

First American Title Insurance Company of New York

Current Developments

SPECIAL EDITION

SALES TAX

As reported in Current Developments issued August 2, 2010, effective September 1, 2010, certain title related services provided in connection with real estate or a cooperative unit situated in New York by title insurance companies, title insurance agents and examining counsel, whether or not they are located in New York, will be subject to the collection of New York State and local sales and compensating use taxes.

Services subject to tax include, but are not limited to, the following, when the product is delivered to the customer on or after September 1, 2010: title reports when no policy of title insurance is to be issued, lien searches, municipal and tax searches, copies of public records, and service charges imposed in connection with any such Information Services.

Information is set forth in the New York State Department of Taxation and Finance's Memorandum (TSB-M-10(7)S) dated July 19, 2010 titled "Sales and Compensating Use Tax Treatment of Certain Information Services", posted at http://www.tax.state.ny.us/pdf/memos/sales/m10_7s.pdf, and in a series of questions and answers, titled "Sales and Compensating Use Tax Questions Regarding Abstracts of Title", accompanying this Bulletin, which has been provided by the Department in advance of its formal release.

Sales tax will not be charged on the premium paid for issuance of a title insurance policy, on which a premium tax is paid to New York State.



First American
Title Insurance Company

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SALES AND COMPENSATING USE TAX QUESTIONS REGARDING ABSTRACTS OF TITLE

Transaction Questions:

1. Where a title insurance company (“title company”) or title agent orders an abstract/examination of title from an abstract search company (“search company”) in connection with the issuance of a title report and title policy for a purchaser or purchaser’s attorney, to be delivered at closing, who would be responsible for the collection of any sales tax due on such examination/abstract of title?

A - The title company or title agent would have to pay the tax to the search company, which would have to register for sales tax purposes, collect the tax, and file sales tax returns, remitting the tax with the return.

Follow-up Question: If a search company delivers an abstract of title and fails to add the sales tax to its bill to the title company or title agent that ordered the search, is the title company or title agent that ordered the abstract of title responsible for the tax?

Yes, the title company/title agent would be liable for the uncollected sales or use tax in that instance and would be required to pay the tax to the Tax Department.

2. Where a tax search is ordered from an independent search company, would the tax search be subject to sales tax if it was not ordered in conjunction with the production of a title report?

A - The taxability of a title company’s purchase of a tax search depends on whether the title company is going to use the tax search in the course of preparing its title insurance policy. Where the tax search is going to be used in preparing the title insurance policy, the title company’s purchase of the tax search is taxable. If the title company is not preparing a title insurance policy, but rather is just re-selling the tax search to its customer, the title company may purchase the tax search for resale, without paying sales tax, by giving the search company a resale certificate. In that case, the title company would have to register for sales tax purposes, collect sales tax on the sale of the tax search to its customer, file sales tax returns, and remit the tax.

3. The Title Insurance Rate Service Association Rate Manual allows a title company or its agent (a “Company”) to impose additional work charges in issuing title insurance for especially difficult titles. Extra charges may be made at or after the receipt of the application for examination of title which may involve additional tax lots, multiple chains of title, land under water, land in bed of streets, rights-of-way, driveways, easements, strips and gores, foreclosures, proceedings under federal bankruptcy or state insolvency related statutes, or which involve other unusual difficulties, or for unusual expenditures for travel, or for recording instruments, telephone, telegraph or delivery charges. Are these additional work charges subject to sales and compensating uses taxes?

A - If these additional charges are made by a title company as part of its charges to issue a title insurance policy, the charges are for the title insurance policy and would not be taxable. In other words, the amount of work or extra work performed does not alter the taxability of the underlying product.

4. Are title reports and certificates, such as certificates of title not prepared for the issuance of a policy of title insurance, lien searches, foreclosure certificates, cooperative unit searches, and zoning lot parties-in-interest certifications, subject to Tax?

A - Assuming that each of the certifications represents the Company's certification of some set of facts ascertained through searches of public databases and do not constitute insurance products, then they would all be taxable information services.

Follow-up Question: If a certification sets forth an amount of liability the Company could have under a certification, is it an insurance product for the application of the sales tax?

A - If the certified abstract is an insurance product, it would not be a taxable information service, but, in the absence of authority to that effect, the mere listing of a liability amount would not make a certified abstract into something other than an information service.

