

**New York State Department of Taxation and Finance
Office of Counsel**

TSB-A-16(22)S
Sales Tax
May 27, 2016

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S130723A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether receipts it derives from three of the products it offers customers are subject to New York State and local sales taxes. Petitioner also asks whether certain ancillary products are subject to tax.

We conclude that Petitioner’s products are excluded from New York State sales tax because they constitute the furnishing of advertising services.

Facts

Petitioner is a company based in a state other than New York. However, Petitioner maintains a business location in New York. Petitioner engages in the business of providing a real estate website from which local real estate agents and brokers can list and advertise their clients’ real estate properties to the public. Petitioner represents that its basic advertising service is free, and it allows real estate professionals to set up an online profile with Petitioner, list properties, receive leads from those listings, and access the platform that will allow an agent to manage his or her listings, leads, and contacts. Potential buyers and renters can also use Petitioner’s website for free in order to search for available properties they may wish to purchase or rent, and find out information about neighborhood statistics. At issue in this Advisory Opinion are the revenues Petitioner generates by offering three types of paid services to real estate agents and brokers – Product A, Product B, and Product C and certain ancillary services offered in conjunction with Products A-C.

Paid Agent Offerings:

1. Product A:

Real estate listings set up using Petitioner’s free service will often contain the advertisements of other real estate professionals in addition to the listing agent’s own contact information. Product A is a service that real estate professionals may purchase to upgrade the promotion that their otherwise free listings on Petitioner’s website receives. Product A offers the ability for agents to have ad-free featured listings, which are listings exclusive to the subscribing agent and do not allow any competitive agent’s advertising. Product A’s pricing options offer agents the choice of a 1-pack, 3-pack, 10-pack, 20-pack, or 50-pack plan, which is based on a different number of ad-free listings an agent purchases. Regardless of which plan an agent purchases, Petitioner still permits an agent to post an unlimited number of non-featured listings; however, such listings may contain competitor agent advertisements. All five paid plans also include a “listing boost,” which will boost an agent’s individual listing to the top of the real estate professionals reflected in a particular search result. In addition, a Product A electronic

badge, which identifies the agent on Petitioner's web site as a Product A "member," is provided under all five paid plans. Petitioner's December 31, 2014 Form 10-K indicates that Product A provides agents the ability to "enhance their online presence [and] feature their listings in search results" Product A was launched in 2008.

2. Product B

This service advertises a real estate professional's profile on both Petitioner's search results pages and property details pages. These advertisements will show up on Petitioner's "Agent List," which is a rotating list of two to four potential agents to contact for more information when a buyer lands on a search results page or property details page. The Agent List is meant to introduce potential buyers to agents and makes it easier for buyers to quickly make contact with these agents. In addition to the Agent List, agents also are able to display their contact information through a banner advertisement on the search results page or property details page. The pricing for Product B allows agents to purchase a share of a market within a certain geographical location (cities and zip codes) in which they choose to advertise. The agent can purchase a share of views in 1% increments for any given geographic area. In this case, the agents are not guaranteed a set number of views, just a percentage of total views that occur within a period. For example, an agent can purchase 50% of a particular zip code for a certain price (the price fluctuates based on the demand of other agents wishing to advertise in that same region). If there are a total of 3,000 page views of that zip code in a month, the paying agent will show up on 50% of them (or 1,500 page views within that zip code). If there are only 1,000 views in another month, the agent will show up on 500 of those views. There is no guarantee that an agent will receive additional leads as a result of purchasing this service, because even if a potential buyer views the agent's contact information or banner in the Agent List, the buyer may choose to contact another agent about a given property, or alternatively contact no one at all. Product B was launched in 2010. Petitioner's December 31, 2014 Form 10-K indicates that Product B provides agents with the opportunity to purchase "local advertising on [Petitioner's] website by zip code or city and by share of given market."

3. Product C

Product C is very similar to Product B, except that it provides agents with banner advertisements and the Agent List on Petitioner's mobile application. The pricing structure is identical to Product B in that agents purchase a share of the market within a geographical location (based on zip code or city) and are guaranteed a percentage of total views in that market. The agent's advertisement will show up only on certain geographical locations that the agent has paid for, on a frequency that is dependent on the percentage of views that was purchased. An agent's advertisement also has the potential to generate leads, but only if a buyer decides to contact that agent while browsing various properties. Product C was launched in 2012.

The percentage of agents who have an account with Petitioner's web site and also subscribe to one of Petitioner's fee-based services (Products A-C) are approximately 3%-4% of all agents who have an account with Petitioner. Petitioner's Form 10-K refers to Products A-C as products that enable real estate professionals the opportunity "to promote themselves to potential buyers."

IV. Additional Features Included with Subscriptions to Petitioner's Products:

Petitioner's three paid services described above all include the following features, which Petitioner represents are incidental components of each Product: (1) "Component 1," which can provide an agent with further detailed buyer information; (2) "Component 2," which provides the ability for agents to show up in the Agent List of geographic areas with low market saturation; and (3) "Component 3," which is a service that provides agents with a special phone number in order to manage phone and email leads in the same place. Petitioner represents that there are no additional charges to subscribing agents of Products A-C for access to Components 1-3, and they are not available for sale separately.

Specifically, "Component 1" can provide an agent with additional potential buyer information, such as the buyer's moving timeframe, loan status, and whether the buyer is currently working with an agent. This additional information, however, is only available to an agent if a potential buyer selects to view an agent's advertised listing and also decides to contact the agent and provide certain requested information. Otherwise, a potential buyer's information is not provided by Petitioner to an agent who is using one of Petitioner's products. The "Component 1" information is a list of questions that are posed to potential buyers just after they elect to click "contact the agent" while on Petitioner's web site. The buyer can elect not to answer the questions. Based on Petitioner's tracking of Component 1, about 60% of buyers elect not to answer any of the Component 1 questions. Petitioner maintains the Component 1 information on a database for purposes of storing the information; however, no information is shared with another agent unless the buyer has chosen to contact that specific agent. The Component 1 service is merely passing on the information provided by the potential customer to the agent, and does not integrate, compile, or recast the information provided by the potential customer. The Component 1 feature was introduced in January 2012.

The "Component 2" feature allows agents to select certain cities and zip codes they are interested in, with the potential of generating more leads. If certain geographic areas are not fully capped in market demand under the Product B and Product C offerings, Petitioner will allow paying agents to show up in the Agent List for a given geographic area on a rotating basis to the extent there is excess supply of listings that need agents to fill. There is no guarantee that an agent will receive any additional leads by listing a geographic region in their Component 2 selection, but they may on occasion show up in an Agent List for the selected geographic location and, therefore, potentially receive an additional lead if a buyer decides to contact that agent. This feature essentially provides agents with the opportunity for additional advertising in areas with a low market saturation of agents. The Component 2 feature was launched in 2011.

Petitioner's "Component 3" feature was introduced in June 2011. The Component 3 feature provides product subscribing agents with an optional phone number provided by Petitioner, which potential buyers can use to contact an agent. This feature sends an automated text message or phone call notification to the agent when a potential buyer has sent a lead to the agent. These phone numbers are used only for purposes of routing responses to a particular agent, and the agent can make no other use of the number (e.g., the agent cannot make outgoing calls, etc.). The functionality of Component 3, such as the phone numbers and the ability to

route calls and emails, is provided by one of Petitioner's vendors for which Petitioner pays a fee based on the minutes of use and the number of phone numbers purchased. Agents have the option of not using Component 3. Without the Component 3 feature, a potential lead can still contact an agent by either calling the phone number listed near the agent's name on the search results page, or by clicking the "request info" button located at the end of all of the agents' names listed for a property. Component 3 is primarily a notification system so that the subscribing agent will receive a text message when it receives a new lead in its inbox. Component 3 also will have any phone messages included in the agent's inbox as an audio file. Component 3 brings agents' voicemails messages and email messages to the same number so an agent may have an easier time organizing and keeping track of them.

Components 1-3 are not offered separately from Petitioner's Products A through C and there are no additional charges to agents for access to, or use of, Components 1-3.

Analysis:

The Tax Law imposes sales and use tax on retail sales of tangible personal property, including prewritten software, and the sale, except for resale, of certain services. *See* Tax Law §§ 1101(b)(6); 1105(a), (b), (c). Among the services subject to tax is 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. Excluded from the tax on information services are advertising services and the furnishing of information that is personal or individual in nature and that is not or may not be substantially incorporated in reports furnished to other persons. *See* Tax Law §§ 1105(c)(1), (9); *see also* TSB-A-09(44)S.

For purposes of the exclusion from the information service tax, "[a]dvertising services consist of consultation and development of advertising campaigns, and placement of advertisements with the media without the transfer of tangible personal property. The furnishing of a personal report containing information derived from information services, by an advertising agency, to its client for a fee is not a taxable information service." 20 NYCRR § 527.3(b)(5). Advertisements have been defined in New York as "the action of making generally known; a calling to the attention of the public." *Matter of United Parcel Serv. Inc. v Tax Appeals Trib. of State of N.Y.*, 98 AD3d 796, 798 (2012), *lv denied* 20 NY3d 860 (2013) (internal quotations omitted).

Traditional advertising services include a range of transactions between advertiser and their clients. *Matter of Hudson Sheraton Corporation*, Tax Appeals Tribunal, September 29, 1988. Selling space on websites for advertising purposes constitutes an advertising service. *See* TSB-A-15(I)S and TSB-A-97(43)S.

When several distinct taxable items and non-taxable items are sold together for one non-itemized price, sales tax is due on the total sales price charged. *See* 20 NYCRR § 527.1(b).

Products A, B and C:

Petitioner engages in the business of providing a real estate website from which real estate agents and brokers can list and advertise their clients' real estate properties to the public for free. Potential buyers and renters also can use Petitioner's website for free in order to search for available properties they may wish to purchase or rent. Petitioner sells subscriptions to Products A-C, all of which in essence enhance an agent's advertising position on Petitioner's web site either by excluding all other potential agents' listings (Product A), or enhancing the likelihood that an agent's listing will be one of several featured in a certain geographical area (Products B and C). The percentage of agents that have an account with Petitioner's website and also subscribe to a fee-based service (i.e. Products A-C) is approximately 3%-4% of all agents who have an account with Petitioner. Charges for Products A-C are not contingent upon the closing of sales by agents. Products A-C are methods of allowing agents to better call an agent's existence and profile to the attention of potential buyers and the public in general. The utilization of websites to advertise brands constitutes non-taxable advertising services. *See* Sales Tax Reg. §527.3(b)(5), TSB-A-15(I)S, and TSB-A-97(43)S. Accordingly, Petitioner's Products A-C are non-taxable advertising services. *See Matter of United Parcel Serv. Inc. v Tax Appeals Trib. of State of N.Y.*, 98 AD3d 796 [2012]), *lv denied* 20 NY3d 860 (2013)

Components 1-3:

If utilized by a potential buyer, Component 1 provides a subscribing agent with additional information about that potential buyer who has seen the agent's advertisement. Component 2 allows a subscribing agent of Products B or C to potentially expand its advertising presence into underserved geographic markets. Component 3 offers agents the ability to receive a voice or text notification message when an agent is contacted by a new lead through the agent's advertisement with Petitioner.

It appears Component 1 and 3 would be taxable on a stand-alone basis. Component 1 appears to include the collecting and compiling of information and furnishing of reports of such information. Component 1, thus, would be a taxable information service under Tax Law §§1105(c)(1), (9). Because the information collected pursuant to Component 1 potentially could be shared with other agents, the exclusion from sales tax for information which is personal or individual in nature would not apply. Component 3 appears to be a telephone or telegraph service and/or telephone answering service subject to sales tax. *see* Tax Law §1105(b)(1), §1737. However, Component 2 appears to be a mirror extension of Products B and C and as such would be a non-taxable advertising service.

Components 1 and 3 are offered only to subscribers of Products A-C. Products A and B were both previously available to paying subscribers before Components 1 and 3 were ever offered. There have never been any incremental additional charges to subscribers of Products A-C for access to Components 1 and 3. Components 1 and 3 are not separately available to parties who do not subscribe to Products A-C. Agents may choose to not use Components 1 and 3, or may use them in such varying amounts that best meet their needs. Components 1 and 3 further the main advertising objectives of Products A-C as integrated parts of such products; however, Components 1 and 3 are not predominant features of Products A-C. Although Components 1 and 3 appear to constitute taxable services on a stand-alone basis, when considered in light of the Petitioner's facts as presented, Components 1 and 3 are merely integrated *de minimis* aspects of

the overall products offered by Petitioner. Accordingly, we analyze the tax status of Components 1 and 3 as part and parcel of Products A – C, rather than as separate individual products themselves. See TSB-A-15(1)S, Tax Law §1101(b)(3), *Penfold v State Tax Commission*, 114 AD2d 696 (1985). Under such circumstances they do not cause the entire products offered by Petitioner to be subject to sales tax and are not subject to taxation themselves. TSB-A-15(1)S, TSB-A-13(1)S, TSB-A-09(54)S, and TSB-A-13(12)S citing *Matter of SSOV'81, Ltd.*, Tax Appeals Tribunal, January 19, 1995.

DATED: May 27, 2016

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.