



Advisory Opinion: TSB-A-24(48)S

The Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED] (“Petitioner”). Petitioner asks whether sales tax is imposed on the commission paid by a buyer to an auction service provider (commonly referred to as a “buyer’s premium”).

We conclude that the buyer’s premium (commission) is part of the sales price of the tangible personal property being auctioned and, as such, is part of the receipt subject to sales tax.

Facts

Petitioner provides auction services to owners of tangible personal property to sell their consigned property. Petitioner does not take title to the property. At the end of the auction, Petitioner collects from the buyer: (1) the accepted bid price for the property (commonly referred to as the “hammer price”); and (2) a commission for its auction services (commonly referred to as the “buyer’s premium”). Such auction services include administrative expenses incurred by Petitioner in facilitating the auction, including, but not limited to, procuring property for auction, marketing consigned property for each auction, locating buyers, maintaining the saleroom and administering the auction, and pre and post-sale logistics.

Petitioner locates prospective sellers. This includes speaking at conferences and lectures for businesses development, working with museums and institutions to host and sponsor events, and visiting prospective sellers. Once a prospective seller is interested in consigning its property with Petitioner, Petitioner’s art experts appraise each piece of property and prepare a proposal. The proposal includes the estimated hammer price, Petitioner’s recommended auction sale and saleroom. If the prospective seller accepts the proposal, the property is consigned with Petitioner.

Petitioner also conducts marketing for the consigned property. Petitioner photographs and catalogues all items in the sale. The auction catalogue includes a description of the property, known information about the artist, the time period in which the property was created, the medium, a brief history of the property, the seller’s name if disclosed and the anticipated hammer price. Petitioner distributes its catalogues to its clients and displays them in the saleroom for public viewing. Additionally, Petitioner provides online and print advertising for all of its upcoming auctions.

Petitioner also locates buyers for specific property consigned in an auction, or to draw general interest for upcoming auctions. This includes speaking at conferences and events, visiting clients, and hosting events to bring prospective buyers into the salerooms to view property consigned for upcoming auctions.

Petitioner also maintains salerooms where it displays property consigned for upcoming auctions. Before each auction, Petitioner renovates its salerooms’ galleries to display each piece of property listed in the upcoming auction. This requires physical renovations to Petitioner’s galleries and resources to arrange the property for display in the viewing room. Petitioner paints each room and

display wall and installs the proper lighting for each piece of property. Once the galleries are finished, they are opened to the public for viewing.

Throughout the renovations, Petitioner stores the property for its sellers, and facilitates moving all pieces of property into and out of the galleries. Petitioner then conducts the auction, which requires organizing the auction and facilitating the bidding process. After the auction, Petitioner distributes the hammer price to the seller. Petitioner also facilitates all post-sale logistics of transferring the purchased property to the buyers. Specifically, Petitioner must contact the buyers to arrange payment, organize the buyer's collection of the property from Petitioner, and if necessary, organize shipment for the buyer.

The commission is charged on a sliding scale based on the price of the property sold. Petitioner's commission scale is: 25% of the hammer price up to and including \$XXX,XXX, 20% on that part of the hammer price over \$XXX,XXX and up to and including \$X,XXX,XXX, and 12% of that part of the hammer price above \$X,XXX,XXX.

Petitioner receives the commission for the services it provides in creating, facilitating, and processing the auction sales.

Analysis

Tax Law § 1105(a) imposes sales tax on "[t]he receipts from every sale of tangible personal property, except as otherwise provided in this article." Tax Law § 1101(b)(3) defines "receipt" to include "[t]he amount of the sale price of any property ..., valued in money ... including any amount for which credit is allowed by the vendor to the purchaser, without any deductions for expenses or early payment discounts..."

The Sales and Use Tax Regulations expound on the definition of receipt. Specifically, the regulations state that "[a]ll expenses, including telephone and telegraph and other service charges, incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer are not deductible from receipts." 20 NYCRR 526.5(e).

This regulation has been found to be reasonable in *Matter of Penfold v. State Tax Commn.* (114 AD2d 696 [1985]). In *Penfold*, the petitioner argued that dumping fees it paid to landfills where it dumped garbage collected in fulfillment of its trash removal service were not part of its receipt because such fees were not themselves subject to tax. The Court held that the fees were in fact part of the receipt and were properly subject to tax. Following *Penfold*, the Tax Appeals Tribunal held that fees paid by petitioners to the Department of Motor Vehicles to obtain driving records of prospective insurance customers and billed to clients for the service provided by petitioners were properly included in the clients' taxable receipts. *Matter of Equifax Services* (Tax Appeals Tribunal, July 21, 1988) and *Matter of Hooper Holmes, Inc.* (Tax Appeals Tribunal, July 21, 1988), *conf'd sub nom. Hooper Holmes, Inc. v. Wetzler*, 152 AD2d 871 (3d Dep't 1989).

Here, the price paid by a purchaser for the tangible personal property sold by Petitioner includes the actual cost of the property itself (the hammer price) and the cost incurred for all of the services provided by Petitioner. Petitioner provides these services to its clients for the sole purpose of selling the consigned items. (For example, Petitioner paints the display rooms to best match the items offered for sale. It markets the items to create interest and it stores, displays and, upon sale, transports or arranges for the transportation of the items.) These clearly are expenses incurred by Petitioner in making the sale. They are comparable to the dumping fees in *Penfold*. Accordingly, the entire amount collected by Petitioner is part of the receipt subject to tax.

Petitioner claims that the “buyer’s premium” is the commission paid to it by the vendor for the services it renders in connection with the auction and infers that the “commission” is not subject to tax. However, this is a distinction without consequence. By Petitioner’s own admission, the commission is the amount Petitioner charges for creating, facilitating and processing the auction sales. Clearly, the commission is part of the receipt. Moreover, the Tribunal has held that a “commission” is part of the taxable receipt on which sales tax is assessed. See *People’s Oil Company, Inc.*, Tax Appeals Tribunal, December 8, 1988 (“However, to the extent petitioner’s calculation begins with the receipts, plus tax, less [Petitioner’s] commission, it is erroneous.”). The Tribunal explained that since the sales tax was imposed on the total selling price, the commission must be included. See *People’s Oil Company, Inc.*

Petitioner’s commission (buyer’s premium) is part of the sales price of the tangible personal property it auctions. Consequently, it should be included in Petitioner’s receipt and is subject to sales and use tax.

DATED: October 16, 2024

/s/

MARY ELLEN LADOUCEUR
Principal Attorney

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.