

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GREATER SYRACUSE ASSOCIATION OF REALTORS, INC. :
DETERMINATION : DTA NO. 812642
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 September 1, 1988 :
through November 30, 1991.

Petitioner, Greater Syracuse Association of Realtors, Inc.,¹
721 East Genesee Street, Syracuse, New York 13210-1505, filed a
petition 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 September 1, 1988 through November 30, 1991.

A hearing was held before Frank W. Barrie, Administrative
Law Judge, at the offices of the Division of Tax Appeals, 500
Federal Street, Troy, New York, on March 1, 1995 at 1:15 P.M.,
with all briefs to be submitted by July 7, 1995, which date began
the six-month period for the issuance of this determination.
Petitioner appeared by William M. Colby, Esq. and Kenneth A.
Marvald, Esq. The Division of Taxation appeared by Steven U.
Teitelbaum, Esq. (Vera R. Johnson, Esq., of counsel).

¹Petitioner was formerly known as Greater Syracuse Board of Realtors, Inc.

ISSUE

Whether initiation fees and monthly charges, received by petitioner, a nonprofit trade association, from its members who wished to participate

in its multiple listing service, were properly subject to sales tax as receipts from the taxable sale of information services under Tax Law § 1105(c)(1).

FINDINGS OF FACT

Petitioner, a New York not-for-profit membership corporation, is a trade association for Syracuse-area realtors and others interested in Syracuse-area real estate. Note (1)(a) to its financial statements for December 31, 1991 and 1990 (included in petitioner's Exhibit "1") summarizes succinctly petitioner's function:

"The Greater Syracuse Association of Realtors, Inc. (the Association) promotes and maintains standards in the real estate profession and provides educational courses, publications and a multiple listing service to its members."

Petitioner has been in operation over 30 years and, during the period at issue, had 5 employees.

John F. Osta, petitioner's president and chief operating officer during the period at issue, testified that petitioner had four categories of members as follows:

<u>Category</u>	<u>Description</u>	
Estimated <u>Number</u>		
A	Broker/Owners of Real Estate Companies	175
B	Brokers	165

C	Realtor Associates	2,000
D	Affiliate members, individuals in 100 banking or mortgaging	_____

Total Members

2,440

The Division of Taxation ("Division") issued a Statement of Proposed Audit Adjustment dated October 27, 1992 against petitioner asserting sales tax due of \$49,565.43 (plus penalty and interest) as follows:

<u>Period Ended</u>	<u>Tax Asserted Due</u>
11/30/88	\$ 3,391.79
2/28/89	3,537.72
5/31/89	4,662.34
8/31/89	4,335.22
11/30/89	883.45
2/28/90	4,406.98
5/31/90	2,953.68
8/31/90	4,504.83
11/30/90	4,967.69
2/28/91	3,613.88
5/31/91	4,482.42
8/31/91	5,401.31
11/30/91	<u>2,424.12</u>
	Total
	\$ 49,565.43

The auditor accepted the gross sales reported by petitioner for the period at issue of \$1,651,678.00, but he increased the taxable sales reported by petitioner of \$47,490.00 to \$755,492.00. The narrative section of the field audit report (Division's Exhibit "C") described the basis for this increase in taxable sales as follows:

"Upon audit it was found that t/p was not charging sales tax on a number of realtor services which were in fact taxable. . . . The following are additional items that we taxed:

Initiation fees-mls; fees paid upon joining multiple listing service. Used to set up member on

computerized information system.

Listing filing fees; fees paid to add listing to MLS system. Information on the particular listing is then added to printed MLS books and to data base on computer.

Monthly service fees; monthly MLS member fees to offset cost of administrating MLS additions and deletions.

Computer Book subscription; fee for books printed from an outside data base provider (PRC) for use by members.

Comparable book subscription; fees for books when PRC system is not used.

Rental filing fees; fees for booking rentals on MLS system.

Credit report fees; fees charged for credit reports provided by GSB.R."

A Notice of Determination dated January 4, 1993 was issued against petitioner asserting sales and use taxes due of \$49,565.43 plus penalty and interest.

A conciliation order dated December 17, 1993 reduced sales tax due from \$49,565.43 to \$9,294.77 and also cancelled penalty. The conferee had determined that the fees paid by petitioner's members to add listings to the MLS system (including listings of properties for sale and for rental) were exempt from sales tax as advertising charges. A review of the Division's Exhibit "D", which includes a schedule showing the recalculation of tax due after the conferee's reduction, shows that these listing fees represented most of the revenue which the Division had treated as subject to sales tax. It is observed that the Division's treatment of subscription fees as taxable has not resulted in additional tax due from petitioner because petitioner has always

paid sales tax on the printing cost of the books which generated such subscription revenue, and such books were resold by petitioner to its members at cost. Therefore, what remains at issue are the initiation fees paid by members to join petitioner's multiple listing service and the monthly service fees which petitioner collects from its members who participate in the multiple listing service.