5. Is the Tax to be applied on the delivery of municipal searches? If so, is it charged by the Company to its customer or by the service company to the Company?

A - A search company's search of municipal records and the sale of the results would constitute a sale of a taxable information service. The answer to the question regarding at what level the tax would be imposed depends on whether the municipal searches are insured under the title insurance policy. If, as seems to be the case, they are not insured by the policy, but are provided by the title company as an accommodation to its customer, then the title company's purchases of the municipal searches from a search company would qualify for the resale exclusion if the title company gave the search company a resale certificate. In that case, the title company would have to register for sales tax purposes, collect the tax on these sales, file sales tax returns, and remit the tax.

6. If a Company charges a service charge to administer the ordering and forwarding municipal searches, is the Tax to be applied to the service charge as well?

A - Yes, if the services are not insured under the title company's title policy.

7. Is the Tax to be applied to the Company's charge for ordering and delivering the results of a land survey conducted by a licensed surveyor where the results of the land survey are incorporated into the title report?

A - No, because charges for the performance of a land survey by a licensed surveyor are not subject to sales and use tax.

Follow-up Question: What about the providing to a Company of a report by a non-surveyor on whether or not there are any changes to the state of facts as shown on an existing land survey? The service by the non-surveyor involves visually inspecting the real property and comparing it to the survey and noting any changes, such as a fence that was on the original survey but has been removed. No measurements are taken.

A - This is a nontaxable service.

8. When a title company, without issuing a title insurance policy, charges its customer for providing certified copies of instruments from the public records is a Tax to be charged and, if the Company imposes a service charge, is that subject to Tax?

A - The charge for the copies and the service charge would all be taxable.

9. When a Company charges its customer for corporate certificates of good standing and reports as to whether a company owes franchise taxes is a Tax to be charged and, if a Company imposes a service charge, is that subject to Tax?

A - The charge for the certificate and the additional service charge would all be taxable, assuming no title insurance policy was issued.

Follow-up Question: If a title policy is issued but the Company charges its customer for the above searches, is sales tax to be imposed?

A - If the customer must pay these additional charges in order to get the title insurance policy, these charges are considered to be charges for the title insurance policy and are thus not taxable.

10. If the abstract of title is produced through the search of a private database or national search engine, is the search taxable?

A - A charge for a search of a private database or national search engine for the purpose of preparing an abstract of title would be a taxable information service unless the resale exclusion applies as discussed above.

Zones Questions:

11. In Zone 2, where the cost of the abstract is included in the insurance premium, is the title company or agent responsible for collection of the tax? If so, on what amount is the sales tax payable? Who is the primary party responsible for payment of the tax?

A - The title company or the title agent is selling title insurance and is using the abstract in its business. Therefore, the title company or title agent must pay sales tax on its purchase of the abstract and should not collect tax on any portion of its charge for insurance. If the Insurance Department permits the title company to assert a charge labeled "sales tax recovery fee," such a charge would not be considered to be sales tax, but rather a pass-through of a tax borne by the title company or title agent.

12. In Zone 1, the abstract of title is billed separately from the title premium and neither charge is collected until the closing of title. Who is the primary party responsible for payment of the tax?

A - You have told us that in Zone 1, under certain circumstances the seller of the real property must obtain an abstract of title, while in other cases the purchaser of real property is the party that obtains the title abstract. You have further explained that in Erie County the seller must obtain a guaranteed abstract of title. In general, whoever buys the abstract of title from the search company must pay the sales tax to the search company and whoever sells the abstract of title must register for sales tax purposes, collect the tax, file sales tax returns, and remit the tax due with the returns. A guaranteed abstract of title, however, appears to be an insurance product, as Insurance Law section 6403(b)(2) makes issuance of guaranteed searches the doing of an insurance business. Thus, the sale of a guaranteed abstract of title is not subject to sales tax, but if an issuer of a guaranteed abstract of title buys a title abstract from a search company, the search company would have to register for sales tax purposes, collect sales tax on the sale, and report and remit the tax.

Follow-up Question: You indicate that an insured product is not sales taxable and that a guaranteed search is an insurance product. Is a certification by an underwriter or agent of a search of the record considered to be an insurance product, analogous to a guaranteed search, notwithstanding that there is no stated amount of possible liability in the search?

