

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:
of	:
<b>EMPLOYMENT SCREENING SERVICES, LLC</b>	: DETERMINATION
	: DTA NO. 829702
	:
for Revision of a Determination or for Refund of New York	
State Sales and Use Taxes Under Articles 28 and 29 of the Tax	:
Law for the Period March 1, 2015 through February 28, 2018.	:

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Petitioner, Employment Screening Services, LLC, filed a petition for revision of a determination or for refund of New York State sales and use taxes under articles 28 and 29 of the Tax Law for the period March 1, 2015 through February 28, 2018.

A videoconferencing hearing was held before Kevin R. Law, Administrative Law Judge, via CISCO Webex on October 5, 2021, with all briefs due April 6, 2022, which date began the six-month period for the issuance of this determination. Petitioner appeared by Roach, Lennon & Brown, PLLC (David L. Roach, Esq., and J. Michael Lennon, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Hall).

***ISSUES***

I. Whether petitioner's employee screening services are protective and detective services subject to sales tax pursuant to Tax Law § 1105 (c) (8).

II. Whether, in the alternative, petitioner's employee screening services are subject to sales tax as information services pursuant to Tax Law § 1105 (c) (1) and (9).

III. Whether, if petitioner's services are subject to sales tax pursuant to either Tax Law § 1105 (c) (8) or Tax Law § 1105 (c) (1), it has established reasonable cause for failure to collect and remit sales tax warranting an abatement of penalties.

***FINDINGS OF FACT***

1. Petitioner, Employment Screening Services, LLC, is a limited liability company that operates an employment screening business located in Amherst, New York. Petitioner has been operating since the mid-1990's. Petitioner was solely owned by Robert Wright until about 2010, when his wife, Rosario, became a co-owner. Mr. Wright died in 2020. Mrs. Wright is presently petitioner's sole-owner.

2. Petitioner provides screening services for its clients including verification services and drug screening services.<sup>1</sup> Petitioner verifies a customer's prospective employee's social security number, name, including any additional names used, address, criminal record, and education. If requested by a customer, petitioner will check references provided by the potential employee. Petitioner does not undertake any investigation other than verifying information provided by a customer's potential employee and only does so with the potential employee's written permission.

3. Petitioner's list of services provided to its clients or potential clients is set forth in its entirety as follows:

"Social Security Number Verification / Trace

Verify the information an applicant has written on their application. You will know if they have failed to list a last known address, if they have used other names or social security numbers. This is an excellent way to uncover information an applicant may be attempting to keep concealed. Many criminal records are discovered in counties that an applicant has failed to inform you about. (*This is not a stand alone service*) [emphasis in original]

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<sup>1</sup> Petitioner's drug screening services are not at issue in this case.

#### Criminal Records Check by County

Uncover an applicant's criminal record, including Misdemeanors and Felonies for the past seven years. The criminal records are extracted directly from the County Courthouse, which is essential to obtain the most accurate and timely information available.

#### Federal Criminal Records Search

This allows your organization to verify if an applicant has ever had a Federal criminal conviction. Examples of such crimes are securities and tax law violations, immigration, weapons, interstate drug crimes and civil rights violations.

#### National Criminal Database Search

The National Criminal Database searches Criminal Convictions, Sex Offender Registry, Department of Corrections, and Arrest records throughout the United States. We strongly recommend you use the National Criminal Database Search as a supplement to the Criminal Records check by County listed above. (*This is not a stand alone service*) [emphasis in original]

#### Drug Screening

Choose from 5 to 10-panel drug screens customizable to fit your specific needs. Our partners are leaders in the industry and have over 10,000 collection facilities nationwide. Results in just 24 hours.

#### Registered Sex Offender Search

This allows you [sic] organization to verify whether an individual is a registered sex offender.

#### Department of Motor Vehicles Drivers License History

Have an in-depth look at the applicant's driving habits for the past three years. You will be able to determine if the applicant has any points on their license, whether they have had an accident or their license has been suspended. You will also be able to determine if the applicant has attended any driver safety courses [sic]

#### National Canadian Criminal Record Search

This search made against the National Repository record for Criminal Records in Canada which is maintained by the Royal Canadian Mounted Police and contains criminal records for all of Canada.

#### Education Verification

Find out if your applicant is truly qualified. Verifies Start Date, End Date, Major, GPA and Degree.

Employment Verification

Verify an applicant's employment history including Salary, Start Date, End Date and Position.

