

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
PRINCIPAL CONNECTIONS LTD. : DETERMINATION
 : 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. :
:

Petitioner, Principal Connections, Ltd., 444 Park Avenue South, Suite 401, New York, New York 10016, 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 December 1, 1993 through February 28, 1997.

A hearing was commenced before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 31, 2001 at 10:30 A.M. and was concluded at the same location on November 1, 2001, with all briefs to be submitted by May 17, 2002, which date began the six-month period for the issuance of this determination. Petitioner appeared by its president, Elizabeth Ulang Wang. The Division of Taxation appeared by Barbara G. Billet, Esq. (Dennis A. Fordham, Esq., of counsel).

ISSUES

I. 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).

II. Whether the fact that Tax Law § 1105(c)(1) imposes a tax upon the furnishing of information “by printed, mimeographed or multigraphed matter” precludes the imposition of tax upon petitioner’s services which were provided by telephone and via the Internet.

III. Whether the Division is entitled to amounts which petitioner collected as sales tax on the sale of its services and which petitioner failed to pay over to the Division.

IV. Whether the Federal Internet Tax Freedom Act of 1998 bars the imposition of sales tax, by the State of New York, on petitioner’s sales.

V. Whether the imposition by the State of New York of sales and use taxes on petitioner’s sales of information to out-of-state customers violates the Commerce Clause of the United States Constitution.

VI. Whether penalties assessed against petitioner should be abated.

FINDINGS OF FACT

1. 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 72nd 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.

2. 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.

3. 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.

4. 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 \$97,986.25.¹

5. 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.

¹ 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.

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.

6. Initially, PCL² 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

² 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.

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 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

* * *

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.

12. 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.

13. 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.

14. 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.

15. 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.)

16. 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.)

SUMMARIES OF THE PARTIES' POSITIONS

17. Petitioner asserts the following:

- a. Applying the "primary function test" set forth by the Tax Appeals Tribunal in ***Matter of SSOV '81 Ltd. d/b/a People Resources*** (Tax Appeals Tribunal, January 19, 1995), PCL's consumer business is a matching or consulting and referral service which is not taxable and PCL's broker business is a multiple listing service which is exempt from sales tax as a sale for resale. PCL states that it does not collect, compile or analyze data as required by Tax Law § 1105(c)(1); it merely facilitates a transaction in a manner similar to that of a real estate broker;
- b. In the alternative, PCL is a licensed real estate broker and, as such, its fees collected for services rendered are not taxable;
- c. In the alternative, PCL's consumer and broker charges are exempt from sales tax because such charges constitute advertising;
- d. Even if found to be taxable information services, PCL's sales are excluded from the imposition of tax because the information furnished is personal and individual in

nature which is not or may not be substantially incorporated in reports furnished to other customers;

e. Even if found to be taxable information services, PCL's internet provided services would not be taxable since they are not enumerated in Tax Law § 1105(c)(1). PCL maintains that all ambiguities must be resolved in favor of the taxpayer;

f. The Internet Tax Freedom Act bars the imposition of the New York State sales tax on internet-accessed information;

g. Even if it is found that its sales were in the nature of taxable information services, New York State cannot tax PCL's sales to customers outside the State;

18. The position of the Division may be summarized as follows:

a. PCL's HOMEline and MLX.com consumer services are information services. HOMEline provided subscribers with written INTELLIMATCH reports. PCL's furnishing of updates over the telephone is taxable pursuant to Tax Law § 1105(c)(9)(i). PCL's MLX.com service provided consumers with written reports by means of e-mail;

b. PCL's LINX and brokersNYC.com services to brokers are also taxable information services. The LINX service provided brokers with "Listing Updates," either by modem or by fax and its brokersNYC.com service provided subscribing brokers with Listing Updates by means of the internet;

c. The Department of State's Decision and Order in *Matter of Lan Lan Wang v. Department of State Division of Licensing Services* is indicative of PCL's sales of apartment listings, i.e., sales of information;

