

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Technical Services Division**

TSB-A-04(25)S  
Sales Tax  
November 12, 2004

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S021001A

On October 1, 2002, the Department of Taxation and Finance received a Petition for Advisory Opinion from ADP, Inc. - Employer Services Division, One ADP Boulevard, Roseland, New Jersey, 07068. Petitioner, ADP, Inc. - Employer Services Division, submitted additional information on November 29, 2002, January 13, 2003, and February 13, 2003.

The issue raised by Petitioner is whether its start-up and on-going charges relating to various employee benefit and human resource services provided to Petitioner's clients are subject to sales tax.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner provides technical solutions to employers that facilitate the administration of various aspects of human resource management. The data processing and administrative services provided by Petitioner under consideration here are known as (1) Health and Welfare Administration, (2) Retirement Services Administration, (3) COBRA/Flex Spending Administration (FSA) and (4) Pre-Employment Screening and Selection Service Administration. This Petition is limited to these services.

The following provides some details for the four processing and administrative services addressed in this Advisory Opinion.

*Health and Welfare Administration*

The basic *On-Going* services provided by Petitioner as part of its Health and Welfare Administration service include:

- maintaining benefit plan rules, based on data gathered from the client, such as hours worked, service time, age, employment status-class-type, resident state-zip code, company and pay group;
- collecting and maintaining up-to-date employee data to determine benefit eligibility;
- processing benefit related charges resulting from human resources activity (i.e., hiring, firing, promotions, etc.);
- collecting employee family status change information and processing changes;

- distributing confirmation materials to participants;
- providing standard management reports that identify participants, plans and coverage amounts;
- maintaining call center support;
- providing system/database maintenance; includes eligibility rules, statement templates, plan modifications, rate tables, zip codes, training materials, and system testing.

Health and Welfare Administration data is collected, analyzed and compiled to the specifications of each client company, and assembled into reports accessible by or furnished to the client company. This service involves the processing of data provided by the client, or the client's employees. The information processed is not derived from a common database.

#### *Retirement Service Administration*

The basic *On-Going* services provided by Petitioner as part of its Retirement Administration service include:

- daily valuation record-keeping via common database rate data;
- investment selection tools with investment performance monitoring;
- employee communications via online, email and mail function;
- an interactive website with a voice response system;
- call center for special needs;
- loan withdrawal processing either electronically or via paper forms;
- daily investment transfer, investment allocation, and contribution rates;
- rollover contribution processing;
- disbursement processing;
- electronic transmission/receipt of payroll data;
- periodic management reports;

- compliance testing and government reporting;
- monthly plan activity reporting.

Retirement Service Administration data is collected, analyzed and compiled to the specifications of each client company, and assembled into reports accessible by or furnished to the client company. This service involves the processing of data provided by the client, or the client's employees. This service does rely to some extent on externally provided data, such as data on prices of securities in which the plan assets are invested.

*COBRA and Flex Spending Account (FSA) Administration*

The basic *On-Going* services provided by petitioner as part of its COBRA Administration service include:

- processing open enrollment documents;
- processing initial COBRA notification letters to qualified participants;
- setup of participants into COBRA services;
- administering enrollments, billing and carrier interaction for clients and their participants;
- issuing documents to participants confirming eligibility and account activities, including changes in status or plans and termination notifications;
- furnishing reports pertaining to current status, activity, termination, new elections, and premium distribution;
- collecting payments from participants and transfer to carriers;
- management of established accounts.

Data is collected, analyzed and compiled to the specifications of each client company, and assembled into reports accessible by or furnished to the client company. This involves the processing of data provided by the client, or the client's employees.

COBRA account administration represents election-based health plan processing for client's qualifying employees. The qualifying event information, which includes reasons for eligibility, length of eligibility, plans offered, employee demographic data and health insurance

information, is provided to Petitioner by the client. The client's employees are notified when there is a COBRA qualifying event (such as an employee termination) and the tracking of the electing employees is maintained for coverage and premium reporting.

On-going services for Flex Spending Account Service Administration include:

- enrollment processing of employee data, check registers, and funding requirements;
- employee contribution administration;
- quarterly summarizing of activity by employee;
- forfeiture reporting of fund amounts in the plan, not used within the specified time.

Flex Spending Account Administration encompasses the administration of flexible spending plans, dependent care plans and mass transportation reimbursement plans. Petitioner receives employee account, contribution and enrollment eligibility records from the client and arranges the data into manageable records. Thereafter, the client's employees file claims against these contributions.