A - Same answer as in regard to question 4, above.

13. In Zone 1, in certain circumstances, an Attorney in private practice who is representing one of the parties may prepare and issue a title report to a Title company. Based on that title report the Company will issue a title insurance policy and remit a portion of the premium to the Attorney. The premium is paid for the services performed by the Attorney, including his or her closing attendance and the preparation of the title report. Is the portion of the amount remitted to the Attorney for the title report subject to Tax?

A - Since a non-lawyer is legally authorized to prepare a title report, then a lawyer's issuance of a title report would not be a legal service. In that case, the payment by the company to the lawyer for the title report is subject to sales tax because it is the payment for an information service. It is possible that some part of the payment to the attorney is for services other than preparing the abstract, in which case that part would not be subject to sales tax, but we would need further information to make that determination.

Follow-up question: In those jurisdictions in Zone 1 where it is customary for the seller to provide and pay for the abstract of title at the request of an examining counsel (usually the buyer's attorney), a Title Company or Title Agent opens a file and issues an invoice for the title premium and applicable endorsements based upon information provided by the examining counsel. The examining counsel then examines the abstract, issues a title report, clears and closes the title. A closing package including a marked up report, copies of curatives and the premium check is then sent to the Title Company which issues the final policy. Are the services of the examining counsel subject to sales tax?

A - No.

Administrative and Other Questions:

14. If title does not close or is cancelled for any reason, is there a sales tax due?

A - Tax is only due if there is a sale; if the failure of the closing to occur means that the title company does not owe the search company any consideration, then no tax would be due.

Follow-up Question 1: Assume the following scenario: the title company or title agent buys the abstract of title and tax search, pays the sales tax to the search company for the abstract and the tax search, also obtains municipal searches from a search company, and issues a tax exemption certificate to that company. The title company or agent prepares a title report and sends the report and the municipal searches (which are provided as an accommodation only and not as part of the insurance product) to its customer prior to closing. The closing is then cancelled and the title does not close.

Is there a tax due on the municipal searches?

A - If the closing is cancelled and the Title Company does not charge the would-be customer for those items, the Title Company doesn't have to collect tax. However, in that case, the title company would not be entitled to any refund of the sales tax it paid when it purchased the abstract.

Follow-up Question 2: If the Title Company or title agent imposes a cancellation charge on its customer for the title abstract, tax search and municipals, is the cancellation fee taxable?

A - Assuming that the items are not used by the title company and are not transferred to the customer, the Tax Department would treat the cancellation charge as nontaxable.

15. If the examination/abstract of title were performed by an employee of the title company or title agent rather than by an independent search company, would there be a sales tax due?

A - No sales tax would be due because payments to employees are not subject to sales tax.

16. Is the Tax to be applied to the actual charges to record instruments? Is there a distinction if the instruments are recorded in connection with a transaction being insured or if they are being recorded merely as an accommodation without insurance?

A - Charges for recording instruments are not subject to sales tax, regardless of whether the transaction is insured or not.

17. If the tax is collected for the State, is it automatically collected also by local tax authorities also collecting their own sales tax?

A – Local authorities do not collect their sales and use taxes. Rather, the seller of the abstract would collect both the State and local sales taxes, report the total on its sales tax return, and remit that amount to the Department. The Department handles the distribution of the sales tax imposed by the locality.

Follow-up Question: It is my understanding that there is an on-line sales tax rate calculator on the State website that will calculate the rate of tax, including the combined rate where there is a local tax involved. It might be a good idea to include the website address to assist those who have to calculate and collect the tax.

A - We agree. <http://www8.nystax.gov/STLR/stlrHome>

18. If the abstract is produced by a company in another state or country, is the search taxable?

A – This question could be interpreted in two ways. One is the following: When a person produces a title abstract at its office outside NY, must that person pay sales tax on its purchase of the real property records search service that was presumably performed in NY? Read that way, the short answer is that the purchase of an information service, including a search of real property records, would not be subject to NY state or local sales or use tax, if the seller of the search service delivers the information it found to a purchaser located outside NY. If the purchaser of the abstract information subsequently uses the information in New York, however, use tax would apply, as discussed below.