- d. PCL's database service which utilizes a computer to search and retrieve from its apartment listings database all listings which match the selection criteria in a subscriber's profile, fits conceptually within example 4 of 20 NYCRR 527.3(a)(3) and is similar to services held to be taxable information services in *Matter of Computone Systems, Inc.* (TSB-H-87[192]S) and in *Matter of ADP Automotive Claims Services, Inc. v. Tax Appeals Tribunal* (188 AD2d 245, 594 NYS2d 96);
- e. The furnishing of information is PCL's primary function;
- f. None of the statutory exemptions set forth in Tax Law § 1105(c)(1) are applicable to PCL. PCL's apartment listings are used by the subscribers and are not resold as such. PCL received no exemption certificates. The apartment listings are not personal or individual in nature since many are taken from the classified sections of the New York Times and Village Voice and all of the listings are pooled together in a common database accessible by many consumers and brokers. These listings can be and often are provided in reports furnished to other subscribers;
- g. PCL's apartment listings are not advertising or other representative services. PCL did not provide advertising agency services nor did it act in a representative capacity in providing its apartment lists;
- h. Lan Lan Wang's license as a real estate broker for some or all of the audit period does not render PCL's services real estate broker services since PCL did not act as anyone's broker in these transactions;
- i. MLX.com came into existence in 1998, after the audit period herein;
- j. PCL is not a multiple listing service, i.e, it did not require participating/subscribing brokers to share brokerage commissions with anyone else;

k. The Federal Internet Tax Freedom Act of 1998 does not apply to this proceeding since it did not take effect until October 1, 1998; the audit period at issue herein ended on February 28, 1997;

l. PCL failed to maintain and produce sales invoices for the audit period; therefore, it cannot prove which, if any, of its charges to consumers and brokers are for services delivered outside New York State.

CONCLUSIONS OF LAW

A. 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

B. 20 NYCRR 527.3 provides, in relevant part, as follows:

(a) *Imposition.* (1) Section 1105(c)(1) of the Tax Law imposes a tax on 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 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.

C. The Court of Appeals, in *Audell Petroleum Corp. v. State Tax Commn.* (69 NY2d 818, 819, 820, 513 NYS2d 962), stated:

As 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.

As PCL correctly points out, the Tax Appeals 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 stating, “To neglect the primary function of petitioners’ business in order to dissect the service it provides into what appear to be taxable events stretches the application of Article 28 far beyond that contemplated by the Legislature.”

Although it sets forth various alternative theories upon which it contends that its sales are not subject to New York State sales tax, PCL’s primary argument, in essence, is that it is in the business of matching those with an apartment to sell or rent with those who are looking to buy or

rent an apartment. PCL maintains that its consumer business is a matching or consulting and referral service which is not taxable, while its broker business is in the nature of a multiple listing service which is exempt from tax as a sale for resale. The Division, on the other hand, asserts that the furnishing of information is PCL's primary function and, as such, its receipts are subject to tax pursuant to Tax Law § 1105(c)(1). Accordingly, it will be necessary to examine, in detail, the business of PCL to ascertain first, whether it furnished information to its consumers/subscribers and to its brokers which is subject to tax and, second, whether PCL's primary function was to collect and disseminate information.

D. Through various means, PCL furnished information to both categories of its customers, i.e., consumers and brokers. PCL maintained one of the largest databases of apartment listings in Manhattan. These listings were obtained from a variety of sources (*see*, Finding of Fact "5"). PCL categorized its listings into different types. Listings were initially divided into rentals and sales and then further divided among brokers, owners and major landlords. Clearly, PCL collected the information, i.e., the apartment listings, and then compiled and analyzed this information which was then provided to its subscribers, in the nature of a report using various means throughout the audit period.

E. With respect to consumers, beginning in August 1994, PCL's HOMEline service initially provided a fax-on-demand apartment listing known as a HOMEline INTELLIMATCH to its consumers/subscribers. After receiving the initial HOMEline INTELLIMATCH, subscribers could telephone PCL for updates as often as they wished. The listings provided to the subscribers were from PCL's database and were matched to the subscriber's profile to satisfy the criteria selected by the subscriber. Both the written fax-on-demand listings and the telephone updates were subject to tax as information services (*see*, Tax Law § 1105[c][1],[9][i]).

While PCL's MLX.com service actually commenced after the audit period, even assuming, *arguendo*, that such service was provided to consumers during a portion of the audit period, it, too, constituted a taxable information service. MLX.com provided apartment listings to consumers by means of the Internet with updates furnished by e-mails. Furnishing information by electronic readouts or displays is subject to tax pursuant to 20 NYCRR 527.3(a)(1).

