

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>PRINCIPAL CONNECTIONS, LTD.</b>	:	DECISION
	:	DTA NO. 818212
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period December 1, 1993 through February 28,	:	
1997.	:	

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Petitioner Principal Connections, Ltd., 11 West 25<sup>th</sup> Street, 10<sup>th</sup> Floor, New York, New York 10010, filed an exception to the determination of the Administrative Law Judge issued on November 14, 2002. Petitioner appeared by Elizabeth Ulang Wang, President. The Division of Taxation appeared by Mark F. Volk, Esq. (Cynthia McDonough, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on October 9, 2003 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether the Division of Taxation ("Division") properly assessed sales tax upon the fees and charges received by petitioner as receipts from the sale of information services under Tax Law § 1105(c)(1).

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Principal Connections, Ltd. ("PCL") was incorporated on May 30, 1991; however, it did not begin doing business until October 1993 when it opened an office at 22 East 72<sup>nd</sup> Street, Suite 4-A, New York, New York. PCL's president is Elizabeth Ulang Wang a/k/a "Lan Lan Wang" or "La La Wang." Ms. Wang is one of three shareholders of PCL.

During the audit period, PCL was not registered as a vendor, for purposes of sales tax, with the State of New York and did not file any sales tax returns or remit any sales tax which it collected.

On December 6, 1996, the Office of Tax Enforcement of the Division was advised by a disgruntled employee of PCL that, among other things, PCL was collecting sales tax but not reporting it. Thereafter, on June 6, 1997, a sales tax auditor from the Division made an unannounced field visit to PCL's offices (which, by this date, were located at 444 Park Avenue South, Suite 401, New York, New York) to commence an audit. The original audit period commenced on March 1, 1991 which was the first sales tax quarter within which PCL was incorporated. The audit period was later changed to commence with the period beginning December 1, 1993 to reflect when PCL actually began doing business.

On June 9, 1997, the auditor sent an appointment letter with a request for PCL's sales records. On September 4, 1997, the auditor and his team leader met with Ms. Wang to discuss the nature of PCL's business and to gather documentation. The auditors received printouts of sales for the audit period as well as the following: Federal income tax returns, depreciation schedules, a general ledger, a cash receipts journal and a cash disbursements journal. No sales

invoices or other source documents evidencing sales were provided to the auditors. At the meeting, Ms. Wang admitted that PCL had collected sales tax on some of its sales, but that it had stopped doing so. She also admitted that PCL had not remitted the tax collected to the Division.

In lieu of adequate source documentation to substantiate PCL's sales, the auditors utilized PCL's printouts of its cash receipts and sales journals in order to determine the amount of its sales to consumers and to brokers. Without sales invoices, the auditors were unable to determine whether sales tax had been collected on any of the individual sales contained in PCL's sales journal. To determine which transactions had sales tax included, the auditors divided the amount listed in the cash receipts journal by the sales tax rate (.0825) and if the resulting amount was even, i.e., without pennies at the end, the auditors assumed that the receipt included sales tax. The method utilized by the auditors eliminated the possibility that tax would be imposed on tax and thereby reduced the computation of PCL's total taxable receipts.

As a result of these computations, the auditors determined that PCL collected \$28,326.81 in sales tax from its customers during the audit period, none of which was reported or remitted to the Division. PCL admits that it collected and failed to report or remit the sum of \$28,326.81 in sales tax which it attributes to mistakes by its bookkeepers and accountants in determining that sales tax should be charged to and collected from its customers.

The computations of the auditors determined that PCL owed a total of \$49,237.25 in additional sales tax, \$24,062.58 from its sales to real estate brokers and \$25,174.67 from sales to consumers. The total additional sales tax due (\$49,237.25) consisted of the \$28,326.81 which PCL admittedly collected and failed to report and remit plus an additional \$20,910.44 which the auditors determined should have been collected from PCL's customers.

On November 12, 1999, the Division issued a Notice of Determination to PCL which assessed additional sales tax in the amount of \$49,237.25, plus penalties and interest, for a total amount due of \$97,986.25.<sup>1</sup>

PCL's Certificate of Incorporation indicates that its purpose is "[g]enerally to do everything suitable, proper and conducive to the successful conduct of real estate and real estate agency and brokerage business . . . ." PCL's president, Lan Lan Wang is a licensed real estate broker.

