

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-03(34)S
Sales Tax
September 3, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S010905A

On September 5, 2001, the Department of Taxation and Finance received a Petition for Advisory Opinion from Nassau County Museum of Art, One Museum Drive, Roslyn Harbor, New York, 11576.

The issues raised by Petitioner, Nassau County Museum of Art, are whether sales tax is required to be collected on the proceeds from the auction sale of artwork and other items where the items:

- 1) are *donated* to Petitioner and sold at live and silent auctions where either
 - a. Petitioner's employees conduct the auction, or
 - b. the auction is conducted by a professional auctioneer, or
- 2) are *consigned* to Petitioner and sold at live and silent auctions where either
 - a. Petitioner's employees conduct the auction, or
 - b. the auction is conducted by a professional auctioneer.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a charitable organization, and is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code and from sales tax under section 1116(a)(4) of the Tax Law. Petitioner conducts from one to three auctions each year. Petitioner currently conducts the auctions using its employees and does not use an outside auctioneer. The majority of the items are pieces of artwork donated by members and others. Some artwork is loaned to Petitioner on a consignment basis, with the understanding that the consignor receives a portion of the auction price (which is stipulated in advance of the auction), and Petitioner receives the remainder. All purchasers of these auction items are individuals. There are no dealers participating in these auctions.

Applicable Law and Regulations

Section 1101(b)(8)(i) of the Tax Law provides, in part:

The term "vendor" includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

Section 1105 of the Tax Law provides, in part:

Imposition of sales tax

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1116 of the Tax Law provides, in part:

(a) Except as otherwise provided in this section, any sale . . . by . . . any of the following . . . shall not be subject to the sales and compensating use taxes imposed under this article:

* * *

(4) Any corporation, association, trust, or community chest, fund, foundation, or limited liability company, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection (h) of section five hundred one of the United States internal revenue code of nineteen hundred fifty-four, as amended), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;

* * *

(b) Nothing in this section shall exempt:

(1) retail sales of tangible personal property by any shop or store operated by an organization described in paragraph (4) . . . of subdivision (a) of this section;

Section 1132(c)(1) of the Tax Law provides, in part:

For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five . . . are subject to tax until the contrary is established, and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax

Section 526.10 of the Sales and Use Tax Regulations provides, in part:

Vendor. [Tax Law, 1101(b)(8)]

(a) Persons included.

(1) (i) A person making sales of tangible personal property the receipts from which are subject to tax is a vendor.

Example 1: Auctioneers, door to door salesmen, independent brokers, and operators of service stations, retail stores, restaurants, etc., are vendors.

* * *

(e) Co-vendor.

(1) Every person . . . operating as an independent contractor representing a particular supplier selling tangible personal property is a vendor for sales tax purposes and must collect tax on merchandise sold by him.

(2) (i) Such person shall undertake all of the responsibilities of a vendor, as listed in subdivision (b) of this section. The person supplying the merchandise to him is also deemed to be a vendor, and shall undertake all of the responsibilities, as listed in subdivision (b) of this section.

(ii) Both the representative and his supplier shall be jointly responsible for the collection and remitting of the taxes and filing of returns.

Section 529.1 of the Sales and Use Tax Regulations provides, in part:

* * *

(f) The exempt status of an organization may be revoked for any reason constituting misuse of the exemption granted, or if it is discovered that the organization's application contained misleading or deceptive information, or if the organization has changed its purposes, activities or organizational structure without notifying the Taxpayer Assistance Bureau as provided by section 529.7(g) of this Part.

(g) An officer, employee or member of any organization described in this Part may not make tax exempt purchases or sales for the benefit of a nonexempt private entity. . . .

Section 529.7(i)(2) of the Sales and Use Tax Regulations provides, in part:

Retail sales of tangible personal property made by any shop or store operated by an exempt organization described in section 1116(a)(4) . . . are subject to the sales and use tax. A shop or store as used in this section includes any place or establishment where goods are sold from display with a degree of regularity, frequency and continuity as well as any place where sales are made through a temporary shop or store located on the same premises as persons required to collect tax. . . .