F. As to the services provided to brokers, PCL's LINX service provided brokers with listings once a week by fax or daily by computer modem using PCL's proprietary software known as OLGA. Its brokersNYC.com service, established after the audit period (March 15, 1999) provided updates to brokers by means of the Internet. These methods of delivery were similar to those provided to consumers through the HOMEline and MLX.com services and, accordingly, are also subject to tax as an information service (*see*, Tax Law § 1105(c)[1], [9][i]; 20 NYCRR 527.3[a][1]).

G. Since it has heretofore been determined that PCL furnished information to both classes of its customers (consumers/subscribers and brokers) by various means, all of which render the furnishing of such information subject to tax pursuant to Tax Law § 1105(c)(1), it must now be determined whether the furnishing of information was PCL's primary function or merely a component of its business in accordance with the decision of the Tax Appeals Tribunal in *People Resources*. In essence, PCL contends that its clients do not do business with PCL to purchase information for the sake of information, but do so to match apartment seekers with available apartments. Although there is an element of truth to this contention, what PCL is alleging is that it is not providing a taxable information service because the information is used for some subsequent purpose.

First, it must be noted that the Secretary of State, in a Decision and Order in *Matter of Lan Lan Wang v. Department of State Licensing Services* (see, Finding of Fact “14”), stated, “That she is selling access to listings of apartments which are available for rent is crystal clear despite her attempts to characterize it otherwise.”

Despite the fact that PCL maintains that its consumer business is a matching or consulting and referral service and that its broker business is a multiple listing service which is exempt from sales tax as a sale for resale, a close examination of its services reveals otherwise. While it is true that PCL provided some services to its consumers in addition to the furnishing of apartment lists, these services (free sponsor offers, use of PCL’s “How to” and “Interactive Zone” and access to a seven-day phone/e-mail consultation and support service) were ancillary to that which the consumers desired most, i.e., the listings of apartments which matched their profiles. Likewise, PCL’s service to brokers, through LINX and brokersNYC.com, allowed brokers to list available properties and to get updates of listings from other brokers and permitted owners and management companies to distribute these listings to brokers and/or to buyers or renters. In all cases, it was the apartment listings or information which were the primary reason for the consumers and brokers paying a fee to PCL.

In its brief, PCL relies upon *People Resources* and asserts that apartment seekers subscribe to PCL’s services to find apartments from owners or through brokers, and owners and brokers utilize PCL’s services to list properties for rent or sale. PCL contends 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. This contention is incorrect. As the Division correctly notes in its brief, PCL’s HOMEline and MLX.com services provided consumers/subscribers with sufficient information to conduct an apartment search on their own.

As PCL's witness, Bruce Colwin, confirmed at the hearing, once he received information from MLX (PCL) which matched his criteria for an apartment, he felt that he had received the service that he had paid for. PCL's LINX and brokersNYC.com services allowed real estate brokers to maximize their listing exposure while reducing listing expenses and gave owners, landlords and management companies additional listing exposure. In both cases (consumers/subscribers and brokers), once they received the apartment listings and updates, they could consummate a transaction (rental agreement or sale) without any additional assistance from PCL. While PCL did, in fact, offer certain additional services, such services were not, in most cases, of paramount importance.

In *People Resources*, a "private club for singles," members submitted a written resume (containing their first name only) and were also photographed and interviewed on videotape. The resume, photographs and videotaped interview constituted the "member's profile" which was placed in the member profile library for review by other members. Each member had the opportunity to review other members' profiles in the member profile library and issue invitations to meet members whom they selected. When a member received an invitation, he or she reviewed the profile of the inviter and decided whether to accept or decline the invitation. When an invitation was accepted, the accepting member completed the invitation by setting forth his or her full name and telephone number. People Resources then notified the accepting member orally of the inviting member's full name and telephone number. Members could telephone People Resources to ascertain whether invitations had been received and accepted. 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). When a member sought a date with another member, People Resources would pass on the full name

and telephone number to the member with whom a date was sought. People Resources also conveyed responses to those members who had extended invitations and, when invitations were accepted, People Resources also conveyed full names and telephone numbers of the accepting members. Therefore, the information, i.e, the resumes, photographs and videotapes was of little or no use to a member of People Resources without the services of People Resources itself and, as a result, the Tribunal held that the sale of information was merely a component of People Resources' business scheme. Therefore, PCL's reliance on *People Resources* is misplaced and it is hereby determined that the furnishing of information was, in fact, PCL's primary function.

