

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S140611A

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether sales and use tax applies to the purchase of a sculpture created in Germany and transported to various locations for display, including New York, before eventually being shipped to the purchaser in Florida. We conclude that Petitioner’s purchase of the sculpture is not subject to sales tax because the sculpture was delivered outside New York State and that Petitioner’s subsequent use of the property in New York is exempt pursuant to the nonresident exemption in Tax Law § 1118(2).

Facts

Petitioner is a limited liability company headquartered in Miami, Florida. Petitioner entered into a purchase agreement with a New York-based art dealer to purchase a sculpture that was being created in Germany. The purchase agreement provided that the gallery would deliver the sculpture to Petitioner by common carrier.

Subsequent to executing the purchase agreement, Petitioner entered into a loan agreement with a museum located in New York City (“Museum”) that has been issued an exempt organization certificate by the Department and is therefore an exempt organization for sales tax purposes pursuant to Tax Law § 1116(a)(4). Pursuant to the loan agreement, Museum arranged for a carrier (“Carrier”) to pick-up the sculpture directly from the sculpture’s fabricator in Germany. Petitioner maintains that Carrier is a fine arts contract carrier and is not a common carrier. Carrier transported the sculpture from the fabricator to Museum where it was put on display. The sculpture was exhibited at Museum from June 2014 until October 2014, and was subsequently shown at various venues in Europe. All transportation of the sculpture before and during the tour was arranged, and paid for, by Museum, except that Petitioner was to reimburse Museum for any expenses exceeding \$20,000 incurred while transporting the sculpture from the fabricator to Museum. Museum also provided all necessary insurance coverage of the sculpture from the day the art was picked up in Germany until it was delivered to Petitioner in Florida. At the conclusion of the tour, the sculpture was delivered to Petitioner in Florida.

At the time it purchased the sculpture, Petitioner had no place of business or employees in the State and did no business of any kind in New York.

Analysis

New York sales tax is a transaction tax. Liability for the tax occurs at the time of the transaction. *See* Tax Law § 1133(a) and 20 NYCRR § 525.2. Generally, a sale occurs upon the transfer of title or possession or both of tangible personal property or rendition of services, for consideration. *See* Tax Law § 1101(b)(5); 20 NYCRR § 525.2. The time or method of payment is immaterial. *See* 20 NYCRR § 525.2. The sales tax is a destination tax. The point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incidence and the tax rate. *See* 20 NYCRR § 525.2(a)(3). Therefore, the key to determining whether sales tax applies to Petitioner's purchase of the sculpture is the location where Petitioner took possession of the sculpture.

Pursuant to the loan agreement, Petitioner authorized Museum to retrieve the sculpture from the fabricator. Museum satisfied this condition by contracting with Carrier to do so. The fabricator relinquished physical possession of the sculpture to Carrier at the fabricator's location in Germany. Because Carrier was acting on behalf of Museum, and Museum contracted Carrier to satisfy Museum's duty to retrieve the sculpture under the loan agreement with Petitioner, Carrier was acting as Petitioner's designee when it took possession of the sculpture in Germany. Upon review of the relevant facts, we conclude that Carrier is a contract carrier.¹ Where a contract carrier is used to transfer possession from a seller to a purchaser, delivery is deemed to have occurred at the location where the contract carrier takes physical possession of the item being sold. *See Matter of Savemart, Inc. v State Tax Commission*, 105 AD2d 1001 (3rd Dep't 1984) (Vendor's in-state delivery of property to an out-of-state customer's private or contract carrier is an in-state transfer of possession of purchased goods.) Carrier, as a contact carrier and Petitioner's designee, took possession of the sculpture in Germany, which means that the sale of the sculpture to Petitioner occurred in Germany, and New York's sales tax does not apply to that sale. *See* 20 NYCRR § 525.2(a)(3).

Petitioner's loan of the sculpture to the Museum would constitute a sale for sales tax purposes as a license to use or a rental if it was supported by consideration. *See* Tax Law § 1101(b)(5). Here, the rental or license to use that Petitioner granted the Museum was supported by consideration because the agreement required the Museum to bear certain expenses associated with the transportation of the sculpture to Petitioner's location in Florida from the fabricator's location in Germany that Petitioner would otherwise have incurred. *See* Tax Law § 1101(b)(5); *Sunny Vending Co. v. State Tax Comm'n*, 101 AD2d 666, 667 (3d Dep't 1984) (referring to the sales definition of "sale" in §1101(b) as "broad and inclusive").

No New York sales tax is due on the loan of the sculpture, however, because delivery of the sculpture to the Museum for the loan period occurred outside the State. *See* 20 NYCRR § 525.2(a)(3). Moreover, Petitioner owes no use tax as a result of the Museum's use of the sculpture in New York because Petitioner qualified as a nonresident at the time Petitioner purchased the sculpture and, thus, the nonresident exemption in Tax Law § 1118(2) applies. *See* 20 NYCRR § 526.15(b). Accordingly, Petitioner owes no sales or use tax in New York as a

¹ Note: if the facts showed that the carrier was a common carrier the analysis and resulting conclusion would differ.

result of the transaction described in this Advisory Opinion. Museum does not owe any use tax based on its use of the sculpture in New York because it has been issued an exempt organization certificate. *See* Tax Law § 1116(a)(4).

DATED: May 2, 2016

/S/

DEBORAH R. LIEBMAN
Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.