Reference Verification

Let Employment Screening Services ask a series of questions which will give your company insight into how personal and/or professional acquaintances feel about the applicant's character.

Professional License Verification

Determine whether an applicant has the licensure they claim on their resume and application.

Office of the Inspector General (OIG)

General Services Administration (GSA)

These two searches are essential for health care providers. OIG & GSA searches determine whether an individual is excluded from participating in Federal Procurement and Non-procurement Programs such as Medicare and Medicaid.

E-Med NY

Office of the Medicaid Inspector General. Search for Restricted, Terminated or Excluded Individuals or Entities.

E-Verify (Conducted Post Employment)

An Internet-based system that allows an employer, using information reported on an employee's Form 1-9, Employment Eligibility Verification, to determine the eligibility of that employee to work in the United States.

Bankruptcy Search

A direct search of the U.S. Bankruptcy Court system to determine if an individual or commercial entity has sought protection under federal bankruptcy laws."

4. As is evident from the list of services set forth above, petitioner accesses various databases to verify background information provided by a client's prospective employee when applying for a job. Databases that petitioner searches include, but are not limited to, those maintained by the New York State courts system, the New York State Department of Corrections, the National Criminal and Sex Offender Database, and the New York State Department of Motor Vehicles.

5. The record does not disclose how petitioner verifies an employment applicant's social security number, address history, or employment history.

6. To verify an applicant's education history, petitioner contacts the educational institution listed by the applicant and provides a copy of the consent allowing that information to be released.

7. When a potential client of petitioner is deciding whether to engage petitioner, petitioner and the potential client sit down and do a needs-based analysis to determine which services petitioner recommends based upon the client's needs. Thereafter, petitioner provides a quote.

8. Petitioner's marketing materials describe the services it performs as a way for customers to "minimize[e] their risks of hiring mistakes and liabilities." Petitioner's website states that its reports are both "thorough and informative" and used as a way to "avoid costly litigation and enhance productivity. Hire with confidence."

9. Petitioner carries professional liability insurance to protect its clients and assures potential clients that if they use its services, they can be sure that they are "hiring honest reliable people."

10. Petitioner's client services agreement requires the client to agree that "it shall use consumer report for employment purposes only for a one time use, and to hold the report in strict confidence, not to disclose it to any third parties not involved in the current employment decision."

11. If hired by the client, petitioner verifies information for a client, it provides a summary report through an online portal that indicates whether the client's applicant's information has been verified or whether it is unverified. The final report may also include

information obtained by permission that is simply copied onto petitioner's letterhead. In the sample report entered into evidence, the fictitious applicant's name, alternate names used, date of birth, and social security number are listed as well as the results of optional searches including the applicant's criminal convictions, drug test and medical exam results and drivers license record.

12. Petitioner maintains a database of all the information that it collects. If two different clients request verification of the same applicant, petitioner will perform two separate searches. Petitioner does not use the data that it verifies for a particular client in any other way; nor is the data that it verifies for one client ever shared with another party.

13. Petitioner has never provided: (i) alarm services; (ii) services of systems that provide protection against burglary, theft, fire, or water damage; (iii) armored car services; (iv) guard, patrol or watchman services; (v) services or systems that provide protection against malfunction of industrial processes; and (vi) services or systems that provide or protect against malfunction of, or damage to, property or persons.

14. Petitioner does not employ any licensed private investigators or licensed detectives, nor does not view itself as a detective agency.

15. In or about May 2018, the Division of Taxation (Division) initiated a sales and use tax audit of petitioner for the period March 1, 2015 through February 28, 2018 (audit period). Petitioner did not file sales tax returns during the audit period nor was it a registered vendor for sales tax purposes.

16. Petitioner consented to a test period audit of its sales and recurring expense purchases for the audit period by its execution of a Test Period Audit Election Method form.

17. A review of sales records determined taxable sales of \$1,799,591.31 with sales tax due of \$139,489.93. Tax was asserted based upon the determination that petitioner's employment verification services were detective or protective services pursuant to Tax Law § 1105 (c) (8).<sup>2</sup> Expense purchases were also reviewed resulting in additional tax of \$349.11 found to be due.

18. On December 5, 2018, the Division issued notice of determination, notice number L-049220535 (notice) to petitioner asserting sales and use tax in the amount of \$139,839.04 plus interest and penalties.