H. PCL contends that since its principal, Lan Lan Wang, is a licensed real estate broker, its fees collected for services rendered are not taxable. This contention is without merit.

PCL's president, Lan Lan Wang admitted during her testimony in this proceeding that she "wasn't doing traditional brokerage" (*see*, Finding of Fact "15"). Moreover, Real Property Law § 440(1) defines the term "real estate broker" as:

any person, firm or corporation, who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys or rents, or offers or attempts to negotiate a sale, at auction or otherwise, exchange, purchase or rental of an estate or interest in real estate, or collects or offers or attempts to collect rent for the use of real estate

PCL does not fall within this definition because it takes no part in the actual sale or rental of real property. It merely acts 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.

Citing to *Matter of Greater Syracuse Association of Realtors, Inc.* (Division of Tax Appeals, December 14, 1995), wherein the administrative law judge held that the petitioner's multiple listing service was not a taxable information service because its primary function was not the dissemination of information, PCL contends that it, too, is a multiple listing service

which has as its primary function not the dissemination of information, but rather the provision of a mechanism for its members to share commissions.

It must be noted that determinations of an administrative law judge are not considered precedent nor are they given any force or effect in other proceedings before the Division of Tax Appeals (20 NYCRR 3000.15[e][2]).

PCL also cites to an advisory opinion, *Matter of New York State Association of Realtors, Inc.* (TSB-A-97[55]S) in which the Commissioner of Taxation and Finance held that a multiple listing service (“MLS”) is not one of the services enumerated under Tax Law § 1105(c) and is, therefore, not subject to tax. However, the facts in the present matter are easily distinguishable from the relevant facts in the advisory opinion which are as follows:

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 . . . 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

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 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 listing property, to the MLS which, in turn, communicates the offer of cooperation and compensation to all MLS participants on behalf of the listing broker. . . .

The advisory opinion noted that 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 there could be no commission earned by selling it. The advisory opinion stated that the dissemination of information regarding the property was merely a component of the MLS listing process, the primary function of which was to exchange offers of cooperation and compensation and to allow the sharing of commissions between listing brokers and selling brokers. Therefore, one-time initiation fees and periodic dues/participation fees charged to MLS participants were held not to be subject to New York sales and use taxes.

In the present matter, PCL's LINX broker agreement did not require participating brokers to exchange offers of cooperation and compensation. PCL exercised no authority or control over what its subscribing brokers did with the apartment listings provided to them by PCL; the record contains no evidence that there existed any agreement as to the sharing of brokers' commissions and fees. 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. Since PCL is not a multiple listing service, its argument that its broker's business is excluded from tax as a sale for resale is also without merit.

I. PCL asserts that its consumer and broker charges are exempt from the imposition of sales tax because such charges constitute advertising. It maintains that its consumer membership services included the posting of "Apartment Wanted" advertisements for viewing by owners and brokers with properties and, in addition, that brokers subscribing to its services are, in fact, advertising their listings to other brokers and consumers.

20 NYCRR 527.3(b)(5) provides, in part, as follows:

Fees for the services of advertising agencies or other persons acting in a representative capacity are excluded from the tax. Advertising services consist of consultation and development of advertising campaigns, and placement of advertisements with the media without the transfer of tangible personal property.

There is no evidence in this record that PCL is or considers itself to be an “advertising agency.” Its certificate of incorporation does not indicate that PCL was formed to act as an advertising agency.

While PCL offered a “guest” of its MLX.com service the opportunity to advertise an available apartment to its subscribers and, once upgraded, offered an “insider” the chance to post an “Apartment Wanted” advertisement on its website, it is clear that these services are ancillary, i.e., these opportunities to post advertisements are not the primary motive for subscribing to the MLX.com service. More importantly, it must be noted that the MLX.com service was not available to subscribers until 1998, after the audit period at issue in this proceeding.