#### *Pre-Employment Screening and Selection Service Administration*

The basic *On-Going* services provided by Petitioner as part of its Pre-Employment Screening and Selection services include:

- criminal record checks;
- worker compensation histories;
- motor vehicle records;
- employment and personal reference checks;
- credit histories;
- name, address, social security number verification;
- education and credential verification.

Pre-Employment Screening and Selection services provide employee background information services to client companies. The client companies match employee background

information with the employer job requirements through the verification of job applicant background. This screening and selection information is gathered or compiled to the specifications of each client and assembled into reports accessible by or furnished to each client. The employee background information is obtained by Petitioner through source document retrieval, public record database searches, company databases and a national network of third party couriers. The information is not proprietary in nature and is equally available to other parties.

### *Billing the Clients*

Petitioner charges clients for *On-going Services* for each of the administration services provided. Charges and services vary depending on which administration service Petitioner provides to the client. Sample invoices indicate that Petitioner's billings separately state many of the options discussed above including the base monthly charge, charges per account, per employee, and per transaction, and start-up and implementation charges.

*Health and Welfare Administration* - Fees for Health and Welfare Administration services are unbundled and separately stated on the invoice. The fees for this service are computed on a per member (client employee), per month basis for the standard menu of services plus a minimum base fee for the bare minimum of service provided. The Health and Welfare Administration services also include charges for start-up services. These start-up services are provided upon commencement of each new contract for a client company and consist of determining the size of the company, ascertaining what specific benefit plans the company wants to offer, plan analysis, and general consulting to establish the best benefit plan for the customer. These start-up services also include project management for programming and developing the interface between the customer's information system and Petitioner's system, as well as separately stated charges with respect to the client's change requests. Charges for Start-up services are based on the number of hours worked, whether worked on the client's premises or otherwise. The charge may also include reimbursable expenses, such as travel, lodging, meal allowance, phone calls, etc. Charges for Start-up Services made to the client are one-time only and are unbundled and separately stated on the invoice.

*Retirement Services Administration* - Fees for Retirement Administration services are unbundled and separately stated on the invoice. The fees for this service are computed on a per member (client employee), per month basis for the standard menu of services plus a minimum base fee for the bare minimum of service provided. The Retirement Administration services also include charges for start-up services (as described above for the Health and Welfare Administration services) which are made one-time only and are unbundled and separately stated on the invoice.

TSB-A-04(25)S  
 Sales Tax  
 November 12, 2004

*COBRA and FSA Administration* - Fees for COBRA and FSA Administration services are unbundled and separately stated on the invoice. The fees for these services are charged on a per participant (client employee), per month basis and are based on qualifying events and the number of employee participants who elect to have coverage. There are no special start-up services or fees for COBRA and FSA Administration. Separate charges are made for extra services such as additional reports, multiple location setup, etc.

*Pre-Employment Screening and Selection* - Fees for Pre-Employment Screening and Selection services are unbundled and separately stated on the invoice. A package option that can include any combination of the available products and services is invoiced at a flat rate for the package, based on the number of products chosen. If the package option is not chosen, each data and service option is charged separately.

Petitioner's services are offered via technologies that streamline and automate the processing and managing of employee and related benefits information for employers. Depending on the needs of the client, Petitioner's services are provided through both manual processing and web-access screens. Common to the services is Petitioner's use of its proprietary software and the technical expertise of Petitioner's staff in implementing its products for each client. Petitioner maintains ownership of all product related software and is responsible for the development, maintenance, enhancements, marketing, and support of the software, all of which is housed and maintained on Petitioner's premises. Some of Petitioner's administrative services are performed by its call center and account representatives.

### **Applicable law and regulations**

Section 1105 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

\* \* \*

(c) The receipts from every sale, except for resale, of the following services:

(1) The furnishing of information by printed . . . 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, 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 . . . .

Section 527.3 of the Sales and Use Tax Regulations provides, in part:

(a) Imposition. (1) Section 1105(c)(1) of the Tax Law imposes a tax on the receipts from the service of furnishing information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any manner such as by tapes, discs, electronic readouts or displays.

(2) The collecting, compiling or analyzing information of any kind or nature and the furnishing reports thereof to other persons is an information service.

(3) Among the services which are information services are credit reports, tax or stock market advisory and analysis reports and product and marketing surveys.