19. At the hearing in this matter, petitioner submitted copies of invoices from its competitors as well as businesses that petitioner hired to perform searches on its behalf. Petitioner's competitors did not charge sales tax to its customers for its services nor did the entities petitioner contracted with charge petitioner sales tax. Petitioner did not give resale certificates to the entities it hired to perform searches on its behalf because it was its understanding that such service was not taxable.

20. Petitioner's longtime accountant, bookkeeper and office manager, Sarah Gruszka, testified at the hearing in this matter. Ms. Gruszka has been employed by petitioner since January 2010. Ms. Gruszka testified that when she began employment with petitioner she inquired with Mr. Wright about sales tax. Mr. Wright informed her that he was told by the Division that petitioner's services were not subject to sales tax. Ms. Gruszka also stated that she did her own research and concluded that petitioner's services were not subject to sales tax.

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<sup>2</sup> In its answer to the petition, the Division alleged that petitioner's services constituted information services subject to tax under Tax Law § 1105 (c) (1) and (9).

### **CONCLUSIONS OF LAW**

A. The Tax Law imposes sales tax on every retail sale, except for resale, of tangible personal property (Tax Law § 1105 [a]) and of certain enumerated services (Tax Law § 1105 [c]). Among the services subject to tax is the provision of:

“[p]rotective and detective services, including, but not limited to, all services provided by or through alarm or protective systems of every nature, including, but not limited to, protection against burglary, theft, fire, water damage or any malfunction of industrial processes or any other malfunction of or damage to property or injury to persons, detective agencies, armored car services and guard, patrol and watchman services of every nature other than the performance of such services by a port watchman licensed by the waterfront commission of New York harbor, whether or not tangible personal property is transferred in conjunction therewith.”

The question for resolution is whether the provision of screening services is a detective or protective service. Here, the record demonstrates that petitioner’s services are not detective services subject to sales tax under the Tax Law. Petitioner does not hold itself out as a detective agency, employ private investigators, nor has the Division alleged that petitioner’s activities are those that would require a private investigator’s license (*see Compass Adjusters & Investigators, Inc. v Commissioner of Taxation & Fin. of State of N.Y.*, 197 AD2d 38, 41 [3d Dept 1994] [holding that because the Tax Law gives no definition of detective services it was appropriate to look to the definition of “private investigator” in General Business Law § 71 (1) to define the term “detective service” and concluding that services requiring a private investigator’s license were taxable as detective services, while services for which no private investigator’s license was required were not subject to tax]). As noted in the findings of fact, petitioner does not employ private detectives, nor is such a license required for the services it performs.

B. In its brief, the Division does not argue that petitioner’s services constitute “detective services,” but instead contends that petitioner’s services are “protective services” subject to sales

tax under Tax Law § 1105 (c) (8). This argument is rejected as it impermissibly extends the reach of the statute beyond its intent (*see Matter of Allied Barton Security Services, LLC*, Tax Appeals Tribunal, February 6, 2016). In *Allied Barton*, the Tax Appeals Tribunal addressed whether services provided by receptionists whose duties included greeting, screening, and processing visitors, and, on occasion, informing unexpected visitors that they could not enter a building, constituted protective services within the meaning of Tax Law § 1105 (c) (8). In holding that such services were not protective services, the Tribunal held that the language in General Business Law § 71 (2), referencing such activities as “watch, guard or patrol agency,” was consistent with, and appropriate to use to interpret Tax Law § 1105 (c) (8), and that the duties performed by the receptionists were not covered by the statute. While it is acknowledged that petitioner’s screening services provide some degree of assurance to its clients that they are screening out “bad actors,” these services can hardly be considered the type of protective services that come within the purview of the statute (*id.*).

C. In the alternative, the Division has asserted tax pursuant to Tax Law § 1105 (c) (1), which imposes sales tax on the furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons (*see also* Tax Law § 1105 [c] [9] [furnishing information services provided by means of telephony or telegraphy or telephone or telegraph service of whatever nature subject to sales tax so long as such would be subject to sales tax pursuant to Tax Law § 1105 [c] [1] if it were furnished by one of the means enumerated therein]). Explicitly excluded from the tax on information services is the furnishing of information that is personal or individual in nature and that is not or may not be substantially

incorporated in reports furnished to other persons (*see* Tax Law § 1105 [c] [1], [9]). The Division’s regulations provide that “[t]he collecting, compiling or analyzing information of any kind or nature and the furnishing reports thereof to other persons is an information service” (20 NYCRR 527.3 [a] [2]) and identify taxable information services to include “credit reports, tax or stock market advisory and analysis reports and product and marketing surveys” (20 NYCRR 527.3 [a] [3]). Examples of taxable information services include a weekly newsletter showing the range of commodity prices, a monthly bound volume of current advertising rates, lists of prospective customers’ telephone numbers, and a computer service company’s print-out of cases and statutes containing the word “assessment” as requested by customers (20 NYCRR 527.3 [a], examples 1-4). Examples of nontaxable information services include a private detective agency’s report to its client, an auto insurance damages appraisal report, and a computer services company’s withholding tax payroll report to subscribers (20 NYCRR 527.3 [b], examples 1-3).

