

DEPARTMENT OF FINANCE AUDIT DIVISION

96-2-UBT 2/21/96

STATEMENT OF AUDIT PROCEDURE

REAL ESTATE SALESPEOPLE UNDER THE UNINCORPORATED BUSINESS TAX

I. Background

The proper classification of real estate salespeople as employees or independent contractors for purposes of the New York City Unincorporated Business Tax ("UBT") requires an examination of the facts and circumstances of each case. This Statement of Audit Procedure ("SAP") provides guidelines for auditors in making that examination. This SAP is intended to apply for tax years beginning on or after January 1, 1996 for individuals acting as real estate salespeople 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 situation.

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

1. The individual must hold one and only one valid license as an associate real estate broker or real estate salesperson under Article 12-A of the New York State Real Property Law.
2. The individual must be affiliated with only one real estate brokerage firm at a time, which firm must hold the individual's license and be named on such license.
3. All printed material 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.
4. 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.
5. 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.

6. The individual must qualify for nonemployee status under Internal Revenue Code section 3508¹ (Qualification for treatment under IRC section 3508 alone is insufficient to be classified as an employee for UBT purposes.)
7. The individual may not have any employees of his or her own. If the individual claims a deduction on a federal Form 1040 Schedule C for commissions or other compensation paid, this requirement is not met.
8. The individual may not take a deduction on a federal Form 1040 Schedule C for a home office. Separate deductions for telephone, automobile, entertainment, travel or postage expenses or for contributions to a Keogh plan, including a SEP, on a Schedule C are permitted.
9. The individual may not engage in purchases or sales of real estate as a dealer. A finding of dealer status for purposes of this requirement will be based on the facts and circumstances of each case, however, holding a rental property for an extended period of time is not, alone, indicative of status as a real estate dealer.
10. The individual may not engage in any other regular trade or business activities related to real estate in his or her individual capacity including but not limited to real estate development, construction, demolition, architecture, interior decoration, mortgage brokerage, or real estate appraisal. For example:

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. Neither A's advice regarding the listing price nor A's advice regarding painting the apartment constitute activities as a real estate appraiser or as an interior decorator so as to constitute a trade or business that would cause A to fail to meet this requirement.

11. The individual may not, in his or her own name and in his or her capacity as a real estate salesperson or associate broker:

receive checks for commissions or other payments from any person other than the brokerage firm with which he or she is affiliated;

be a party to a brokerage or co-brokerage agreement; or

advertise a property for sale or lease.

B. Additional Safe-Harbor Requirements To be classified as an employee and not an independent contractor under this safe harbor, an individual must meet at least three of the following requirements in addition to meeting all of the requirements listed in A above:

1. The individual must be subject to minimum office hours or performance goals in terms of commissions earned or listings obtained set by the brokerage firm with which the individual is affiliated.
2. 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.

¹ In 1982, Congress enacted section 3508 of the Internal Revenue Code to provide statutory nonemployee status to certain real estate salespersons.

3. The individual may not claim a deduction on a federal Form 1040 Schedule C for advertising expenses paid by the individual for advertising in the name of the brokerage firm with which the individual is affiliated.

The individual must be subject to periodic written performance evaluation. This requirement is met if the salesperson has a written agreement with the brokerage firm that is subject to annual or periodic renewal and that may be terminated or not renewed by the brokerage firm for reasons related to performance.

4. If the brokerage firm with which the individual is affiliated carries errors and omissions, or comparable insurance coverage, the individual must be covered by such insurance at no additional cost to the individual. If the firm does not carry such insurance, this requirement will be deemed to be satisfied, provided the brokerage firm does not require the individual to carry such insurance.