\* \* \*

(b) Exclusions. (1) Sales tax does not apply to receipts from sales of information services which are for resale as such.

(2) The sales tax does not apply to the receipts from the sale of information which is personal or individual in nature and which is not or may not be substantially incorporated into reports furnished to other persons by the person who has collected, compiled or analyzed such information.

## **Opinion**

Petitioner provides technical solutions to employers that facilitate the administration of various aspects of human resource management which assists employers in providing benefits to their employees. The services provided by Petitioner under consideration here are known as (1) Health and Welfare Administration, (2) Retirement Services Administration, (3) COBRA/Flex Spending Administration (FSA) and (4) Pre-Employment Screening and Selection Service Administration.

Some of the administrative services provided are performed by Petitioner's call center and Petitioner's account representatives. In relation to the administration of benefits programs for client companies, Petitioner performs a multitude of tasks which might be generally categorized as record-keeping and administrative functions.

TSB-A-04(25)S  
Sales Tax  
November 12, 2004

Section 1105 of the Tax Law imposes a tax on the sales of all tangible personal property unless such property is specifically exempt. Services are not subject to sales tax unless they are specifically enumerated as being subject to tax under section 1105 of the Tax Law.

With the exception of its Pre-Employment Screening and Selection services, the administrative services provided by Petitioner are similar to data processing, accounting and other record maintenance services which are generally administrative in nature and are not within the enumerated services specified under section 1105 of the Tax Law. See *Deloitte & Touche LLP*, Adv Op Comm T&F, April 14, 1998, TSB-A-98(26)S.

To the extent Petitioner's Health and Welfare Administration, Retirement Services Administration and COBRA/FSA services include components that might be considered to be an information service, they appear to be exempt from tax under section 1105(c)(1) of the Tax Law as information services which are personal or individual in nature. Accordingly, Petitioner's start-up and ongoing charges for these services are not subject to sales tax, provided that Petitioner is not engaged in the sale of tangible personal property or taxable services in conjunction with these services.

However, Petitioner's Pre-Employment Screening and Selection Service Administration allows Petitioner's clients to obtain detailed information about potential employees. The information is obtained by Petitioner through source document retrieval, public record database searches, company databases and a national network of third party couriers. The information is not proprietary in nature and is equally available to other parties. Thus, the information provided by Petitioner comes from databases which are common to all clients utilizing this service. Although a client submits a request relating to an identified, potential employee, the information furnished is not personal or individual in nature and may be substantially incorporated in reports furnished to other persons. Charges for information services are subject to tax pursuant to section 1105(c)(1) of the Tax Law. See *Rich Products Corporation v. Chu*, 132 AD2d 175, lv denied 72 NY2d 802; *Towne-Oller & Assoc. v. State Tax Comm*, 120 AD2d 873; *Alan/Anthony, Inc.* Adv Op Comm T&F, June 19, 1992, TSB-A-92(51)S. Therefore, Petitioner's charges for Pre-Employment Screening and Selection Service Administration are subject to sales tax pursuant to section 1105(c)(1) of the Tax Law.

Where sales of taxable and non-taxable items are bundled in a single transaction, the entire charge is subject to sales tax unless the non-taxable items may be purchased separately and the charges for such items are separately stated on Petitioner's bill or invoice and are reasonable in relation to the total charges. See section 1101(b)(3) of the Tax Law and *Penfold v. State Tax Commission*, 114 AD 2d 696; *Hodgson, Russ, Andrews, Woods and Goodyear*, Adv Op Comm T&F, April 2, 1992, TSB-A-92(31)S; *PricewaterhouseCoopers LLP*, Adv Op Comm T&F, March 25, 2003, TSB-A-03(11)S. Provided that Petitioner's pre-employment screening service is sold separately and the charges for such service are reasonable and separately stated from



TSB-A-04(25)S  
Sales Tax  
November 12, 2004

other charges for nontaxable record-keeping and administrative services, only the charges for pre-employment screening service would be subject to sales tax.

To perform its processing and management services, Petitioner utilizes proprietary software applications. Petitioner maintains ownership and dominion and control of all product related software, and is responsible for the development, maintenance of, and enhancements to, the software. While Petitioner provides limited access to some of this software to its customers, it is Petitioner that is the user of the software in the performance of these services. Such software and equipment, therefore, are not sold to Petitioner's clients.

DATED: November 12, 2004

/s/  
Jonathan Pessen  
Tax Regulations Specialist IV  
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.