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# REAL ESTATE WEEKLY

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## The price of doing real estate business just went up — again

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It recently got more expensive to close a real estate transaction in New York.

I wanted to make you aware that now certain documents are subject to a sales tax, but it's not considered a tax increase.

The change began on Sept. 1, 2010 that sales tax will be collected on the delivery of certain title abstracts and document searches, such as good standing certificates, related lien searches and zoning lot certifications.

It may not be a large amount of money, but it is still an additional cost.

This important issue was reported by Joseph Lipari and Debra Silverman Herman, partners at Roberts & Holland, LLP in The New York Law Journal. I wanted to summarize the issue and used excerpts from the article to explain the change.

The modification was not required by any change to existing Sales Tax Law. Rather, it resulted from new administrative guidance issued by the New York Department of Taxation and Finance in July of this year, in the form of a Technical Services Bureau Memorandum or TSBM.

The Tax Department regularly issues TSBMs to set forth its policy, often in connection with legislative changes.

Over the years, the courts and administrative tribunals that have considered the breadth of the information services tax

have focused on the "primary function" of the service (the "Primary Function Test") when determining whether any particular service is subject to sales tax as an information service.

The Tax Department TSBM reverses the Primary Function Test, resulting in the application of the Sales Tax to title reports and good standing certificates.

As pointed out in the NYLJ article, private companies who provide abstracts of title are simply arranging to pick up the information from the government and transmit it to the client. They are not providing an information service.

One would not think that a company that delivers newspapers or copies of printed materials from a publisher to a customer is engaged in an information service but in a transportation

service.

The Tax Department is also reversing its prior correspondence which indicated that sales of abstracts of title were not subject to Sales Tax.

Therefore on or after Sept. 1, 2010 sales of an abstract of title to either a prospective purchaser of real estate property or to an attorney who uses the abstract in connection with an opinion of title are now considered taxable information services and subject to sales tax.

The TSBM also concluded that a title search conducted by an attorney is exempt as the provision of legal services. Other dif-

ficult issues arise when the sale of the abstract is in connection with the sale of title insurance. Since insurance is not subject to Sales Tax, it is unclear whether the abstract of title is taxable when included in the sale of title insurance.

Several state and local tax practitioners believe that the Tax Department's policies set forth in the TSBM are inconsistent with the principal test — the Primary Function Test — applied by the New York courts and administrative Tribunals when determining whether a service is a taxable information service.

For these reasons, the positions taken in the TSBM may be challenged.

**In other REBNY news:**

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