The Operation of the Multiple Listing Service

Petitioner's members who wished to receive the benefits of the multiple listing service had to become participants in the service by the payment of an initiation fee, which according to Mr. Osta "was pretty much the same throughout [the period at issue], \$1,000" and the payment of a monthly service fee, which was "from \$50 to \$60" (tr., p. 71). The auditor's schedules (Division's Exhibit D) show that petitioner collected 32 initiation fees of \$1,000 each during the audit period.

Petitioner has promulgated rules and regulations governing the operation of its multiple listing service, which are attached to the stipulation of the parties as an Exhibit "F".

When a member of the multiple listing service enters into an exclusive-right-to-sell contract with a property owner, the property owner authorizes the member realtor to list the property with the service. Pursuant to such contract, the property owner appoints the MLS member as his exclusive agent for a designated period of time to sell the property on the owner's stated terms and agrees to pay the broker a commission when the property is sold, whether by the owner, the broker, or

another broker. The exclusive-right-to-sell contract authorizes the listing MLS member, as exclusive agent, to appoint subagents and to divide the commission paid by the seller with such subagents. Sample contracts attached to the parties' stipulation as Exhibit "E" show commissions of 6% or 7% of the selling price with the selling subagent to receive from 6% of the selling price (which would leave curiously no part of the commission to the listing broker in a contract dated June 14, 1988) to 3.6%. Mr. Osta testified that the commission is more commonly split "40 per cent to the listing broker and 60 percent to the selling broker" (tr., p. 65).

When an MLS member lists a property with the multiple listing service, the MLS member makes a blanket unilateral offer of subagency to all of the MLS members. The data gathered by the multiple listing service is neither disseminated nor sold to any non-MLS member. Further, only MLS members have the right to receive and accept the offer of subagency (which is disseminated by the multiple listing service among its members by computer book subscriptions and by computer) and share in the commission. Mr. Osta testified that during the audit period approximately 250 to 300 books were printed and distributed at a cost of approximately \$500 to \$600 for a six-month subscription.

The full rights and obligations of the MLS members, as outlined in the MLS rules and regulations, include the following: (i) the obligation of an MLS member to extend offers of subagency to other MLS members with respect to properties offered for sale by that member (subject to maintaining an

"office exclusive") and for the delivery of a listing to the multiple listing service within 48 hours after all necessary signatures of the sellers have been obtained, (ii) the right to receive and accept MLS offers of subagency regarding properties listed with the multiple listing service by other members, and (iii) the right to purchase computer book subscriptions and comparable book subscriptions from the multiple listing service.

Relevant portions of the parties stipulation (Division's Exhibit "A") have been incorporated into this determination.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner provides three reasons why its multiple listing service is not a taxable information service: (1) the information provided by the multiple listing service is only a component of the primary function of the multiple listing service which is to provide a system for its members to share commissions on the sale of listed properties by offers of subagency made via such service, (2) information is not sold or distributed by petitioner to other persons, but rather, is redistributed among the same persons, and (3) the multiple listing service is acting in a representative capacity on behalf of its members.

Petitioner contends that prior decisions of the State Tax Commission concerning the taxability of a multiple listing service as an information service, such as Matter of Rensselaer County Board of Realtors, Inc. (State Tax Commission, April 23, 1976), were "based on sketchy facts and do not emphasize the subagency features of the multiple listing services"

(Petitioner's brief, p. 10). According to petitioner, if the primary function test articulated by the Tax Appeals Tribunal in Matter of SSOV '81 Ltd. d/b/a People Resources (January 19, 1995) is applied to the facts at hand, petitioner's multiple listing service may not be viewed as an information service.

Petitioner also argues that petitioner does not provide information to "others", but "MLS members furnish information to their not-for-profit trade association for redistribution among themselves" (Petitioner's brief, p.12). In addition, petitioner contends that it "performs services as agent for its members" and therefore its services are "specifically exempt from the Sales Tax under section 1105(c) of the NY Tax Law" (Petitioner's brief, p. 16).

The Division counters that "the essence" of petitioner's services is the provision of information and that "(t)he information provided includes information on subagency offers" (Division's brief, p. 9). The Division maintains that MLS members are customers of petitioner, relying on Sperry Rand Corp. v. Tully (99 Misc 2d 717, 416 NYS2d 949), and rejects petitioner's contention that it does not provide information to "others". The Division also argues that no agency relationship exists between petitioner and its customers, the MLS members, because it charged a fee to its members to cover the cost of providing the multiple listing service.

In its reply brief, petitioner argues that the *raison d'etre* of the multiple listing service is the offer of subagency:

"The information provided to Participants regarding details of properties offered for sale by other Participants has value only because of the MLS Offer of Subagency, and as such, the furnishing of this information is only incidental to the MLS Offer of Subagency" (Petitioner's reply brief, p. 10).