Ms. Wang stated that the original purpose for incorporating PCL was to eliminate inefficiencies attributable to a fragmented real estate market in New York City. Because there were no multiple listing services in Manhattan, brokers had their own separate databases of listings. Ms. Wang felt that there ought to be a way for a broker, a buyer or a renter to specify what he or she was looking for and be able to get all of the information about available properties as well as to be able to obtain information on how to sell or buy.

PCL maintained one of the largest databases of apartment listings in Manhattan. In January 1994, PCL had a couple of thousand apartments in its database. As of the time of the hearing, it had between 6,500 and 8,500 apartment listings in its database.

These apartment listings were obtained from a variety of sources including the classified sections of the New York Times and Village Voice as well as from apartment owners, management companies and brokers.

PCL's database was divided into the categories of rentals and sales. Within the category of rentals, listings were further divided between brokers, owners and major landlords.

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<sup>1</sup> The penalties assessed by the Division consisted of \$10,000.00 for doing business without a Certificate of Authority as well as \$14,771.17 in statutory penalties for underreporting taxable sales.

Initially, PCL<sup>2</sup> provided a fax-on-demand service of providing no-fee apartment listings to consumers. PCL's marketing materials described MLX (then Manhattan Listing Xpress) as "a centralized clearinghouse of available apartment listings for sale and for rent." MLX was a clearinghouse for all types of apartment listings, such as no fee apartments direct from landlord/owners, low fee apartments discounted from brokers and full fee exclusive apartments.

In August 1994, PCL began its "HOMELine" service which offered prospective tenants faxed Manhattan apartment listings provided by landlords. Subscribers paid a fixed fee ranging from \$39.00 to \$150.00. Once a potential renter paid the subscription fee to register, an individual profile was created. The profile included such information as the neighborhood sought, desired type of building, number of rooms preferred and the amount of rent that the subscriber wanted to pay. Once registered, the subscriber could call HOMELine's automated fax service to receive an updated list of apartments matching the subscriber's specifications. When the subscriber called and inputted his or her secret code and fax number, a list of custom-matched apartments was faxed to the subscriber. The list of apartments was known as a "HOMELine INTELLIMATCH" and contained information such as: the address of the apartment; the neighborhood (such as Murray Hill, Battery Park, etc.); size; rent; availability date; number of bedrooms and bathrooms; certain other amenities such as doorman or elevator; and contact person and phone number. After receiving the initial HOMELine INTELLIMATCH, subscribers could telephone PCL for updates as often they wished. Subscribers were also advised that HOMELine was staffed by helpful professionals to answer questions and offer apartment hunting advice seven days a week. In addition, subscribers were provided with free sponsor offers. A

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<sup>2</sup> During the audit period, PCL conducted business under various d/b/a names such as: HOMELine; Manhattan Listing Xpress or MLX; National List; Metro List Xpress and Listing Network Xpress or LINX.

list of apartments could be viewed by a number of people (consumers and brokers) who subscribed to the service and who entered the same profile.

To register for PCL's HOMELINE consumer service, a subscriber completed a registration form. In November 1996, a registration form executed by one Michelle James provided as follows:

Subscription expires the sooner of subscription term, maximum number of apartments matched, Lessee's signing of a lease, or Lessee moving. Lessee acknowledges MLX information is provided by Lessor/Landlord and is furnished subject to errors and omissions including, but not limited to change of price, rental, prior sale or withdrawal without notice. MLX does not guarantee matches, performance of Lessor, board approval. Lessee assumes all responsibility for conducting his own due diligence. Lessee acknowledges MLX may accept fees from both Lessors and Lessees. MLX reserves the right to negotiate commissions with owner/manager Lessors upon disclosure to Lessee. Lessee acknowledges that unless otherwise agreed in writing, MLX is not acting as his broker or representative. MLX had fiduciary responsibility to neither Lessees or Lessors. MLX liability is limited to the total of MLX fees paid by Lessee. Lessee acknowledges that he is of serious intent to rent/sublet a Manhattan residence. All MLX/HOMELINE materials are for his exclusive and personal use to locate one (1) apartment and Lessee will not sell, lend or exchange any MLX material with any individual or broker/salesperson.

