New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

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Corporation Tax
January 12, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. C911211B

On December 11, 1991, a Petition for Advisory Opinion was received from KPMG Peat Marwick, 345 Park Avenue, New York, New York 10154.

The issue raised by Petitioner, KPMG Peat Marwick, is whether a health maintenance organization ("HMO") licensed under Article 44 of the Public Health Law is an insurance corporation for franchise tax purposes and taxable under Article 33 of the Tax Law.

Under Petitioner's hypothetical fact situation an HMO X is incorporated in New York State and is licensed as an HMO under Article 44 of the Public Health Law. X is a member of an affiliated group of corporations which includes insurance company Y. Y is an accident and health insurance company incorporated in New York State and is licensed under the Insurance Law to write accident and health insurance.

As an HMO in New York, X is approved to write several types of managed care products. The various types of products can be summarized as follows:

1. Traditional HMO Services - This product represents the traditional Individual Practice Association ("IPA") model HMO business. Participating physicians and health care institutions are reimbursed for medical services to members on a fee-for-service ("FFS") basis.

2. Point-of-Service ("POS") Product - POS is an integrated product which offers the member dual coverage of both traditional HMO coverage underwritten by X and indemnity coverage underwritten by Y.

   This product would be marketed and sold jointly by X and Y. For regulatory purposes, the HMO coverage of this product is underwritten by X and "out-of-plan" indemnity coverage is underwritten by Y. Two separate certificates are issued to each POS member. Traditional HMO coverage is provided by X through its HMO certificate. Indemnity type coverage using non-HMO providers is provided by Y through its indemnity certificate.

To establish its network for the provision of medical services to its members, X contracts directly with individual physicians in private practice, IPAs (i.e., groups of physicians) and health care institutions. The physicians are independent contractors of X and are not employees or agents of X. Moreover, they are not contractually prohibited from entering into similar agreements with X's competitors.

Since X is a FFS, IPA-model HMO, it charges its groups a monthly pre-paid fixed fee for the medical service coverage provided to the group members under the terms of its traditional HMO

product. As stated above, X contracts with medical providers for the provision of medical services to its membership. The providers are reimbursed for these services based upon a fixed fee schedule. FFS is simply the reimbursement of a provider based upon a schedule of fees for the various medical services. To the extent that a member requires a specialist, the member can obtain these services based upon a referral from the member's primary care physician. Specialists are also reimbursed on a FFS basis and participate in the physician network established by X. In addition, members can receive medical services out-of-network (i.e. out-of-area services) solely for true medical emergencies. For emergency services, non-contracted providers are reimbursed based upon the cost of the medical service that was provided.

For its monthly pre-paid fees, X incurs the following costs with respect to the medical service coverages:

1. The frequency cost for in-network medical services provided by primary care physicians. X would control the level of the medical service charge through the terms of its provider agreements. Under those agreements, X is only required to reimburse its providers utilizing the established fixed fee schedule.

2. A frequency cost also exists with respect to the medical services provided by consulting specialists from referrals by primary care physicians. Medical service costs are controlled in the same manner as the in-network services described above.

3. X has a frequency cost with respect to emergency out-of-area medical services. Unlike in-network medical services, X would be unable to control the level of the charge it may be required to reimburse.

Pursuant to Article 33 of the Tax Law, two of the franchise taxes imposed on • insurance corporations are contained in sections 1501 and 1510 with a cap contained in section 1505.

The tax imposed pursuant to section 1501(a) of the Tax Law provides:

> Every domestic insurance corporation and every foreign or alien insurance corporation, for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state ... shall annually pay a franchise tax ....

Section 1510 of the Tax Law provides for an additional premiums tax on insurance corporations as follows:

> Except as hereinafter provided, every domestic insurance corporation and every foreign insurance corporation and every alien insurance corporation, other than such corporations transacting the business of life insurance, (1) authorized to transact business in this state under a certificate of authority from the superintendent of insurance ...

> shall, for the privilege of exercising corporate franchises or for carrying on business in a corporate or organized capacity within this state, and in addition to any other taxes imposed for such privilege, pay a tax on all gross direct premiums, less return premiums thereon, written on risks located or resident in this state ....

The taxes imposed under Article 33 of the Tax Law are limited by section 1505 of the Tax Law as follows:

> Notwithstanding the provisions of sections fifteen hundred one and fifteen hundred ten, the amount of taxes imposed under such sections ... shall not exceed an amount computed as if such taxes were determined solely under section fifteen hundred ten....

Section 1500 of Article 33 of the Tax Law states that:

> (a) The term "insurance corporation" includes a corporation, association, joint stock company or association, person, society, aggregation or partnership, by whatever name known, doing an insurance business ...
>
> (b) The term "domestic insurance corporation" means an insurance corporation incorporated or organized under the laws of this state ....

Under Article 33 of the Tax Law, "doing an insurance business" is not defined. However, historically the Department of Taxation and Finance looks to the Insurance Law for such definition.

"Doing an insurance business" is defined in section ll01(b)(1) of the Insurance Law as follows:

> Except as provided in paragraph two hereof, any of the following acts in this state, effected by mail from outside this state or otherwise, by any person, firm, association, corporation or joint-stock company shall constitute doing an insurance business in this state and shall constitute doing an insurance business in this state within the meaning of section three hundred two of the civil practice law and rules:
>
> (A) making, or proposing to make, as insurer, any insurance contract, including either issuance or delivery of a policy or contract of insurance to a resident of this state or to any firm, association, or corporation authorized to do business herein, or solicitation of applications for any such policies or contracts;
>
> (B) making, or proposing to make, as warrantor, guarantor or surety, any contract of warranty, guaranty or suretyship as a vocation and not as merely incidental to any other legitimate business or activity of the warrantor, guarantor or surety;

(C) collecting any premium, membership fee, assessment or other consideration for any policy or contract of insurance;

(D) doing any kind of business, including a reinsurance business, specifically recognized as constituting the doing of an insurance business within the meaning of this chapter;

(E) doing or proposing to do any business in substance equivalent to any of the foregoing in a manner designed to evade the provisions of this chapter.

Section 1102 of the Insurance Law provides that no person, firm, association, corporation or joint-stock company shall do an insurance business in New York State unless authorized by a license in force pursuant to the provisions of the Insurance Law or exempted by the provisions of the Insurance Law from such requirement.

Section 1109 of the Insurance Law provides that HMOs are exempt from the licensing requirements of the Insurance Law as follows:

(a) An organization complying with the provisions of article forty-four of the public health law may operate without being licensed under this chapter ...

(b) An organization which provides health care services for a periodic fee paid in advance but which does not comply with the provisions of article forty-four of the public health law shall be deemed to be engaged in the business of insurance and may not operate without being licensed under this chapter ....

Therefore, if the business conducted by an HMO organized under Article 44 of the Public Health Law complies with the provisions of Article 44 of the Public Health Law, such HMO is not considered to be doing an insurance business for purposes of Article 33 of the Tax Law.

Accordingly, as long as X complies with the provisions of Article 44 of the Public Health Law, X is not an insurance corporation for purposes of Article 33 of the Tax Law. However, X is subject to tax under Article 9-A of the Tax Law.

DATED: January 12, 1993

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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