

DATE: January 8, 1991

TO: Conny M. Jamison, City Treasurer
FROM: City Attorney
SUBJECT: Taxation of Real Estate Salespersons

BACKGROUND

In November you sent a memo to this office asking whether real estate salespeople, or associate realtors, should be considered employees under "our Business Tax Code." We assume that you refer to San Diego Municipal Code section 31.0101 et seq. In subsequent conversation, you said that the City Auditor is under the assumption that all real estate salespeople are independent contractors, but that the San Diego Association of Realtors claims that salespeople should be considered employees. If the answer is unclear under the existing Code, you asked that we suggest appropriate action to clarify this issue, i.e., whether it could be handled administratively, or whether a Code revision would be in order.

ANALYSIS

We begin our analysis with the definition of "employee" found in San Diego Municipal Code section 31.0110(c). In that section, Business Taxes - Definitions, subsection (c), "'EMPLOYEE' refers to a person defined in Title 22, section 4304-1 of the California Administrative Code." That section of the Administrative Code is contained within Title 22, Social Security, Division 2.5, Withholding Tax on Wages, and states in pertinent part that:

The most important factor is the right of the principal to control the manner and means of accomplishing a desired result. If the principal has the right to control the manner and means of accomplishing the desired result, whether

or not that right is exercised, an employer-employee relationship exists. Strong evidence of that right to control is the principal's right to discharge at will, without cause.

That section of the California Administrative Code as well as the following section, 4304-2, Specific Application of Rules for Determination of Employment Status to Circumstances in the Real Estate Industry, provides specific application of section 4304-1 rules to the real estate industry and

incorporates quite extensive criteria to be examined in each individual case to determine whether a person is an independent contractor or an employer. It is unrealistic for The City of San Diego to attempt to answer numerous questions in every single business tax case where a real estate salesperson is involved.

You informed us that the San Diego Association of Realtors claims that federal and state law treat real estate salespeople "differently." In fact, statutes do differ according to the context in which the question is raised. For example, regarding federal employment taxes, 26 USCS 3508(a)(1) states that "a real estate agent shall not be treated as an employee." However, under California law, a real estate salesperson cannot act as an in-dependent contractor, but must work under a broker. Real Estate Regulations, found in California Business and Professions Code, section 10130 et seq., are quoted here in pertinent part:

Section 10132. Salesman

A real estate salesman . . . is a natural person who, for a compensation or in expectation of a compensation, is employed by a licensed real estate broker to do one or more of the acts set forth in other Sections

Section 10137. Unlicensed persons, employment; salesman payments through broker; violations

No real estate salesman shall be employed by or accept compensation from any person other than the broker under whom he is at the time licensed.

Section 10151. Salesman; application

Application for the real estate salesperson license examination shall be made in writing to the commissioner. . .

Section 10160. Custody of salesman's license

The real estate salesman's license shall remain in the possession of the licensed real estate broker employer until canceled or until the salesman leaves the employ of the broker; and the broker shall make his license and the licenses of his salesman available for inspection by the commissioner or his designated representative.

Section 10177. Grounds for suspension or
revocation of license

The commissioner may suspend or revoke
the license of any real estate licensee

...

(h) If, as a broker licensee, failed to
exercise reasonable supervision over the
activities of his salespersons.

In addition, a California appellate court, Second District,
has held that "for purposes of the administration of the real
estate law, the salesperson is the employee and agent of the
broker." Grubb & Ellis Co. v. Spengler, 143 Cal. App. 3d 890,
895 (1983).

CONCLUSION

California statutes hold that real estate salespeople must work
under a broker; hence, they are employees of that broker.
Therefore, for purposes of the City's Business Tax Code, real
estate salespersons should be considered as employees, not as
independent contractors.

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By

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