In the summer of 1995, PCL expanded its business to include residential apartment owners (professional owners, management companies and individuals) by offering its LINX (Listing Network Xpress) service. At the time, Ms. Wang stated:

It's an important advance that brokers can now get electronic updates of hundreds of listings daily. But even larger than this is the significance of breaking the psychological barrier which formerly dictated that Manhattan couldn't be a multiple listing town. (Real Estate Weekly, September 20, 1995.)

Real estate brokers who subscribed to LINX received listings once a week by fax or daily by computer modem with PCL's proprietary LINX software known as OLGA which was provided

free of charge to allow for easy tracking and total control over distribution. OLGA software was provided to owners and management companies for use in distributing their listing information. By providing PCL with their listings of available apartments (by phone, fax or modem with the OLGA software), owners and management companies were able to distribute these listings to the brokers of their choice (through the LINX service) and/or directly to buyers or renters (through HOMELine, PCL's consumer division). Brokers were able to maximize their listing exposure while reducing listing expenses.

PCL's Lease Service Agreement stated that PCL was granting "a non-transferable license to use LINX Software, Database, Documentation and Listing Updates, hereinafter collectively referred to as LINX Services." Nowhere in the Lease Service Agreement was there any mention of advertising services to be provided by PCL to the subscriber. Paragraph "10" of the Lease Service Agreement provides that:

Subscriber will not copy, modify, alter, adapt, transfer, distribute in whole or in part, the data, software or documentation of LINX by any means manual, electronic, mechanical, optical or otherwise. . . . Information retrieved from LINX Service may be used only for the Subscriber's internal, on-site search and retrieval purposes. Subscriber is specifically prohibited from duplicating and/or importing any data, records or information into other databases.

On or about August 24, 1995, PCL d/b/a Manhattan Listing Xpress, registered the internet domain name "MLX.com." However, it was not until 1998, or after the audit period at issue herein, that MLX.com replaced the fax-on-demand HOMELine service and PCL's website, "www.220HOME.com," where a subscriber could also access apartment listings. Through MLX.com, the apartment listings were provided to subscribers over the Internet and updates

were furnished by means of e-mail. The price charged to a subscriber by PCL did not vary depending upon the type of media utilized by the subscriber.

MLX.com permitted customers to register as an “Insider” or as a “Guest.” Persons visiting the website but not registering were referred to as “Visitors.” PCL’s MLX.com service offered free benefits to guests in an attempt to get them to become members (insiders). For one month, guests were allowed to preview PCL’s apartment listings that matched the guest’s profiles. The guest’s preview did not provide house numbers or contact information. Guests were allowed certain additional free benefits including: free sponsor offers; use of “How to” (which consisted of information on topics such as buying, renting, selling, moving, packing, tax deductions and neighborhoods); use of the “Interactive Zone” to get and give advice on places to move, experiences and general industry questions and answers; and use of seven-day phone/e-mail consultation and support. In addition, the guest was permitted to place into the PCL database, an apartment which it had available for sale or rent and thereby could advertise to other PCL subscribers without paying classified advertising charges to a newspaper. Once upgraded to “Insider,” a fee-paid subscriber could then obtain details on the specific apartments provided to the subscriber.

Insider membership services included seven-day-per week consultation with PCL personnel in person, by telephone or e-mail to schedule appointments, check on apartment details, ask real estate questions, negotiate leases with landlords and negotiate commissions with real estate brokers. Insiders could also customize their search profile, view custom-matched apartments, receive notification by e-mail of new matching apartments, post an “Apartment



Wanted” advertisement, send and receive e-mail messages to and from owners and brokers and redeem special offers from move-related service providers.

The reports provided by PCL via the Internet (MLX.com) and by means of its INTELLIMATCH provided to its HOMELINE subscribers via facsimile were essentially the same. However, using MLX.com allowed the subscriber to link from item to item.

A 1999 Metro List Xpress (the “MLX”) Subscriber Agreement provided, in pertinent part, as follows:

1.4 All information accessed from MLX is for the sole use of Subscriber. All information, including but not limited to the residential real estate rental and sales listings (“Listings”), photos, floorplans, how-to information, advice, featured columns, editorials and sponsors and advertisers (“Information” including Listings) provided through the Services to Subscriber, is provided solely for Subscriber’s personal search and retrieval use.

