

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

TSB-A-97(55)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S960606A

On June 6, 1996, the Department of Taxation and Finance received a Petition for Advisory Opinion from the New York State Association of Realtors, Inc., 130 Washington Avenue, Albany, New York 12210-2298.

The issue raised by Petitioner, the New York State Association of Realtors, Inc., is whether certain fees charged participating brokers and realtor associates in connection with the operations of multiple listing services are subject to New York State and local sales and compensating use taxes.

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

Realtors in the various communities throughout New York State have formed trade associations as not-for-profit corporations, which are generally known as real estate boards. These are membership corporations and the voting members are usually brokers who are the owners or other principals of real estate brokerage companies. Realtor associates, who are licensed sales persons, generally have a lesser class of membership. There are sometimes a small number of affiliate members who are persons and businesses that are related to the real estate brokerage industry, such as mortgage lenders. Generally, each of these local real estate boards has established a multiple listing service ("MLS"). The MLS is usually an activity conducted within the board, itself, but which is sometimes conducted by a wholly-owned subsidiary corporation. In some cases when the MLS is run by a separate corporation, it is a business corporation rather than a not-for-profit corporation. Under either structure, participation in the MLS is restricted to realtor members of the board.

The purpose of an MLS is to provide a mechanism whereby the commission on the sale of a property can be shared between the participant in the listing service who obtains the listing for a property (the "listing broker") and the participant in the listing service who finds a buyer for the property (the "selling broker"). While the listing broker will receive only part of the commission if another participant in the listing service is successful in finding a buyer, the efforts of that selling broker will generate a share of the commission for the listing broker. Because all of the multiple listed properties are available to all participants in the MLS, each benefits from having a much greater inventory of properties available to sell. In the same way, owners of properties benefit from having large numbers of sales people trying to sell the properties that they have placed on the market, while prospective buyers have many properties available through the sales people with whom they are working.

When a property owner who is selling a property lists the property with an MLS participant and authorizes the use of the MLS, he or she will enter into an "exclusive right to sell" contract with the listing broker. Under the terms of

the contract, the property owner authorizes the listing broker to list the property with the MLS. Pursuant to the contract, the property owner appoints the listing broker as his or her exclusive agent for a designated period of time to sell the property on the owner's stated terms and agrees to pay a stated commission when the property is sold. The contract also authorizes the listing broker, as exclusive agent, to cooperate with other participants in the MLS and compensate them for successfully arranging a transaction. The listing broker may appoint subagents by this mechanism and divide the commission paid by the selling property owner with such a subagent. Alternatively, the cooperating MLS participant who arranges the sale may be a buyer's agent, and receive a share of the commission for acting in that capacity. The terms of the commission split between the listing broker and a subagent or buyer's agent are provided for in the contract and vary from one listing to another.

After the listing broker enters into an exclusive "right to sell" contract with a property owner, he or she communicates to the other MLS participants the information regarding the terms of the contract, including the commission that will be paid to a cooperating MLS participant, whether as a subagent or buyer's agent, together with information relating to the property that is offered for sale. In doing so, the listing broker extends a blanket unilateral offer of subagency to all of the other participants in the MLS and/or an offer to compensate a buyer's agent. This is accomplished by furnishing the information regarding the commission arrangement and listing terms, together with a description of the listed property, to the MLS which, in turn, communicates the offer of cooperation and compensation to all MLS participants on behalf of the listing broker. MLS offers of cooperation and compensation are made available only to participants in the MLS. Generally, the corresponding information concerning the property is only delivered to participants in the MLS with the offer of cooperation and compensation. Without the offer of cooperation and compensation to MLS participants that is the primary function of each listing, the information provided about the property that is offered for sale would be irrelevant to the broker receiving it because he or she could not earn a commission by selling the property. The dissemination of information regarding the property is merely a component of the MLS listing process, the primary function of which is to exchange offers of cooperation and compensation and to allow the sharing of commissions between listing brokers and selling brokers.

In the case of each MLS, the expense of operating the MLS is recovered through charges that are made to the participants. The structure of these charges varies from one MLS to another, but in each case the structure includes one or more of the following fees:

Initiation Fee This is a one-time charge made to a broker at the time when he or she decides to participate in the MLS.

Dues/Participation Fees These charges are made to participating brokers on either a monthly or an annual basis to defray the costs that are not offset by the other charges.

Listing Fee Listing fees and rental filing fees are paid by MLS participants, where utilized, to offset the cost of transmitting their offers of cooperation and compensation and related information to other participants, whether electronically or through printed materials.

Office Assessment This is a charge sometimes made by an MLS to offset general overhead expense.

Book Fee This is a charge made for a printed book containing the current listings. This charge is subject to sales tax under Section 1105(a) of the Tax Law and is not at issue in this Advisory Opinion.

Opinion

The one-time initiation fees and periodic dues/participation fees charged to participants in connection with the operation of a multiple listing service are not subject to New York State and local sales and compensating use taxes where the primary function of the multiple listing service is to serve as a mechanism for such participants to exchange offers of cooperation and compensation and to share in the commissions on the sales (or rentals) of listed properties. In this regard, the information communicated to brokers and realtor associates in the multiple listing is considered to be merely a component of the primary function of the multiple listing service. Section 1105(c) of the Tax Law imposes tax upon the receipts from every sale, except for resale, of certain enumerated services. A service of this nature is not one of the services enumerated under Section 1105(c) and, therefore, is not subject to tax.

Listing fees and rental filing fees charged to multiple listing service participants to offset the costs of communicating offers of cooperation and compensation and related information regarding listed properties to others, whether conveyed electronically or through printed materials, are considered to be charges for the service of advertising and are not subject to tax.

Office assessments that are sometimes charged by a multiple listing service to offset general overhead expenses are not considered to be receipts from the sale of enumerated services taxable under the Tax Law and, consequently, are not subject to tax.

DATED: September 3, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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