Example 1: An exempt organization owning a fleet of automobiles decides to sell, at auction, a number of the automobiles. The automobiles sold at the auction are not subject to sales or use tax.

Example 2: An exempt organization operates a gift shop and book store. Sales made by such shop or store are taxable.

Opinion

Petitioner is a charitable organization, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code and from sales tax under section 1116(a)(4) of the Tax Law. Petitioner conducts from one to three auctions each year. Petitioner wishes to ascertain whether or not it is required to collect sales tax on the proceeds from the sale of donated artwork, consigned artwork and other items sold at live and silent auctions conducted by Petitioner's employees or by a professional auctioneer.

Issue 1

Donated property is property for which title is transferred to the exempt organization without consideration. The Tax Law provides that retail sales of tangible personal property by an organization exempt under section 1116(a)(4) of the Tax Law are not subject to sales tax unless such

sales are made by a shop or store operated by such an organization. A “shop or store” is defined in section 529.7(i)(2) of the Sales and Use Tax Regulations as any place or establishment where goods are sold from display with a degree of regularity, frequency and continuity as well as any place where sales are made through a temporary shop or store located on the same premises as persons required to collect tax.

Auction sales of Petitioner’s own property, including donated items, conducted by Petitioner’s employees are not sales from a “shop or store” as defined above. Items sold at auction are sold to the highest bidder pursuant to the rules of the auction and in compliance with the laws concerning auctions. See Uniform Commercial Code section 2-328, General Business Law, article 3, statutory provisions respecting auctions and auctioneers. These sales are inherently different from sales at a shop or store and, therefore, auction sales are not considered to be sales from a shop or store. Thus, receipts from auction sales conducted by Petitioner’s employees are not subject to sales tax. See section 529.7(i)(2) of the Sales and Use Tax Regulations.

If a professional auctioneer is hired by Petitioner to conduct an auction of items donated to (and therefore owned by) Petitioner and is paid a flat fee for his or her services, and invoices for the sale of the auctioned items show Petitioner as the seller, Petitioner need not collect tax on the receipts from such sales. If the auctioneer acts as agent for or co-vendor with Petitioner, and makes sales of property owned by Petitioner, such sales are not subject to the tax. If, however, the auctioneer is the only name appearing on the sales invoice issued to the purchaser, the sale will be presumed to be taxable. The auctioneer, in that case, must maintain records sufficient to establish that it was merely acting as an agent of Petitioner in regard to that sale in order for the sale to be exempt. See section 1132(c)(1) of the Tax Law.

Issue 2

The loan of goods to an exempt organization on a consignment basis results in the creation of an agency relationship. The consignee (here the exempt organization) becomes the agent of the consignor for the purpose of making sales of the consignor's property, and is obligated to account to the consignor for the proceeds. In Estate of Friedman, 91 Misc. 2d 201 (1977), the court stated that “It is axiomatic that a consignment for sale is quite distinct, in principle, from a sale. On the one hand, if the provisions of a contract are such that title to the subject matter passes absolutely from one party to the other and a correlative obligation to pay the purchase price is imposed, the contract should be construed to be a contract of sale. . . . On the other hand, even though a contract contains a recitation denoting passage of title and payment of purchase price, if it appears from all the terms of the contract that the buyer is required to act in a fiduciary capacity and as such account to the other party for the proceeds of a sale, the contract is one of consignment for sale. . . .” Cf., Matter of Friedman, 64 AD 2d 70 (1978); In Re Majority of Directors of James Chambers, 17 App. Div. 340 (1897). Accordingly, if Petitioner acts as agent for a non-exempt seller by accepting tangible personal property on a consignment basis for sale and thereby makes taxable sales, it must

TSB-A-03(34)S
Sales Tax
September 3, 2003

collect sales tax on receipts from such sales at auction, regardless of whether these sales constitute sales made by a shop or store.

Since either Petitioner or the auctioneer acts as agent for a non-exempt entity by accepting tangible personal property on a consignment basis for sale, Petitioner or the auctioneer must collect sales tax on receipts from such sales at auction.

DATED: September 3, 2003

/s/
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.