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## **2. MLX CONTENT**

2.1 The contents of MLX Service are intended for the personal, non-commercial use of its registered Subscribers. All materials published via MLX Services, including, but not limited to Listings and other information, are its valuable trade secrets and protected by copyrights of the MLX.

2.2 The Service is protected by copyright as a collective work and/or compilation, pursuant to U.S. copyright laws, international conventions, and other copyright laws. Subscriber may not copy, duplicate, modify, publish, transmit, adapt, translate, participate in the transfer or sale of, reproduce, create derivative works, enter into a database, distribute, perform, display, reverse engineer, decompile or disassemble or in any way exploit the information or Service in whole or in part.

2.3 Subscriber may download or copy the information and other downloadable items displayed on this Service for personal use only, provided that Subscriber maintains all copyright and other notices contained in such information. Subscriber shall not store any significant

portion of any information owned by, or licensed to, or aggregated by MLX, or sourced from MLX, in any form. Copying or storing of any information for other than personal, non-commercial use is expressly prohibited without the prior written permission from MLX.

2.4 All information, including but not limited to listings and sponsor offers, presented by or through MLX is presented subject to error, omissions, change or withdrawal without notification. MLX accepts no responsibility or liability for sponsor or advertised offers. MLX Insider and Guest redemption of offers is entirely a matter between the Insider/Guest and vendor.

On March 15, 1999, PCL d/b/a Manhattan Listing Xpress registered the Internet domain name, "brokersNYC.com" which transformed the dial-in modem based LINX apartment listing for brokers into an Internet based service. This Internet service began operating in or about August 1999, after the audit period at issue herein.

In 1999, Bruce Colwin became a subscriber to MLX in an attempt to find an apartment in Manhattan without paying a broker's fee. He later became a consultant to PCL. While an MLX subscriber, Mr. Colwin received e-mails containing information from MLX's database about apartments that matched his criteria. When he received these e-mails about apartments which "seemed like a good fit," he would visit the neighborhood and look at the building. Once MLX provided information to Mr. Colwin which matched his criteria for an apartment, Mr. Colwin felt that he received the service that he had paid for.

On or about February 8, 1999, the State of New York, Department of State, filed a complaint against Lan Lan Wang, representative real estate broker for PCL, which commenced a proceeding pursuant to Article 12-A of the Real Property Law to revoke or suspend Ms. Wang's real estate license for engaging in the business of Apartment Information Vendor without a license to do so and for demonstrating untrustworthiness and incompetence. The charges were

brought as result of a complaint brought by Michelle James who sought a refund of \$189.44 (\$175.00 plus tax) from Manhattan Listing Xpress (HOMELine). Ms. James alleged that when she registered in November 1996, Manhattan Listing Xpress gave her the impression that there were plenty of apartment listings within her budget limitations, but that she soon discovered that there were few apartments within her budget. She stated that when she received lists from Manhattan Listing Xpress, the apartments set forth thereon were well over her budget or, on some occasions, she received no listings at all because there were no matches.

In response, MLX contended that it provided the information which Ms. James requested when registering and maintained that she missed many listings by not calling on a daily basis. Moreover, MLX, by letter from Ms. Wang dated February 22, 1999, denied that it was an Apartment Information Vendor and asserted that it was an online community which provided member and guest services to consumers and brokers. The letter stated:

Brokers' services (\$3,000 - \$30,000/year) include job postings, real estate listings, photos, floorplans, advertising opportunities, education-related services and links to important sites. Consumer membership (\$150) embraces a general lifestyle membership of how to and career information and e-commerce sponsor and advertiser offers from interior designers, locksmiths, etc. Members have an option to subscribe to a three month service of custom matched apartment listings where an additional \$150 fee is payable upon renting or buying an apartment.

On July 27, 1999, a hearing was held before an administrative law judge at the offices of the New York State Department of State, Division of Licensing Services, and on January 31, 2000, a decision was rendered whereby it was found that Lan Lan Wang operated as an unlicensed Apartment Information Vendor and, as such, demonstrated untrustworthiness and incompetence as a real estate broker. Accordingly, pursuant to Real Property Law § 441-c, Ms. Wang's license as a real estate broker was suspended until she presented satisfactory proof that

she was no longer engaged in the business of Apartment Information Vendor. This decision was subsequently appealed by Lan Lan Wang to the Secretary of State of the State of New York.

On January 4, 2001, the Secretary of State issued a Decision and Order in *Matter of Lan Lan Wang v. Department of State Division of Licensing Services* which stated, in relevant part, as follows:

A careful review of the entire record reveals that since late 1996, when first contacted by Division of Licensing Services investigators concerning her failure to obtain a license as an apartment information vendor, the Appellant has steadfastly refused to comply with the requirements of Real Property Law (RPL) § 446-b. She has been repeatedly requested to do so by the Division of Licensing Services. That she is selling access to listings of apartments which are available for rent is crystal clear despite her attempts to characterize it otherwise. The language of the statute is clear and unambiguous and she has adamantly refused to comply with it. Appellant's argument that the legislature should amend or otherwise modify the statute so as to exempt her on-line business from its requirements is neither relevant nor grounds to excuse compliance with a statute, like it or not, now in effect. Her argument that as an on-line business, it would be impossible to comply with the current requirements of the statute, is similarly unavailing.

Accordingly, the decision of the administrative law judge was upheld and the Division of Licensing Services was ordered to suspend Ms. Wang's real estate license. At the hearing, Ms. Wang stated that this decision was also being appealed, but no evidence of such appeal was presented therein.

At the hearing, Ms. Wang, when testifying about the proceeding which charged her with operating as an unlicensed Apartment Information Vendor, stated:

So they decided to go after my real estate broker's license, and what they said was that they revoked the license because I was operating an unlicensed AIV.

And, again, I got very stubborn, it wasn't that I needed the brokers's license necessarily, I wasn't doing traditional brokerage. It sort of

remains to be seen whether the business of what it is that I am doing could be construed as brokerage . . . . (Tr. pp. 376, 377.)

On cross-examination, Ms. Wang, in response to a question concerning PCL's charges, stated:

MLX was a subscription service and you can't deconstruct [sic] it. I can't deconstruct [sic] that it was a dollar for this and \$5 for that. It was a single fee for a lot of services, and of those services, each consumer chose to avail themselves [sic] of different parts of the service. (Tr. p. 325.)

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge noted that the receipts from the sale of the services of "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 . . . ." are subject to sales tax pursuant to Tax Law § 1105(c)(1).

The Administrative Law Judge observed that the New York Court of Appeals, in ***Matter of Audell Petroleum Corp. v. New York State Tax Commn.*** (69 NY2d 818, 513 NYS2d 962, 963), stated that "[a]s the statute and the implementing regulations (*see*, 20 NYCRR 527.3[a][1]-[3]) indicate, it is 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."

The Administrative Law Judge also noted that the Tax Appeals Tribunal ("Tribunal"), in ***Matter of SSOV '81 Ltd. d/b/a People Resources*** (Tax Appeals Tribunal, January 19, 1995) (hereinafter "***People Resources***") applied a "primary function" test in determining the taxability of services, stating "[t]o neglect the primary function of petitioners' business in order to dissect

the service it provides into what appear to be taxable events [footnote omitted] stretches the application of Article 28 far beyond that contemplated by the Legislature.”

The Administrative Law Judge analyzed petitioner’s business and concluded that petitioner collected the apartment listings, i.e., the information, and then compiled and analyzed this information and provided it to its subscribers in the nature of a report using various means throughout the audit period.

The Administrative Law Judge found that petitioner’s HOMeline service, which initially provided a fax-on-demand apartment listing to its consumers/subscribers, with updates by telephone, was subject to tax as an information service.

The Administrative Law Judge further determined that petitioner’s LINX service, which provided brokers with listings once a week by fax or daily by computer modem using petitioner’s proprietary software known as OLGA, was also subject to tax as an information service.

The Administrative Law Judge then considered whether the furnishing of information was petitioner’s primary function or merely a component of its business in accordance with the decision of the Tribunal in *People Resources*. The Administrative Law Judge concluded that in all cases, it was the apartment listings or information which were the primary reason for the consumers and brokers paying a fee to petitioner.

