



UBT-2009-1
2/12/09

STATEMENT OF AUDIT PROCEDURE

REAL ESTATE SALESPEOPLE UNDER THE UNINCORPORATED BUSINESS TAX

I. BACKGROUND

Statement of Audit Procedures ("SAP") UBT 2008-1 provided guidance to auditors examining whether real estate salespeople were subject to the Unincorporated Business Tax (the "UBT"). That SAP established a safe harbor under which individuals meeting the requirements were classified as employees rather than as independent contractors subject to the UBT. Any individual who did not meet the safe-harbor requirements of SAP UBT 2008-1 was classified as an employee or independent contractor based upon an examination of the facts and circumstances of his or her particular situation.

This Statement of Audit Procedure simplifies the process an auditor should use to determine whether real estate salespeople are subject to UBT, by providing new safe-harbor requirements. This Statement of Audit Procedure applies for all open tax years for individuals acting as real estate sales people or associate brokers.

II. PROCEDURE

This SAP establishes a safe harbor under which individuals meeting the safe-harbor requirements are to be classified as employees and not independent contractors. Individuals meeting the safe-harbor requirements will not be subject to the UBT with respect to their activities as real estate salespeople or associate brokers.

An individual who does not meet the following safe-harbor requirements will be classified as an employee or independent contractor based upon an examination of the facts and circumstances of his or her particular situations.

A. Mandatory Safe-Harbor Requirements: To be classified as an employee and not an independent contractor under this safe harbor, an individual must meet the following requirements:

1. The individual holds a valid license as an associate real estate salesman under Article 12-A of the New York State Real Property Law.

2. The individual is affiliated with only one real estate brokerage firm at a time and all licenses held by that individual under Article 12-A of the New York State Real Property Law are held by that real estate brokerage firm or its wholly owned affiliates.
3. The individual must be subject to a minimum number of office hours or performance goals in terms of commissions earned or listings obtained set by the brokerage firm with which the individual is affiliated.
4. The individual must be subject to standards of behavior or to direction or training as to real estate sales techniques or be required to attend periodic meetings of sales staff.
5. If the brokerage firm with which the individual is affiliated carries errors and omissions, or comparable insurance coverage, the individual must be covered by the firm's insurance at no additional cost to the individual. If the firm does not carry such insurance, this requirement will be considered to be satisfied unless the brokerage firm requires the individual to carry similar insurance individually.
6. All printed materials used by the individual in connection with his or her real estate sales activity must display the name of the real estate brokerage firm with which the individual is affiliated.
7. The brokerage firm must provide the individual with office facilities, e.g. a desk, telephone, supplies, etc. at the offices of the brokerage firm at no cost to the individual. Facilities shared by more than one individual will satisfy this requirement.
8. All listings produced by the individual must be subject to approval by a supervising employee of the brokerage firm. The individual must not have any legal authority to bind the brokerage firm in any agreements, including but not limited to, commission agreements.
9. The individual may not claim a deduction on a Federal Form 1040 Schedule C for advertising expenses paid by the individual in excess of 25% of the individual's gross receipts from brokerage services.
10. The individual may not claim a deduction on a Federal Form 1040 Schedule C for employee compensation in excess of 25% of the individual's gross receipts from brokerage services.

B. Other Real Estate Related Regular Trade or Business Activities

Real estate salespeople or associate brokers who meet the safe harbor requirements above with respect to a particular brokerage firm will be classified as employees of that brokerage firm. In general, the activities of a real estate salesperson or associate broker as an employee of a brokerage firm (the "Brokerage Activities") will not be subject to the UBT.

However, certain salespeople or associate brokers may also engage in activities related to real estate (the "Non-Brokerage Activities"), including but not limited to real estate development, construction, demolition, architecture, interior decoration, mortgage brokerage, real estate appraisal, and the purchase and sale of real property.

The Audit Division must review the nature and frequency of the Non-Brokerage Activities to determine if those activities constitute a regular trade or business subject to the UBT (the Non-Brokerage Business"). If the facts indicate that the Brokerage Activities are performed in furtherance of or for the direct benefit of the Non-Brokerage Activities, the Brokerage Activities will be considered a part of the Non-Brokerage Business. Under these circumstances, compensation from the Brokerage Activities will be subject to the UBT as part of the Non-Brokerage Business filing **even if the real estate salesperson or associate broker is classified as an employee of a brokerage firm under the safe harbor described above.**

Examples:

1. Salesperson A is contacted by individual B regarding a potential listing of B's apartment for sale. In the course of discussions regarding the listing, A advises B that the apartment could be listed at a price of \$X. A further recommends to B that B have the apartment painted to make it more marketable. A giving advice about the listing price in and of itself does not mean that A is regularly engaged in the business of real estate appraisal. Similarly, A's advice regarding painting the apartment does not mean that A is engaged in the trade or business of interior design. No further examination is necessary.
2. Salesperson C owns two apartments in Brooklyn. She lives in one, and rents out the other to several different tenants over the course of several years before selling the second apartment to the final tenant. This fact is not, alone, indicative of status as a real estate dealer, and no further examination is necessary.
3. Salesperson D has just finished a degree in decorating at Pratt, and has started handing out business cards promoting her services as a decorator at open houses sponsored by the brokerage firm that holds her license. The Audit Division may determine that her non-Brokerage activities are regular enough to constitute a trade or business, and that her Brokerage Activities directly benefit her business.