

# New York City Unincorporated Business Tax: A Trap for the Unwary Independent Contractor

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Recently the Board of Directors of the Westchester-Putnam Multiple Listing Service, Inc. elected to require that Participants of the Multiple Listing Service who take listings in the Borough of the Bronx submit to the MLS all of their listings and not only the listings they select. The reason the Board of Directors made this decision was based upon the fact that WPMLS had approximately 1,100 listings of properties in the Bronx and real estate agents typically now regularly cross the magical line to market properties in Westchester and the Bronx.

## **New York City Unincorporated Business Tax**

Many real estate licensees are unaware that the City of New York imposes a New York City Unincorporated Business Tax on any independent contractor or unincorporated business entity which carries on a trade or profession wholly or partly within New York City. There are exemptions when total gross income is less than \$75,000 and the unincorporated business taxable income is less than \$35,000. Brokers were frequently audited during the early 1990s and many independent contractor salespersons were shocked to learn that their net income was subject to a 4% UBT ("Unincorporated Business Tax") because they were selling properties within the City of New York.

When a Westchester-based broker actively markets property in the City of New York the UBT will apply.

## **Statement of Audit Procedure**

On February 21, 1996 in response to complaints of many real estate brokers who were then being audited by the City of New York, New York City's Department of Finance issued a Statement of Audit Procedure (96-2-UBT) entitled Real Estate Salespeople Under the Unincorporated Business Tax.

This Statement of Audit Procedure provides a "safe harbor" for licensed real estate brokers and broker associates who are employees of real estate brokerage firms. True independent contractors however do not qualify for this exemption. Unlike true independent contractors, the employee real estate agent affiliated with a brokerage firm and claiming safe harbor coverage, is a person who is subject to minimum office hours, performance goals, standards of behavior, direction or training, mandatory attendance at sales meetings and inability to advertise properties at their own expense, periodic written obligations and may

not carry their own errors and omission insurance coverage. That would eliminate most independent contractors under current state laws from being within the safe harbor rules.

### **Does this Apply to You?**

A licensee operating in the Southern Westchester Community who regularly markets properties in the Bronx must know that he or she would not meet the safe harbor requirements of 96-2-UBT. In fact that salesperson would be required to file unincorporated business tax returns allocating to the City of New York, that portion of their commission income derived from activities within the City of New York.

While the law does provide a \$10,000 base exemption, whatever net income is derived in excess of the \$10,000 (or 20% of net income whichever is lower), is subjected to the UBT at the rate of 4%.

If a salesperson fails to file the tax returns required by the City of New York there is no statute of limitations limiting the City of New York from pursuing the individual salesperson or the unincorporated brokerage firm. Moreover, the failure to file and pay the applicable taxes will result in the imposition by the City Department of Finance of interest and penalties.

### **Allocating Income**

The New York City UBT does permit a person who is based in Westchester but who markets property in both Westchester and in the Bronx (or the other Boroughs as well), to make certain allocations of their income between New York City and the income derived from outside of the City of New York. That allocation formula does not exempt the person from filing a tax return or from paying the tax on the portion of the income which is allocable under the City guidelines. Since January 1, 2005, taxpayers are required to use what is referred to as the "formula method". The formula method allows the taxpayer to pay the tax on a portion of the taxpayer's income based upon the formula.

### **How to Comply**

The form to be filed by salespersons and by unincorporated business entities which sell property in the City of New York even if they are not based in the City of New York, is form NYC-202 (Unincorporated Business Tax Return). The form is available from the New York City Department of Finance and can be obtained through their customer assistance line from 8:30AM – 5:30PM Monday through Friday at (212)-504-4036. The City also has an internet website at [www.nyc.gov/finance](http://www.nyc.gov/finance).

## **Failure to Know About the Tax May Have Other Consequences**

If a real estate licensee is at some point determined to be liable for Unincorporated Business Tax returns which have not been filed and is assessed taxes, interest and penalties which are not paid, the failure to file the tax returns and the failure to make payment of same may be deemed to be an act of untrustworthiness by the New York State Department of State (D.O.S.). D.O.S. licenses real estate salespersons and brokers in the State of New York. Not only can the tax, interest and penalties accruing from the failure to file be burdensome, the inability to make payment of these taxes can result in the loss or suspension of the license of a real estate licensee.

### **What Should You Do Now?**

If you are a person who maintains facilities in the City of New York or operates in Westchester and markets property in the City of New York (the UBT is applicable to all five boroughs) you should immediately review with your accountant, any requirement which may exist for the filing of an unincorporated business tax return. If you have failed to file returns in the past, discuss with your accountant the procedures for preparing the tax returns for past years and submitting them at the earliest possible date.