The Administrative Law Judge rejected petitioner’s argument that there is no legal distinction between its “real estate referral service” and the dating-matchmaking service which, in *People Resources*, the Tribunal held to be nontaxable. The Administrative Law Judge compared the services provided by the taxpayer in *People Resources* and those provided by

petitioner herein. The Administrative Law Judge found that what clearly distinguishes the *People Resources* case from the present matter is that People Resources (the club) was a necessary element in completing a transaction (a date between two members). In the present case, the Administrative Law Judge found that once subscribers and brokers received the apartment listings and updates, they could consummate a transaction (rental agreement or sale) without any additional assistance from petitioner. While petitioner did, in fact, offer certain additional services, the Administrative Law Judge found that such services were not, in most cases, of paramount importance. The Administrative Law Judge concluded that petitioner's reliance on *People Resources* was misplaced and the furnishing of information was, in fact, petitioner's primary function.

The Administrative Law Judge also rejected petitioner's argument that since its principal, Lan Lan Wang, is a licensed real estate broker, its fees collected for services rendered are not taxable. The Administrative Law Judge concluded that petitioner was not acting as a broker because it took no part in the actual sale or rental of real property. Rather, it acted as a facilitator by providing a means for the exchange of information between those who have property to sell or rent and those who desire to buy or rent property.

The Administrative Law Judge distinguished petitioner's services from those provided by a Multiple Listing Service ("MLS"), which the Department opined to be nontaxable in TSB-A-97(55)S.

The Administrative Law Judge did not accept petitioner's arguments that its services were exempt because they constituted advertising services or because the information furnished is

personal and individual in nature and is not or may not be substantially incorporated in reports furnished to its other customers.

Finally, the Administrative Law Judge found no merit in petitioner's argument that because Tax Law § 1105(c)(1) imposes a tax on the furnishing of information "by printed, mimeographed or multigraphed matter" and petitioner's services were provided by telephone and via the Internet, the statute cannot be expanded to include services which are not specifically listed in the statute. The Administrative Law Judge noted that Tax Law § 1105(c)(9)(i) imposes tax on information services, taxable pursuant to Tax Law § 1105(c)(1), which are delivered by means of telephone service.

The Administrative Law Judge rejected petitioner's contention that the Internet Tax Freedom Act bars the imposition of the New York State sales tax on information accessed by its customers from the Internet because that law (Pub L 105-277) had an effective date of October 1, 1998 and no retroactive application. Despite petitioner's contention that its clients were from all over the world and that the State of New York cannot collect sales tax on services provided to out-of-state clients, the Administrative Law Judge found that petitioner did not provide sales invoices to the auditors despite a written request therefor. As a result, the Administrative Law Judge concluded that it was impossible for the auditors to determine which, if any, sales were made to out-of-state customers.

The Administrative Law Judge upheld the imposition of penalties against petitioner, finding that petitioner introduced no evidence from which it can be determined that its failure to file sales tax returns, to pay or pay over sales tax or to obtain a certificate of authority was due to reasonable cause and not due to willful neglect.



***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that the Administrative Law Judge failed to understand the primary purpose of PCL's business. Petitioner argues that the proper test for taxability is the "primary function test" set forth by the Tribunal in ***Matter of SSOV '81 Ltd. d/b/a People Resources (supra)***. Petitioner maintains that the "purpose and value of PCL services is the presence of the complementary party on the other side of the match or transaction - not the information itself" (Petitioner's brief in support, p. 13). Petitioner does not agree that ***People Resources***, a matching service, can be distinguished from PCL's services on the basis that staff from People Resources passed invitations and telephone numbers on to its clients. Petitioner maintains that its clients do not have an interest in the information provided per se, and after a series of matching events culminates in a transaction, consumers no longer have an interest in PCL's services.

Petitioner believes that the Administrative Law Judge's conclusion that PCL was a vendor of information services per se was inconsistent with his finding that PCL clients pay for a bundled membership package. Petitioner analogizes PCL to a nontaxable Multiple Listing Service. Petitioner argues that the brokers who use an MLS are no different than those who use PCL's services.

Petitioner asserts that in ***People Resources***, the Tribunal differentiated between transactional-type data bases, where two or more parties converge with a data platform in between as a facilitator, and functional-type data bases where the providing party furnishes unilateral information digested by the purchaser. Petitioner argues that PCL is such a

transactional data base, facilitating matchmaking of property owners and apartment seekers, either directly or through brokers.