D. In *Matter of SSOV’81 Ltd.* (Tax Appeals Tribunal, January 19, 1995), the Tax Appeals Tribunal (Tribunal) explained that an information service:

“has been interpreted to mean ‘the sale of the service of furnishing information by a business whose function it is to collect and disseminate information which is taxable under Tax Law § 1105 (c) (1) and not the mere sale of information’ .... In order to determine a service's taxability, the analysis employed by the New York courts and the Tax Appeals Tribunal focuses on the service in its entirety, as opposed to reviewing the service by components or by the means in which the service is effectuated” (citations omitted).

In *Matter of SSOV’81 Ltd.*, the Tribunal focused on the “primary function” of the service, which was to enable members of a dating referral service to meet others. In concluding that such primary function was not one of the enumerated taxable services set forth in Tax Law § 1105 (c), the Tribunal recognized that the proper focus should be on the primary function itself and not upon whether the service might, as an incident thereof, involve the provision of information. In

so holding, the Tribunal stated that, “[t]o neglect the primary function of petitioner’s business in order to dissect the service it provides into what appears to be taxable events stretches the application of Article 28 far beyond that contemplated by the Legislature” (*id.*).

E. Under the foregoing, to be an information service, the taxpayer's primary function must be the business of furnishing information, including the services of collecting, compiling or analyzing information and furnishing reports thereof. Petitioner, relying on *Matter of SSOV’81 Ltd.*, asserts that its services are analogous to those in that case, because its verification services are provided for the purpose of facilitating a decision on making an employment relationship. Contrary to petitioner’s line of argument, it is determined that petitioner’s primary function is to collect and compile information and submit that information in the form of a report to the client. Although petitioner asserts that it does not collect and compile information, it simply verifies information already given it, its search of various databases to confirm (or dispute) the information that the client’s prospective employee shares with it, contradicts this claim. Here, information is what petitioner’s clients are paying it for. In order for petitioner to verify information, it must collect and compile information and submit its findings to its client. Petitioner is not being paid to find its clients potential employees, rather, petitioner verifies information provided by job applicants already known to the client. By definition, petitioner is providing an information service. Notwithstanding, it must be determined whether the services petitioner provides is the furnishing of information that is personal or individual in nature and that is not or may not be substantially incorporated in reports furnished to other persons such as to be excluded from taxation.

F. To determine whether the information petitioner furnishes to its customers is personal or individual in nature, and which is not or may not be substantially incorporated in reports

furnished to other persons, case law has held that it is the source of the information that controls whether the report will be considered “personal or individual in nature” (*Matter of ADP Collision Estimating Services, Inc.*, Tax Appeals Tribunal, August 8, 1991, *confirmed Matter of ADP Automotive Claims Services, Inc. v Tax Appeals Tribunal*, 188 AD2d 245 [3d Dept 1993], *lv denied* 82 NY2d 655 [1993]). If the information is derived from a single data repository that itself is not confidential and is widely accessible, it will not be considered personal or individual in nature (*id.*). In this case, petitioner verifies the information its client’s job applicants enter on their respective applications. This verification is performed using information that is from a variety of sources rather than a single data repository (*id.*). Some of the information petitioner utilizes in providing its services is widely accessible, such as criminal record histories, while information such as social security traces and employment and education histories, is not.<sup>3</sup> Here, the reports petitioner generates are tailored and customized based upon the specific applicant, which makes them, by definition, individual and personal in nature (*see Matter of New York Life Ins. Co. v State Tax Commn.*, 800 AD2d 675 [3d Dept 1981], *affd sub nom Matter of Metropolitan Life Ins. Co. v State Tax Commn.*, 55 NY2d 758 [1981]).