As to PCL’s services provided to brokers, there is no evidence that PCL developed “advertising campaigns.” PCL did not assist the brokers in placing advertisements with the media; the apartment listings were merely placed into PCL’s database. The Lease Service Agreement which PCL entered into with subscribing brokers contained no mention of the provision by PCL of advertising agency services.

Even assuming, *arguendo*, that a portion of PCL’s services could be construed to be “advertising services,” PCL’s President, Lan Lan Wang, admitted that PCL charged “a single fee for lots of services.” When services of both a taxable and nontaxable nature are performed, sales tax is required to be charged on the total amount of the invoice where the charges for taxable and

nontaxable services are not separately stated (*Artex Systems, Inc. v. Urbach*, 252 AD2d 750, 676 NYS2d 284).

J. PCL contends that, even if found to be a taxable information service, its sales are exempt from sales tax because the information furnished is personal and individual in nature which is not or may not be substantially incorporated in reports furnished to its other customers. PCL alleges that all of its member accounts are personal and individual in nature since access via fax-on-demand, by telephone or through a website login and password entails confidential, personal and individual information and advice. Since listings vary with a member's profile and the date and time of access, PCL maintains that the likelihood of any two consumers obtaining the identical information is slim.

In response, the Division states that PCL's apartment listings are not uniquely personal to the various subscribers because many of the listings are taken from the published classified ads in the New York Times and Village Voice and, in addition, all of the listings are pooled together in a common database which is accessible by many different consumers and brokers.

In *Matter of Twin Coast Newspapers v. State Tax Commn.* (101 AD2d 977, 477 NYS2d 718, *appeal dismissed* 64 NY2d 874, 487 NYS2d 553), the Court upheld the imposition of sales tax upon the sale of printouts of export and import information extracted by computer from trade newspapers. In the present matter, many of PCL's apartment listings were obtained from the classified ads in newspapers.

In *ADP Automotive Claims Services, Inc. v. Tax Appeals Tribunal* (188 AD2d 245, 594 NYS2d 96, 98 *lv denied* 82 NY2d 655, 602 NYS2d 804), a case involving an automobile repair cost estimate service generated by computer, the Court held that where the provided service (here, the provision of a cost estimate), although customized to each particular situation, comes

from a common source or data repository that is not confidential and is widely accessible, it is not personal or individual in nature. The Court noted that it is not personal or individual in nature “regardless of whether the information culled from the database and provided to the customer is customized in some fashion to respond to the raw data he or she submits.”³

In the present matter, the apartment lists provided to PCL’s customers come from PCL’s database which, as the Division correctly points out, is accessible by many different consumers and brokers. While, as PCL contends, the likelihood of any two consumers obtaining the identical information, i.e, the same report containing the identical apartments, is somewhat slim (due to the variance of the member’s profile as well as the date and time of access), it seems rather likely that more than one customer would receive a report containing some of the same apartment listings and, therefore, the information provided by PCL cannot be found to be personal or individual in nature. As was the case in *ADP Automotive Claims Services, Inc. (supra)*, it seems quite likely that the information furnished by PCL (apartment listings) was incorporated into more than one report to its customers. Accordingly, it cannot be found that the information furnished by PCL to its customers was personal or individual in nature which is not or may not be substantially incorporated in reports furnished to other persons. As a result, PCL’s receipts are not entitled to the exclusion provided for in Tax Law § 1105(c)(1).

K. PCL maintains that because Tax Law § 1105(c)(1) imposes a tax on the furnishing of information “by printed, mimeographed or multigraphed matter” and PCL’s services were

³ Previously, the Tax Appeals Tribunal, in *Matter of ADP Collision Estimating Services, Inc.* (Tax Appeals Tribunal, August 8, 1991) noted that customizing a report using information supplied by the customer or in response to specific requirements of a customer does not make that report personal and individual within the meaning of the statutory exclusion. In addition, the Tribunal rejected the petitioner’s argument that the information was not substantially incorporated in other reports stating that: “[g]iven the nature of the information, i.e., prices for car parts and time calculations for repairing specific damage, the evidence here establishes that it was extremely likely that the same information was incorporated into more than one report.”

provided by telephone and via the Internet, the statute cannot be expanded to include services which are not specifically listed in the statute. PCL's position is without merit.