Petitioner argues that PCL is more akin to a nontaxable dating service and an MLS than to a taxable information service. Further, petitioner maintains that PCL does not collect, compile or analyze data. Rather, PCL merely facilitates a transaction, similar to the taxpayer in *People Resources*. Petitioner asserts that PCL's services to both brokers and consumers were multi-directional. Petitioner also argues that PCL's services are nontaxable because they are advertising, no different from the property listings maintained by MLS, and that the information PCL furnished was personal and confidential.

The Division, in opposition, argues that the Administrative Law Judge correctly determined that PCL's primary function was the provision of taxable information services. The Division maintains that petitioner gathered its information from a variety of sources and then created a searchable database of available apartment listings. Subscribers, for a fee, could obtain reports that listed apartments based on the subscriber's criteria. The Division argues that such reports were not personal or confidential in nature. The Division argues that unlike *People Resources*, PCL was not a necessary party to complete the transaction involved. The Division maintains that petitioner did not work with the consumer to close the rental transaction nor did it collect broker's fees. Further, it believes that petitioner did not provide traditional brokerage services nor did it operate an MLS. The Division argues that despite petitioner's assertion, it clearly collected, compiled and analyzed data in order to sell customized information reports to its subscribers.

### ***OPINION***

Tax Law § 1105(c)(1) provides that the receipts from every sale, except for resale, of the following services are subject to sales tax:

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, 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, and excluding the services of advertising or other agents . . . .

The Division's regulations, 20 NYCRR 527.3, provide as follows:

(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.

\* \* \*

Example 3: A firm supplies to business concerns listings of prospective customers' telephone numbers is providing a taxable information service and must collect the appropriate tax on the charges for such service.

Example 4: A computer service company owns a service program consisting of analyses of law cases and statutes. It is asked by a customer to research all references to the word "assessment". The fee for the printout received by the customer constitutes a taxable receipt from an information service as the citations listed may be given to another subscriber requesting the same information.

\* \* \*

(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.

As the Administrative Law Judge observed in his determination, it is 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” (*Matter of Audell Petroleum Corp. v. New York State Tax Commn.*, *supra*, 513 NYS2d, at 963).

In *Matter of SSOV ‘81 Ltd. d/b/a People Resources* (*supra*), we noted that in order to determine whether a service was subject to sales and use tax, “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.” In *People Resources*, we found that the primary function of the service provided by People Resources was to allow its members to meet each other and to foster dates among them. Relying on *Matter of Rochester Gas & Elec. Corp.* (Tax Appeals Tribunal, January 4, 1991), we concluded that where a service is not taxable because it is not enumerated in Tax Law § 1105(c), “the mere fact information is transferred will not create a taxable event” (*Matter of SSOV ‘81 Ltd. d/b/a People Resources*, *supra*).

We distinguished the service furnished by People Resources from those provided by the taxpayers in *Matter of ADP Automotive Claims Serv. v. Tax Appeals Tribunal* (188 AD2d 245, 594 NYS2d 96, *lv denied* 82 NY2d 655, 602 NYS2d 804), which provided computer-generated repair cost estimates to its customers from an in-house database and *Matter of Allstate Ins. Co. v. Tax Commn.* (115 AD2d 831, 495 NYS2d 789, *affd* 67 NY2d 999, 502 NYS2d 1004) which obtained motor vehicle reports on potential customers from the Department of Motor Vehicles

and furnished them to automobile liability insurers. We noted that in each of those cases, “the taxpayers' business was selling information services, as opposed to supplying information as a component of another service” (*Matter of SSOV ‘81 Ltd. d/b/a People Resources, supra*).

Whether the service furnished by PCL falls within the taxable ambit of Tax Law § 1105(c) or is outside of its scope depends on what the primary purpose of PCL is. The Administrative Law Judge has determined that PCL’s primary purpose was to furnish information. We agree.