G. Finally, the Division argues against exclusion, asserting that the information contained in a report furnished to a client may be furnished or included in a report furnished to another client involving the same job applicant. While it is true that a report could include some information previously provided to another client if the applicant sought employment with both clients, the Court dealt with a similar argument in *New York Life Ins Co. v State Tax Commn.*,

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<sup>3</sup> As petitioner notes in its reply brief, an individual’s employment history is clearly personal and not generally available on a publicly accessible database. The same is true of academic credentials, where disclosure of such records by educational institutions in the absence of a student’s consent is prohibited by federal and state law (*see* The Federal Education Rights and Privacy Act, 20 USC § 1232g; Education Law § 52-d). Similarly, the Consent Based Social Security Number Verification System requires written consent of the number holder (*see* [www.ssa.gov/privacy/pia/CBSVfinalPIA.htm](http://www.ssa.gov/privacy/pia/CBSVfinalPIA.htm)).

and rejected it. The Court held that to deny the exclusion simply because that situation “could” or “might” occur would be to read into the language of the statute “a limitation for which no sound reason can be found and which could render the exclusion futile.” Here, the likelihood of having the information provided in one report substantially incorporated into a report furnished to another client is minimal, at best. Accordingly, it is hereby determined that the reports furnished by petitioner to its clients are individual and personal in nature and are not or may not be substantially incorporated in reports furnished to other clients. Based upon the foregoing, that portion of the notice of determination asserting tax on petitioner’s verification services is canceled. The Division is directed to modify the notice of determination in accordance herewith.

H. With respect to that portion of the notice of determination that asserts tax on its capital purchases, petitioner did not introduce any evidence that the tax asserted is in error nor has petitioner raised any challenge to same. Therefore, this amount is sustained as petitioner has succumbed to its presumption of correctness.

I. Although the issue of penalty abatement is moot based upon the holding above, it will nonetheless be addressed for sake of a complete record (*see Matter of Riehm v Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992], *reargument denied* 80 NY2d 893 [1992]). Here, the Division assessed penalty herein pursuant to Tax Law § 1145 (a) (1) (i). Tax Law § 1145 (a) (1) (i) provides that any person failing to file a return or pay over any sales or use tax shall be subject to a penalty. This penalty may be canceled if the failure was “due to reasonable cause and not due to willful neglect” (Tax Law § 1145 [a] [1] [iii]). Although petitioner has not briefed the issue of penalties, its challenge to the notice in the first instance is sufficient to address whether penalties should or should not be abated. In establishing reasonable cause for the abatement of penalty, the taxpayer faces an onerous task (*see Matter of Philip*

*Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). In *Philip Morris* it was explained that “[b]y first requiring the imposition of penalties (rather than merely allowing them at the Commissioner’s discretion), the Legislature evidenced its intent that filing returns and paying the tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted]” (*Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992, *confirmed* 193 AD2d 978 [3d Dept 1993]). A finding that the taxpayer acted in good faith is a prerequisite to the conclusion that the failure or delay was due to reasonable cause and not willful neglect. The most important factor in determining whether reasonable cause and good faith exist is the extent of the taxpayer’s efforts to ascertain the proper tax liability (*Matter of Kal Assoc.*, Tax Appeals Tribunal, October 17, 1991; *Matter of Philip Morris, Inc.*, *supra*). In this case, petitioner has failed to make a showing of reasonable cause. While petitioner elicited testimony from its office manager/bookkeeper that its former principal, Mr. Wright, made inquiries with the Division concerning petitioner’s sales tax obligations, there is no other information in the record concerning the specific details concerning same nor any contemporaneous documentation evincing said conversations. “Advancement of a reasonable legal theory in good faith or reliance upon professional advice, in the absence of inquiry to ascertain the position of the Department of Taxation and Finance, does not constitute reasonable cause...” (*Matter of CBS Corp. v Tax Appeals Tribunal* , 56 AD3d 908 [3d Dept 2008]). Here, although it is concluded that petitioner’s legal theory is certainly reasonable (as is evident from the conclusions of law above), this is not enough of a basis to abate penalties without some evidence to document its claim that the Division informed it that its services were not taxable, and it had a right to rely on such representations. Therefore, should it be determined that petitioner provides a taxable information service, penalties would be sustained.

J. Based upon the foregoing, the petition of Employment Screening Services, LLC, is granted to the extent indicated in conclusion of law G, and otherwise denied; and the December 5, 2018 notice of determination, as modified, is sustained.

DATED: Albany, New York  
October 06, 2022

/s/ Kevin R. Law  
ADMINISTRATIVE LAW JUDGE