As to information services provided by means of the telephone, 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. PCL's Internet services were not operational during the audit period; its MLX.com service to consumers did not begin until 1998 (*see*, Finding of Fact "9") while its brokersNYC.com service for brokers became operational in or about August 1999 (*see*, Finding of Fact "12"). Even assuming, *arguendo*, that PCL's services via the Internet were provided during the audit period, such services would still be subject to tax by virtue of the provisions of 20 NYCRR 527.3(a)(1) which states as follows:

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.

In addition, as correctly noted by the Division, information services provided by means of a computer have been held to be subject to tax (*see*, 20 NYCRR 527.3[a][3][Example 4]; *Matter of ADP Automotive Claims Services, Inc. v. Tax Appeals Tribunal, supra*).

L. Tax Law § 1137 (a) provides, in relevant part, as follows:

Every person required to file a return under the preceding section whose total taxable receipts . . . are subject to the tax imposed pursuant to subdivisions (a), (c), (d), (e) and (f) of section eleven hundred five of this article, shall, at the time of filing of such return, pay to the tax commission the total of the following:

* * *

(iii) All moneys collected by such person, purportedly as tax imposed by this article or pursuant to article twenty-nine

Tax Law § 1136(a), referenced above in section 1137(a) provides, in relevant part, that “[e]very person required to register with the tax commission as provided in section eleven hundred thirty-four . . . shall . . . file a return . . . with the commissioner.”

Tax Law § 1134(a)(1)(i) states that “[e]very person required to collect any tax imposed by this article . . . shall file with the commissioner of taxation and finance a certificate of registration”

Tax Law § 1131(1) defines “person required to collect any tax imposed by this article” as including “every vendor of tangible personal property or services”

Tax Law § 1101(b)(8)(i)(A) defines “vendor” as including, among others, “[a] person making sales of tangible personal property or services, the receipts from which are taxed by this article.”

Having heretofore determined that PCL’s services were subject to tax pursuant to Tax Law § 1105(c)(1), PCL was required pursuant to the provisions of Tax Law § 1137(a) to pay to the Division, all moneys collected by it purportedly as tax. Since PCL admitted (*see*, Finding of Fact “3”) that it failed to report or remit the sum of \$28,326.81 in sales tax which it had collected from its customers, such amount is due and owing to the Division.

M. PCL’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 is rejected. The Federal Internet Tax Freedom Act (Pub L 105-277) was signed into law in 1998, with an effective date of October 1, 1998. It had no retroactive application and, as such, does not apply to the present matter since the audit period at issue herein ended on February 28, 1997.

N. PCL contends 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. As previously noted

(*see*, Findings of Fact “2” and “3”), PCL did not provide sales invoices to the auditors despite a written request therefor. Printouts of sales in lieu of invoices were utilized by the auditors to compute PCL’s sales for the audit period. Therefore, it was impossible for the auditors to determine which, if any, sales were made to out-of-state customers.

Tax Law § 1135(a) mandates that persons required to collect tax keep records of every sale, including sales slips, invoices, etc. Tax Law § 1135(g) provides that such records must be made available for inspection and examination by the Division. Clearly, PCL failed to comply with these statutory requirements.

Tax Law § 1132(c) provides that it shall be presumed that all receipts for property or services taxable under Tax Law § 1105(a), (b), (c) and (d) are subject to tax until the contrary is established and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax or the customer. In the present matter, PCL produced no sales invoices upon audit or at the hearing. Therefore, PCL’s contention that its services were provided to customers outside New York State and were, therefore, not subject to tax must fail for lack of substantiation. Accordingly, PCL’s assertion that the imposition, by the State of New York, of sales and use taxes on its sales to out-of-state customers violates the Commerce Clause of the United States Constitution is moot.

O. Tax Law § 1145 provides that penalties shall be remitted upon a finding that a failure to file a return, to pay or pay over tax or possess a valid certificate of authority was due to reasonable cause and was not due to willful neglect. PCL has 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 and, accordingly, penalties imposed by the Division are hereby sustained.

P. The petition of Principal Connections, Ltd. is denied and the Notice of Determination issued by the Division of Taxation on November 12, 1999 is hereby sustained.

DATED: Troy, New York
November 14, 2002

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE