

**New York State Department of Taxation and Finance**  
**Taxpayer Services Division**  
**Technical Services Bureau**

TSB-A-91 (27)S  
Sales Tax  
March 7, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S910117A

On January 17, 1991 a Petition for Advisory Opinion was received from Satterlee Stephens Burke & Burke, 230 Park Avenue, New York, New York 10169-0079.

The issue raised by Petitioner, Satterlee Stephens Burke & Burke, is whether a not-for-profit corporation not otherwise subject to sales tax pursuant to Section 1116(a)(4) of the Tax Law is required to collect sales tax with respect to an annual auction held at a commercial auction house.

A corporation organized under the New York Not-for-Profit Corporation Law ("Nonprofit Inc.") has duly obtained an Exempt Organization Certificate from the Department of Taxation and Finance. Nonprofit Inc. proposes to raise funds for its charitable purposes through a charity auction. Nonprofit Inc. will solicit donations of property from the general public approximately two months before the auction. Nonprofit Inc. will place advertisements about the auction in an auction trade publication. The auction will be conducted by a professional auctioneer. The items available for auction will be previewed on the day of the auction. The auction will be held on the grounds of a public school or at a commercial auction house.

Section 1116(a)(4) of the Tax Law provides that:

(a) Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy 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 or foundation, 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;

Section 1116(b)(1) of the Tax Law provides in part that:

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

(2) 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.

In the instant case Nonprofit Inc. is an organization exempt from the imposition of sales tax pursuant to Section 1116(a)(4) of the Tax Law and thus any sales made by it of property that has been donated to it are not subject to sales tax unless it is engaged in the retail sale of tangible personal property by any shop or store operated by it as provided for by Section 1116(b)(1) of the Tax Law.

The sale at an annual auction by Nonprofit Inc. of property donated to it does not constitute a retail sale through a shop or store in accordance with Section 529.7(i)(2) of the Sales and Use Tax Regulations. The fact that the annual auction may be held at a commercial auction house or on the grounds of a public school or that Nonprofit Inc. may hire a professional auctioneer to conduct the auction does not cause the receipts from the property sold at auction to be subject to sales tax.

DATED: March 7, 1991

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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