An alternative reading of that question is the following: What is the taxability of a title abstract service produced outside NY? The answer is that it doesn't matter where the abstract is produced; what matters is where it is delivered and used. If the abstract is compiled remotely in another State but then delivered to the customer (i.e., the title company) in NY, the sale would be subject to State and local (county and/or city) sales taxes at the combined rate in effect where it is delivered. If the search company that produces the report has nexus with New York, it would be a "vendor" under Tax Law section 1101(b)(8) and it must register for sales tax purposes, collect the tax due, and remit the tax with its sales tax returns. If the search company does not have nexus, then the title company to which the abstract was delivered would have to report and pay the uncollected sales tax directly to the Commissioner of Taxation and Finance. If the title company is itself registered for sales tax purposes, it would report the tax due on its purchase of the abstract on its sales tax return and pay the tax with that return. If the title company is not registered for sales tax purposes, the title company would report the tax on Form ST-130, Business Purchaser's Report of Sales or Use Tax. See Tax Bulletin Do I Need to Register for Sales Tax (TB-ST-175).

In addition to owing State and local sales tax on its purchase, the title company that purchased the abstract would owe additional local use tax if it uses the abstract in another jurisdiction in NY that has a higher local tax rate than the local rate that applied in the jurisdiction where the abstract was originally delivered, but only to the extent of the difference between the two rates. For purposes of the use tax, the abstract would be used in another jurisdiction if the abstract itself or the title report derived from the abstract were to be used by the purchaser (i.e., the title company) in the other jurisdiction. An example of when the abstract would be subsequently used by the purchaser in another jurisdiction would be sending the abstract to a title company's main office to be reviewed and analyzed in the process of issuing a title insurance policy. Another example is the use by the purchaser of a title report derived from the abstract at a closing in a different jurisdiction from where the abstract was originally delivered.

Follow-up Question 1: The title company is to pay the sales tax if the search company does not have a nexus with New York. What standard is the title company to apply to make this determination?

A - The title company has to pay sales tax directly to the Department whenever the vendor fails to collect it. So the title company never has to figure out if the vendor has nexus with the state.

Follow-up Question 2: Local sales tax appears to be payable based upon the location of the Company to which the abstract is delivered. Accordingly, if a Company in New York County receives the abstract, the New York City sales tax rate is to apply. What if, however, the tax is collected not by the search company but by the Company either as the provider of the information or under a resale certificate and the parties to the transaction are in multiple, different locations?

Assume a transaction in which the title company takes delivery of the abstract in New York County, the property is located in Erie County, the Seller's counsel is located in White Plains, in Westchester County, the Buyer's Counsel is located in Nassau County, and the Lender's Counsel is located in Manhattan. Each of these parties receives the taxable information.

What determines the local sales or use taxes, as applicable, that apply and how are the local taxes assessed as amongst the parties?

A - The applicable local sales tax rate would be that of the jurisdiction to which the search company delivered the abstract to the title company and the tax would be owed by the purchaser, i.e., the title company. If the title company then uses the abstract information in another jurisdiction with a higher local sales tax rate, it would owe use tax based on the difference in rates. Use tax necessitates a use by the purchaser in a jurisdiction in which the purchaser is a resident. In this context, "use" requires the title company or its agent to exercise any right or power over the abstract information.

For example, a title company is asked by the purchaser of real property located in Zone 2 to provide title insurance. Assume that (a) the title company purchases an abstract of title and has it delivered to its offices in Jurisdiction 1, where the abstract is analyzed and a title report is prepared; (b) the title company mails a copy of the abstract to its independent contractor attorney at his or her office in Jurisdiction 2 for the preparation of an opinion of counsel; (c) the title company also mails the title report at no charge to the real property seller in Jurisdiction 3; and (d) the title company marks up the title report at the closing in Jurisdiction 4. Under these facts, the title company would only owe use tax in Jurisdiction 4 where the closing occurred and would only owe additional sales and use tax if the local tax rate in Jurisdiction 4 was higher than the local rate in Jurisdiction 1. The title company does not owe use tax in Jurisdiction 2 because it is the independent attorney, not the title company, that uses the abstract information there. Likewise, the title company does not owe use tax in Jurisdiction 3 because it did not use the abstract information there.

Similarly, if the issue is the title company's sale of taxable search services, the title company would collect sales tax based on where it delivered the search.

