Independent Television Network, Inc.*, TSB-A-99(17)C; *Video Aid Corporation*, TSB-A-93(19)C; *Citrin & Cooperman & Co., LLP*, TSB-A-98(7)C.

[12] *See* NY Tax Law § 210.3 (a)(2) and State Tax Regulation [20 NYCRR] § 4-4.3 (a).

[13] A State tax advisory opinion "is binding upon the [State] commissioner [of Taxation and Finance] only with respect to the petitioner and only about the facts described in the advisory opinion" (State Tax Regulation § 2376.4[a]).

dealing with "other business receipts"[14] or commissioned sales agents.[15] The remaining rulings are conflicting. Three rely on a "generation of income" analysis, a phrase found in neither the statute nor the regulation, which is used in two of the rulings[16] to justify a mechanical test to find the act immediately preceding payment rather than examining where the services are rendered, as is required by the statute and regulations. These non-binding rulings provide little guidance.

Respondent raises two arguments disputing the analysis that the service is to be allocated based on the location of the consultants and research managers. The first is that the client pays for the subscription at the outset, requiring that the focus of the receipts analysis be on the salespeople, who solicit and receive the subscription payment. The second is that the independent contractors work on their own behalf and not on behalf of GLG, so their efforts should be eliminated from the analysis. Neither argument is convincing.

The fact that the client pays for the service through a subscription agreement at the inception of the engagement that is generally non-refundable is not relevant to determining what the service is and who provides it. Regulation § 11-65 (b)(1) states "It is immaterial where such amounts were payable or where they actually were received." Because the location of payment is expressly excluded from the analysis, the timing of the payment - whether it occurs before or after the rendition of the services -

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[14] *Video Aid Corporation.*

[15] *Citrin & Cooperman & Co.* (quoting the regulation concerning commissioned sales agents in the final paragraph).

[16] *Alan Langer* and *Independent Television.*

appears to be equally irrelevant. Therefore, the fact that GLG's clients paid for the service at the inception of the engagement has no bearing in this analysis. It is equally immaterial that these payments were non-refundable. Here, it is not the salespeople who provide the services that create the receipts, anymore than it would be the accounting department that did so if GLG's client paid after the services were rendered in response to an invoice created by that department. The regulation considers only where the services were rendered, not the mechanics of payment.

The clients' payment for the services before they are rendered does not change the fact that GLG's research managers and consultants render the services for which the client is paying. Although the salespeople collect the receipts, their efforts do not represent the services to which GLG's clients subscribe.

The regulation examines the activities of salespeople only in the case of a commissioned sales agent (Regulation § 11-65 [b][2]). If Petitioner's activities involved receiving sales commissions, then it would be appropriate to consider where the sales agents performed their activities. But GLG's salespeople were not commissioned sales agents, so this regulation has no application here. Respondent's first argument must therefore be rejected.

Regarding its second argument, Respondent cites no authority for the proposition that the services of independent contractors are to be disregarded because they are "working for themselves." Indeed, this position is contrary to the regulation, § 11-65 (b)(1), which states that receipts include services provided "by

employees or agents of the taxpayer, by subcontractors, or by any other persons." Respondent itself states at page 2 of its reply memorandum, "Rather, the regulation requires that employees, agents, subcontractors or other persons actually perform the services which generate the receipts sought to be allocated." As noted, the services in this case are performed by the consultants and research managers.

GLG's clients pay for a package of information provided by the consultants and research managers. The consultant plainly works on behalf of GLG, providing expertise as an integral part of the services provided. The client does not pay the consultant independently of its payment of a subscription fee to GLG. There is no relationship between the client and the consultant independent of GLG. The fact that GLG disclaims liability for the acts of the consultant does not change this result.

The services at issue are not provided by GLG's salespeople. GLG's receipts were the result of services provided by its research managers and consultants. Accordingly, the Notices of Determination are cancelled.

Turning to the refund claims, for the 2003 year, GLG filed an amended return and the auditor confirmed the underlying computations. The amended return was premised on a more conservative computation than that found to be correct here.[17] A refund in at least this amount is proper. Therefore, the disallowance of the refund claim for 2003, in the amount of

[17] The amended 2003 return allocated receipts based on the locations of the consultants, research managers, consultant managers, and 50% of IT personnel.

$280,873, is cancelled and a refund in that amount is allowed, plus interest as allowed by law.

As for 2005-2010 years, GLG submitted two alternative refund claims. It submitted one claim basing allocation of receipts on the locations of the consultants and research managers, initially in the amount of $913,710, and then in the amount of $1,007,380. It submitted another claim based allocation on the locations of the consultants, in the amount of $2,006,353.

The claim for refund for $2,006,353 is disallowed because the analysis is incorrect. The relevant services were performed not just by the consultants, but by the consultants and research managers.

The other claim for refund, in the amount of $913,710 or $1,007,380, is disallowed because it lacks substantiation. The claim consists of the dollar amounts of receipts in and out of the City without substantiation or computations showing how the amounts were derived. Four telephone conferences were held with the parties, after the hearing and after the briefing was completed, from March to July, 2016, inviting GLG's counsel either to show where in the record the substantiation for the refund claims was, or to submit such substantiation. Although submissions were made to attempt to do this, these were unsuccessful, as GLG's counsel tacitly acknowledged in the conference on July 14, 2016, by undertaking to make another submission, which did not occur.

The second claim for refund for 2004 uses the same analysis as the $2,006,353 refund claim for 2005-2010. It is disallowed for these same reasons.

During the hearing the parties agreed that, if necessary, the Tribunal could select a methodology for determining the receipts factor, and leave the parties to compute the tax consequences in a procedure analogous to Tax Court Rule 155 (Tr 919:21 - 921:5). However, such a procedure does not permit the record to be re-opened and additional information submitted. It is limited to mathematical computations based on information already in the record (*DeNaples v Comm'r*, 674 F3d 172 [3d Cir. 2012]). Therefore, it is not possible to have the parties jointly compute the amount of the refund claims because this would require information not in the record. For these reasons Respondent's disallowance of the refund claims for the 2004-2010 years is sustained.

Accordingly, the Notices of Determination are cancelled, the claim for refund for the 2003 tax year is allowed, and the refund claims for 2004-2010 are disallowed.

IT IS SO ORDERED.

Dated: New York, New York
October 4, 2016

/s/
David Bunning
Administrative Law Judge