CONCLUSIONS OF LAW

A. Tax Law § 1105(c)(1) imposes sales tax on:

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

(1) 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, or other persons acting in a representative capacity, and information services used by newspapers, radio broadcasters and television broadcasters in the collection and dissemination of news."

This provision does not create an exception to the imposition of sales tax. Rather, it defines a particular service activity that is subject to tax. As a result, in analyzing this provision, which may be viewed as an "imposition statute", ambiguities are construed against the Division and in favor of the taxpayer (see, Matter of Penn York Energy Corp., Tax Appeals Tribunal, October 1, 1992; see also, Matter of Insurance Automation Systems, Inc., Tax Appeals Tribunal, February 23, 1995 [wherein the Tribunal, in reversing the administrative law judge, rejected a more expansive view of what constituted "information"]).

B. Petitioner is correct that the decisions of the former

State Tax Commission, which subjected receipts from multiple listing services to sales tax as information services, were based on sketchy facts. In addition, the Commission's legal analysis was conclusory. Moreover, decisions of the former State Tax Commission are not binding on the Division of Tax Appeals (see, Matter of Racal Corp., Tax Appeals Tribunal, May 13, 1993). Consequently, the former State Tax Commission's determination that multiple listing services constituted taxable information services is not conclusive.

C. The recent decision of the Tax Appeals Tribunal in Matter of SSOV '81 LTD. d/b/a People Resources (January 19, 1995) provides a clear standard for determining what activities constitute a taxable information service. In its decision, the Tribunal rejected vigorously the Division's contention that the purpose of business activities was irrelevant while the means utilized by the business were controlling:

"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.

* * *

Consequently, we cannot accept the Division's argument that the means by which a service is provided is the controlling factor in determining whether the subject service is taxable. To 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.

Applying the above principles to the matter before us, the service at issue cannot rationally be taxed as a separate service. There can be no dispute that the

function of the service provided by petitioners was to allow members to meet others. Because this is not a service enumerated in section 1105(c) of the Tax Law, it is not subject to the sales tax imposed by this section [citation omitted]. Further, we have in the past recognized that where a service is not so enumerated, the mere fact information is transferred will not create a taxable event [citation omitted]. . . .

* * *

As a result, we find the Administrative Law Judge erred in failing to address what we find is a threshold issue in this matter; was the sale of information merely a component of People Resources' business scheme or its primary function."

The Tribunal went on to review two cases where it was determined properly that the taxpayer was selling information services: (1) Matter of ADP Automotive Claims Serv. v. Tax Appeals Tribunal (188 AD2d 245, 594 NYS2d 96, lv denied 82 NY2d 655, 602 NYS2d 804) and (2) Matter of Allstate Ins. Co. v. Tax Commn. (115 AD2d 831, 495 NYS2d 789, affd 67 NY2d 999, 502 NYS2d 1004). In both of these cases, the Tribunal observed that "the taxpayers' business was selling information services, as opposed to supplying information as a component of another service." The taxpayer in ADP Automotive Claims provided computer-generated repair cost estimates to its customers from its in-house database, and the taxpayer in Allstate provided motor vehicle reports on potential insureds obtained from the Department of Motor Vehicles to automobile liability insurers.

D. Applying this primary function test to the facts at hand, it is concluded that petitioner's multiple listing service was not a taxable information service because its primary function was not the dissemination of information. Rather, petitioner has established that the primary function of the

multiple listing service was to provide a mechanism for its members to share commissions on the sale of real property by conveying offers of subagency through its dissemination of real estate listings. The MLS members did not pay substantial initiation fees to join the multiple listing service and monthly service fees in order to obtain merely information provided in the listings. Rather, the primary function of the multiple listing service was to provide a system for its members to extend, receive, and accept offers of subagency, and the collection and dissemination of the real estate listings was a component of such function.

E. The Tax Appeals Tribunal in Matter of Bleistein (August 11, 1994) noted that administrative law judges may not moot issues. As a result, petitioner's alternative arguments will be addressed.

F. Because there is no evidence that petitioner was in a fiduciary relationship with its members, it may not be concluded that petitioner was acting as an agent of its members in providing its multiple listing services (see, Matter of John Hancock Mutual Life Insurance Company, Tax Appeals Tribunal, April 29, 1992). Furthermore, petitioner's argument that it is not selling information to other persons is also rejected. Petitioner's members do not lose their identity as distinct persons by becoming members of the multiple listing service (see, Sperry Rand Corp. v. Tully, 99 Misc. 2d 716, 416 NYS2d 949).

G. The petition of Greater Syracuse Association of

Realtors, Inc. is granted, and the Notice of Determination dated January 4, 1993 is cancelled.

DATED: Troy, New York
December 14, 1995

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE