

## **Regulatory Amendments Related to Sales Made by Certain Sales Tax Exempt Organizations - Effective January 1, 2009**

The Tax Department has adopted amendments to the Sales and Use Taxes Regulations that change how sales made by certain exempt organizations are subject to State and local sales and compensating use taxes (sales tax). The amendments are effective January 1, 2009. Under the regulations as amended, nonprofit charitable, educational, and religious organizations; armed services posts; and other organizations described in sections 1116(a)(4), (5), and (6) of the Tax Law (collectively referred to as "affected exempt organizations") are required to collect sales tax on sales, other than for resale, of taxable items of tangible personal property sold as described below. The changes described in this memorandum are in addition to the statutory changes made by Part KK-1 of Chapter 57 of the Laws of 2008 that were previously described in TSB-M-08(5)S, *Tax Law Amendments Related to Sales Made by Certain Sales Tax Exempt Organizations Effective September 1, 2008*.

### **Sales considered to be made from an exempt organization's shop or store**

If an affected exempt organization operates a shop or store and also makes retail sales of similar (though not necessarily identical) items of tangible personal property by any means other than at its shop or store (such as by remote means or at an auction), those additional sales are considered to be made from its shop or store. A *shop or store* is any place or establishment where goods are sold from display with a degree of regularity, frequency, and continuity, and any place where sales are made through a temporary shop or store located on the same premises as persons required to collect tax.

*Example: An exempt charitable organization operates a store on its premises from which it sells books, calendars, DVDs, posters and similar items. The organization also maintains a Web site that contains various information about the organization and its operations. Each year for the holiday shopping season, the organization adds a temporary section to its Web site through which customers can purchase some, but not all, of the items available at the organization's physical store. Sales of items through the organization's Web site are considered to be sales made from the exempt organization's shop or store and are subject to sales tax.*

### **Traditional auctions**

A *traditional auction* is an auction where any bidders or their representatives are physically present. This is so, regardless of whether bids are also accepted by telephone, over the Internet, or otherwise. Sales of taxable items of tangible personal property made by an affected exempt organization at a traditional auction are considered sales made from a shop or store operated by the organization and are subject to tax if made with a degree of regularity,

frequency, and continuity.<sup>1</sup> A *single traditional auction event* is any day or portion of a day during which a traditional auction sale takes place. **Note:** Where the guidance in this memorandum is inconsistent with any previously issued guidance that sales made by an exempt organization at a traditional auction do not constitute sales made from a shop or store, the guidance in this memorandum will apply.

If an affected exempt organization conducts no more than two traditional auction events during a calendar year, sales made at these events are not considered to be made with a degree of regularity, frequency, and continuity from a shop or store and are not subject to tax provided:

- the exempt organization does not otherwise make sales of similar (though not necessarily identical) items at a shop or store; and
- the auction events are not conducted on the premises of a commercial auction house or on any premises where an auctioneer is conducting other auction sales.

*Example: An exempt veterans organization holds an annual one-day auction of donated items on the premises of the organization. The organization does not make sales of similar items at a shop or store. Sales at the auction event are not subject to tax.*

If an affected exempt organization conducts, or schedules or otherwise intends to conduct, three or more traditional auction events during a calendar year, sales at the auction events are considered to be made with a degree of regularity, frequency, and continuity from a shop or store and are subject to tax, and the organization must collect tax on all taxable sales beginning with those made at the first auction event. However, if an affected exempt organization does not schedule or otherwise intend to conduct more than two auction events during a calendar year, but does, in fact, conduct more than two auction events during that year, the organization does not have to collect tax on sales made at the first two auction events (unless the sales are otherwise taxable as discussed above). The organization must collect tax on any taxable sales made at the third and any subsequent auction events.

*Example: An exempt religious organization schedules and holds three auction events each year to sell various taxable items. Sales made at all of the auction events are subject to tax.*

*Example: A charitable relief agency that is an affected exempt organization occasionally holds auction events on its premises to sell paintings that have been donated to the organization. The organization does not sell paintings at any time other than during the auction events. The organization does not schedule or intend to conduct more than two auction events each year. However, during a particular calendar year, because of the number of paintings donated, the organization decides after the first two auctions have*

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<sup>1</sup> It is noted that the sale of certain services by auction may also be subject to sales tax. See section 1116(b)(ii) of the Tax Law.

*been conducted to hold a third auction. Sales made at the first two auction events are not subject to sales tax, but sales made at the third auction are subject to tax.*

When a traditional auction event is held by or for the benefit of an affected exempt organization on the premises of a commercial auction house, or on any premises where an auctioneer is conducting other auction sales, the sales made at the auction are considered to be made by the exempt organization's temporary shop or store, and any sales of taxable items of tangible personal property are subject to tax, even if the organization participates in only one or two such auction events each year.

*Example: A private college that is an affected exempt organization contracts with a commercial auction house to auction a collectible piece of furniture owned by the college. The auction event will be held on the premises of the auction house, which is a vendor required to collect tax. The auction house must collect and remit tax on the sale of the furniture.*

### **Remote auctions**

A *remote auction* is an auction conducted by remote means where no bidders or their representatives are physically present, such as an auction conducted by telephone, mail order, or over the Internet. Sales of taxable items of tangible personal property made by an affected exempt organization at a remote auction are subject to tax if made with a degree of regularity, frequency, and continuity.<sup>2</sup> A *remote auction event* is an auction conducted by remote means for a period of time beginning on a common date and closing on a common date during which one or more taxable items of tangible personal property are offered for sale to the highest bidder. Each such occurrence is considered a separate *remote auction event*. An affected exempt organization may conduct remote auction events over the Internet using the organization's own Web site, or it may use an Internet auction service to conduct the events. Each auction conducted by a different auction service or auctioneer constitutes a separate auction event. Generally, if several items are offered for sale, each item must be offered for the entire duration of the event for it to be considered a single auction event. However, the occasional late addition of an item or items after the start of the event, where the bidding for those items ends on the common date, will not be considered a new auction event.

If an affected exempt organization conducts no more than two remote auction events during a calendar year, sales made at these events are not considered to be made with a degree of regularity, frequency, and continuity and are not subject to tax, provided the organization does not make sales of similar (though not necessarily identical) items at a shop or store or by remote means.

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<sup>2</sup> It is noted that the sale of certain services by auction may also be subject to sales tax. See section 1116(b)(ii) of the Tax Law.

*Example: An affected exempt organization that provides testing for public safety regularly sells appliances, electronics, and other items after they are tested from a store located on the organization's premises and collects tax on those sales. The organization also conducts an annual remote auction event where it uses an Internet auction service to sell similar items. Since the exempt organization sells items from its store that are similar to the items being sold at the auction event, all sales of taxable items made at the remote auction event are subject to tax.*

If an exempt organization conducts, or schedules or otherwise intends to conduct, three or more remote auction events in a calendar year, sales at the auction events are considered to be made with a degree of regularity, frequency, and continuity, and the organization must collect tax on all taxable sales beginning with those made at the first remote auction event. However, if an affected exempt organization does not schedule or otherwise intend to conduct more than two remote auction events during a calendar year, but does, in fact, conduct more than two remote auction events during that year, the organization does not have to collect tax on sales made at the first two remote auction events (unless the sales are otherwise taxable as discussed above). The organization must collect tax on any taxable sales made at the third and any subsequent remote auction events.

*Example: WEXO, an exempt organization that operates a public broadcasting television station, conducts an annual auction of items donated to the station to support its broadcasting activities. The auction event is conducted over the air and on the station's Web site. Hundreds of items are listed for sale and may be bid upon by telephone or online. New items are regularly introduced during the four weeks that items are offered for sale. Individual items are generally not offered for sale for the entire four weeks of the auction. Instead, most items are offered for sale for a period of one week or less. When determining whether the organization is conducting auction events with a degree of regularity, frequency, and continuity, each time an item is offered for sale during a different time period (i.e., the opening and closing bidding dates of one item are different than those of other items offered), that offering is considered a separate auction event. If these separate remote auction events are conducted, or scheduled or otherwise intended to occur, three or more times during the four-week period during which items are offered for sale, all of the taxable items sold by remote auction are subject to tax.*

*Example: An exempt organization that fosters international amateur sports competition plans to conduct an annual auction on its Internet Web site where it sells donated sports memorabilia. All of the items being auctioned are offered for sale on the same date and may be bid on during the entire period that the auction is held. On the last day of the auction, all items are sold to the highest bidders. The organization does not plan or intend to conduct any other auction sales during the calendar year and does not make sales of similar items at a shop or store. Sales made at the remote auction event are not subject to tax.*

## Definitions

*Section 1116(a)(4) organizations* include any not-for-profit corporation, association, trust, or community chest, fund, foundation, or limited liability company, organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, testing for public safety, fostering national or international amateur sports competition, or preventing cruelty to children or animals.

*Section 1116(a)(5) organizations* include qualifying posts or organizations of past or present members of the armed forces of the United States, as well as auxiliary units, societies, trusts, or foundations for the organizations. These organizations must be incorporated in New York State, or, if not incorporated, must be physically located in New York State. In addition, these organizations must meet the following membership requirements:

- at least 75% of the members of the post or organization must be past or present members of the armed forces of the United States; and
- 90% of the remaining members must be cadets or spouses, widows, widowers, ancestors, or lineal descendants of past or present members of the armed forces of the United States or of cadets.

*Section 1116(a)(6) organizations* include the following Indian nations or tribes:

Cayuga	Seneca Nation of Indians
Oneida Indian Nation	Shinnecock
Onondaga Nation of Indians	Tonawanda Band of Senecas
Poospatuck	Tuscarora Nation of Indians
St. Regis Mohawk	

## Sales tax registration and other requirements

Any exempt organization that makes taxable auction sales described in this memorandum, or makes any other taxable sales, must, if it has not already done so, register for sales tax purposes and obtain a *Certificate of Authority*, which authorizes the organization to make sales and to collect sales and use tax on its taxable sales. To register for sales tax purposes, the organization may apply using the *New York State Online Permit Assistance and Licensing Web site* at [www.nys-permits.org](http://www.nys-permits.org), or fill out Form DTF-17, *Application to Register for a Sales Tax Certificate of Authority*, and send it to the address listed in the instructions for that form at least 20 days before the organization commences business in the State. Once registered, the exempt organization must collect tax on its taxable sales, keep accurate records, file tax returns, and remit tax required to be collected with its returns.

**Additional Information**

For more information, see Publication 750, *A Guide to Sales Tax in New York State*, Publication 850, *New York State and Local Sales and Use Tax Quick Reference Guide*, and Publication 900, *Important Information for Business Owners*.

NOTE: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.