PCL’s Certificate of Incorporation filed with the New York State Secretary of State states that the purpose of the corporation is “[g]enerally to do everything suitable, proper and conducive to the successful conduct of real estate and real estate agency and brokerage business . . . .” However, PCL did not conduct a brokerage business in any sense. PCL’s president, Lan Wang admitted during her testimony in this proceeding that she “wasn’t doing traditional brokerage” (Hearing Tr., pp. 376-377) and PCL took no part in the actual sale or rental of real property.

PCL maintained one of the largest listings of apartments for sale or rent in New York City as a centralized clearinghouse of all types of apartments which were for sale and for rent. It provided a variety of services to apartment seekers as well as to apartment owners, landlords and brokers, not all of which consisted of furnishing information. Through its services, PCL allowed apartment owners and brokers to disseminate listings of available apartments and allowed apartment hunters to pinpoint their search for an apartment that satisfied their personal criteria.

PCL analogizes itself to a multiple listing service and relies on the Division’s advisory opinion in *Matter of New York State Assn. of Realtors, Inc.* (TSB-A-97[55]S). In that advisory opinion, the Division opined that the primary function of a multiple listing service was to

exchange offers of cooperation and compensation between brokers and to allow the sharing of commissions between listing brokers and selling brokers. The Division found that the dissemination of information regarding the property was merely a component of the property listing process. As a result, the Division considered that the multiple listing service was not one of the services enumerated under Tax Law § 1105(c) and is, therefore, not subject to tax. PCL argues that the brokers that use its services are no different than those that use a multiple listing service.

What distinguishes the nature of the services offered by People Resources and multiple listing services from those offered by PCL and the taxpayers in *ADP Automotive Claims Services* and *Allstate Insurance Co.* is that the data collected and furnished by People Resources and multiple listing services was used to foster transactions between its members or subscribers. These transactions were their primary purposes and the information was merely a means to achieve those ends. For the members of People Resources, information was furnished to induce members to date each other. The primary purpose of a multiple listing service, according to the Division, is commission sharing among listing and selling brokers.

Had People Resources obtained information from the personal advertisements found in local newspapers and other publications in order to bolster its inventory of single adults, as PCL did to bolster its lists of available apartments, the nature of its business would have been different. People Resources could not offer its services to the non-members whose names were taken from those publications nor would it have had any role in facilitating an invitation, acceptance or meeting between its member and a non-member. Similarly, if a multiple listing service were to list all properties found for sale in an area, including those listed by non-brokers

or non-participating brokers, the multiple listing service would have no means of requiring an offer of compensation and cooperation to enable the sharing of sales commissions between its members and non-members.

PCL argues that its primary purpose was the matching of prospective apartment hunters with available apartments. While that is accurate to an extent, PCL did not restrict its listing of available apartments to those held by its members. Whether PCL's subscribing apartment seekers rented an apartment from one of PCL's subscribing brokers or from a non-subscriber who had only listed an apartment for rent in a newspaper was of no concern to PCL. Nor did PCL insist on any cooperation among the brokers or apartment owners for sharing commissions between listing and selling/renting brokers. As the Administrative Law Judge stated: "PCL was merely the vehicle by which subscribing brokers were able to maximize their listing exposure and, while there may be some similarities to a multiple listing service, PCL's service cannot be found to be a multiple listing service" (Determination, conclusion of law "H"). There seems little doubt that PCL's services were valuable to apartment seekers and brokers, relying on the description petitioner provided of the Manhattan real estate market at the time that PCL initiated its business. It is clear that PCL concentrated on obtaining and providing its subscribers with as broad a base of information as possible on available apartments in New York City. PCL did not, however, require nor expect that resultant rental or sale transactions would take place only between its members. Thus, its primary purpose was accomplished by furnishing information to its subscribers.

As to the remaining arguments offered by petitioner that PCL's services are nontaxable because they constitute advertising or because the information furnished was personal or confidential, we find these arguments to be without merit and we affirm the conclusions of the Administrative Law Judge on these arguments as set forth in his determination. As a result, we

find that the fees and charges received by petitioner were receipts from the sale of information services taxable under Tax Law § 1105(c)(1).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Principal Connections, Ltd. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Principal Connections, Ltd. is denied; and
4. The Notice of Determination dated November 12, 1999 is sustained.

DATED: Troy, New York  
February 12, 2004

/s/ Donald C. DeWitt  
Donald C. DeWitt  
President

/s/ Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner