

Memorandum

295.1538

To : Mr. Philip R. Hendricks
Audit Evaluation and Planning Section
MIC:40

Date: February 27, 1996

From : Anthony I. Picciano
Staff Counsel

Subject: *P--- V--- B--- of R---*
SR -- XX-XXXXXX3

This is in response to your memorandum dated December 20, 1995, in regard to the application of sales tax to charges for multiple listing service publications received in consideration for payment of "membership fees."

In that memorandum you state:

"We are requesting a legal opinion regarding the application of tax to multiple listing service (MLS) publications received in consideration of payment of 'membership fees.' In a current audit of P--- V--- B--- of R--- (PVBR), staff assessed tax on a portion of 'membership fees' paid in connection with the sale of MLS publications. PVBR disagreed with staff's conclusion that a portion of the 'membership fees' were subject to tax, claiming that the fees were paid solely for the privilege of membership in a professional organization (as stated in the attached letter from the taxpayer).

"In a telephone conversation with a member of my staff, Industry District Supervising Tax Auditor Hong Tran, explained that membership in PVBR is open to any licensed Realtor upon payment of a one-time fee. Members must then pay in *additional* monthly 'membership fee' which allows the customer access to an on-line database of listed properties, extracts of which may be downloaded via modem; and the right to receive Multiple Listing Service publications, which are billed separately from the 'membership fee.' Additionally, Ms. Tran stated that the customer must pay the 'membership fee' to receive any Multiple Listing Service publications. District staff concluded that the portion of the 'membership fee' which represented charges to access the database and transmission of extracts via modem was for the performance of an exempt service. The remaining portion of the fee was considered paid in

anticipation of receiving tangible personal property, and therefore taxable. The auditor relied on Senior Tax Counsel Ron L. Dick's letter, dated January 6, 1992, to compute the portion of the 'membership fee' subject to tax, as indicated in the attached facsimile transmission (Question No. 6).

"In connection with researching background information requested by the Deputy Director, a member of my staff spoke with Mr. Dick to confirm the applicability of the district's percentage approach to allocate the portion of the membership fee subject to tax. Based on a brief description of PVBR's reporting method, Mr. Dick stated that it was his opinion that the membership fee is not subject to tax. He explained that, as long as the MLS publications were sold for a stated price, tax did not apply to the membership fee, as advised in a similar response to Question 1 in his January 6, 1992, letter.

"It is my opinion that some portion of the membership fee does represent the performance of an exempt service, i.e., the access to the database of property listings and transmission of extracts via modem; however, it also appears that tax would apply to a portion of the membership fee, as payment of the fee is required in order to receive the MLS publications. In view of these differences, I would appreciate your opinion on this matter. As completion of the audit is being held in abeyance pending your response, your earliest attention to this matter would be appreciated. Additionally, I understand that Ms. Pat Hart Jorgensen is currently assigned to respond to our previous request concerning the analysis of certain MLS publications for purposes of the 'ten percent news test.' . . ."

We understand that a Board of Realtors is a not-for-profit corporation which is run entirely by its membership. It operates in conjunction with the California Department of Real Estate along with the National and California Associations of Realtors and is like a governing body for the real estate industry. We also understand the P--- V--- B--- of R--- (PVBR) is charged with the governing of the Realtor in regard to his or her ethical and professional conduct. The public may address their complaints to this organization in regard to ethics or professional standards concerning a member. PVBR also prevents the unlicensed from being associated with board offices. PVBR provides education for Realtors to assist them in their renewal of their state licenses. Further, PVBR issues all legal briefs issued by the state or federal authority.

In addition to the services provided by the PVBR, PVBR sells MLS books to its members. In order to purchase the MLS books, an individual must also be a member of the PVBR. The charge for such MLS books is separate from both the membership fee for the MLS and PVBR is currently paying sales tax on those sales.

As you know, the retail sale of tangible personal property in California is subject to sales tax, measured by the gross receipts, unless the sale is specifically exempt from taxation by

statute or is a sale for resale. (Rev. & Tax Code § 6051.) The Board recently adopted (January 10, 1996) Sales and Use Tax Regulation 1584. Subdivision (a)(1) of Regulation 1584 provides that membership fees related to the anticipated retail sale of tangible personal property are includable in taxable gross receipts when either: (A) the retailer sells its products only to members and the membership fee exceeds a nominal amount, or (B) regardless of the amount of the membership fee, the retailer sells its products for a lower price to a person who has paid the membership fee than to a person who has not paid the fee.

Subdivision (a)(2) of Sales and Use Tax Regulation 1584 further provides that charges for membership fees not related to anticipated retail transactions are not subject to tax. Social organizations such as country clubs and other similar organizations are recognized as being essentially service organizations. Membership fees for service organizations are not related to anticipate a retail transaction even though such organizations may incidentally sell tangible personal property. At the January 10, 1996, public hearing, the Board agreed with the staff that membership fees for trade associations, such as the California Association of Realtors and the Multiple Listing Service, which are primarily service organizations, are not subject to tax.

It is undisputed that access to the database of property listings and transmissions extracts via modem represents the performance of a nontaxable service. The only question is whether a portion of PVBR membership fees are subject to tax.

Based on the extensive services provided by PVBR, our conclusion is that charges for the membership fees are not related to anticipated retail transactions. Therefore, under subdivision (a)(2) of Regulation 1584, charges for PVBR membership fees are not subject to tax. Because PVBR is essentially a service organization, subdivision (a)(1)(B) of Regulation 1584 is inapplicable. The true object of PVBR membership is to entitle its members to receive services provided by PVBR which are unrelated to anticipated retail transactions. Thus, the fact that the members of PVBR may be entitled to purchase certain products is a nominal benefit and is immaterial to the determination that the membership fee should not be included in the measure of tax.

I trust that this response adequately answers the questions that you have raised. If you have need for additional information, please do not hesitate to write again.

AIP:cl

cc: Mr. David Theiss (MIC:40)
Mr. Dennis Fox (MIC:40)