19. How will the sales tax apply to a company out of state which pulls NY public records and sells them out of state?

A - If the NY public records are delivered outside NY to the out of state company and that company then sells them outside NY, there would be no NY State or local sales tax due on either that company's purchase or its subsequent resale of the records outside NY. But if the out of state company uses the NY records to produce a title abstract and sells the abstract to an out of state purchaser, the title abstract purchaser would be subject to NY state and local use tax if that purchaser later brings it into NY for use here and that purchaser was a resident of NY at the time it purchased the abstract out of state.

As stated above, the abstract is considered to be used in NY if the abstract itself or a title report derived from the abstract is used in NY. An example of when the abstract is used would be sending the abstract to a title company's main office in NY to be reviewed and analyzed in the process of issuing a title insurance policy. Another example is the use of a title report derived from the abstract at a closing in NY.

Follow-up Question: If the real estate transaction closes outside of New York and the abstract is not reviewed in New York is the abstract being brought "into NY for use here"?

A - If there is no delivery of the abstract to the purchaser in New York, and no use of the abstract information in New York, there would be no sales and use tax liability in New York.

20. Will the Department provide a definition of an "abstract of title" (or examination of title) for the Title Industry?

A - We are not planning on defining the term because the issue is whether an information service is being conducted, not whether a title search, per se, is being done.

Administrative and Other Questions:

21. Is the imposition of a sales tax on abstracts of title to be imposed only on examinations/abstracts of title ordered on or after September 1, 2010?

A - The taxability of the sales would depend on when the abstract is delivered. If the abstract is delivered on or after September 1, it will be taxable, even if it was prepared prior to that date.

22. Will abstracts of title completed prior to September 1, 2010, but where title does not close until on or after September 1, be subject to tax?

A - Taxability again depends on the date the search company delivered the title abstract to the title company or title agent. So the only relevance of the date of the closing would be if the date of the closing controlled the delivery date of the title abstract.

Follow-up question: If a municipal search product was delivered to a title company on 8/31/10 but not delivered to the end user until 9/2/10, does the sales tax apply to that product?

A - If the title company is not issuing a title insurance policy covering the municipal search product, and the search company delivers the results of the search to the title company prior to September 1 and the title company re-sells the municipal search to its customer with delivery occurring after September 1, the title company's purchase of the search is not taxable, but its sale of the municipal search product after 9/1/10 is taxable.

Additional Questions:

23. Are charges to down date a policy in connection with a loan policy of title insurance already issued, which charges have been authorized by the Insurance Department, subject to sales tax?

A - We understand that down-dating involves updating a title insurance policy in the context of a construction loan to guarantee that no additional encumbrances on the real property have occurred since the lender advanced the last loan increment. The charge for down-dating the title insurance policy is not taxable because it is the charge for an insurance product. But the title company's purchase of the information used in down-dating the title insurance policy would be taxable as an information service.

24. Are charges for closing services, such as the attendance of a closer at the closing of a transaction, including any gratuities that may be paid to a closer, subject to sales tax?

A - For the purposes of answering this question, it is assumed that the closer's duties at the closing involve marking up the title report, and accepting affidavits and checks from the parties to the closing, and transferring those documents to the title company. These services are not taxable.

25. In the case of a national title company with multiple offices in New York and out of this state, does each office have to apply for a separate Certificate of Authority? Can the Company file consolidated sales tax reports or can a single consolidated report be filed with a single remittance of tax? If so, can the report include information and the remittance of tax from subsidiary companies?

A - A business entity with multiple locations can get one Certificate of Authority (COA) and file a consolidated return, but a subsidiary with a different EIN would have to get a separate COA for itself and file separate sales tax returns. For more information, see Tax Bulletin How to Register for New York State Sales Tax (TB-ST-360).

26. An abstractor provides information which the Title Company or Title Agent uses to prepare an abstract of title which is then sold to the end user. Does the Title Company/Title Agent have to pay sales tax to the abstractor or can it be deemed a purchase for resale with the abstractor giving the Title Company or Title Agent a resale certificate?

A - If the Title Company is buying the abstract to resell it and not to use it to issue title insurance, the Title Company can buy it for resale and, if it is registered for sales tax purposes, may use a resale certificate to buy the abstract without paying sales tax. If it is going to use the abstract in preparing title insurance policy, then it must pay tax when it buys the abstract.

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No. 125. August 23, 2010

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