

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
COMMISSIONER OF TAXATION AND FINANCE
ALBANY, NEW YORK

Pursuant to the authority contained in subdivision First of section 171, paragraph (1) of subdivision (b) of section 1116, subdivisions (1) and (8) of section 1142, and section 1250 (not subdivided) of the Tax Law and Part KK-1 of Chapter 57 of the Laws of 2008, the Commissioner of Taxation and Finance hereby proposes to make and adopt the following amendments to the Sales and Use Taxes Regulations, as published in Subchapter A of Chapter IV of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, the amendments to read as follows:

Section 1. Paragraph (10) of subdivision (a) of section 526.10 of such regulations is amended to read as follows:

(10) Any organization [that has received an Exempt Organization Certificate certifying it is exempt from sales and use tax under paragraph (4) or (5) of] or entity described in subdivision (a) of section 1116 of the Tax Law[, which] that makes taxable sales [or tangible personal property through a shop or store operated by the organization, or sells food and drink, in the State] described in such section is a vendor.

Section 2. Paragraph (1) of subdivision (i) of section 529.7 of such regulations is amended to read as follows:

(1) Except as provided in [paragraphs (2) through (4) of this subdivision] section 1116 of the Tax Law or other law, sales of tangible personal property and services by exempt organizations are exempt from the sales and use tax.

Section 3. Paragraph (2) of subdivision (i) of section 529.7 of such regulations is renumbered to be

subparagraph (i) of such paragraph.

Section 4. Example 1 in subdivision (i) of section 529.7 of such regulations is amended to read as follows:

“Example 1:” An exempt organization [owning] owns a fleet of automobiles [decides to sell, at auction,]. It sells a number of the automobiles at auction. The organization conducts one auction each calendar year, and it is held in its parking lot. The automobiles sold at the auction are not sold from a shop or store and are not subject to sales or use tax. See subparagraph (vi) of this paragraph for rules concerning auctions of this nature.

Section 5. New subparagraphs (ii) through (vii) are added to paragraph (2) of subdivision (i) of section 529.7 of such regulations, following Example 6, to read as follows:

(ii) If an exempt organization described in section 1116(a)(4), (5), or (6) of the Tax Law 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.

(iii) Sales, other than for resale, of the services described in section 1105(b) or section 1105(c)(5) of the Tax Law by an exempt organization described in section 1116(a)(4), (5), or (6) of the Tax Law are subject to tax, whether or not made at a shop or store. These services include the sales of:

(“a”) gas, electricity, refrigeration, and steam, and gas, electric, refrigeration, and steam services of whatever nature (see section 1105(b)(1) of the Tax Law and section 527.2 of this Title);

(“b”) telephony, telegraphy, and telephone and telegraph services of whatever nature, except sales of interstate and international telephony, telegraphy, and telephone and telegraph services (see section 1105(b)(1)

of the Tax Law and section 527.2 of this Title);

(“c”) telephone answering services (see sections 1101(b)(13) and 1105(b)(1) of the Tax Law);

(“d”) prepaid telephone calling services (see sections 1101(b)(22) and 1105(b)(1) of the Tax Law);

(“e”) mobile telecommunications services (see sections 1101(b)(24) and 1105(b)(2) and (3) of the Tax Law); and

(“f”) maintaining, servicing, or repairing real property, property, or land (see section 1105(c)(5) of the Tax Law and section 527.7 of this Title).

(iv) Retail sales of tangible personal property by an exempt organization described in section 1116(a)(4), (5), or (6) of the Tax Law are subject to tax if the sales are made with a degree of regularity, frequency, and continuity by remote means. Sales by remote means include, but are not limited to, sales made by telephone, over the Internet, and by mail order.

(v) Retail sales of tangible personal property by lease or rental by an exempt organization described in section 1116(a)(4), (5), or (6) of the Tax Law are subject to tax, whether or not made at a shop or store.

(vi) For calendar years beginning on or after January 1, 2009, the following provisions apply to sales made at auction events other than by remote means (“i.e.,” bidders or their representatives are physically present at the auction event).

(“a”) For purposes of subparagraph (i) of this paragraph, if an exempt organization described in section 1116(a)(4), (5), or (6) of the Tax Law conducts no more than two auction events during a calendar year, then 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:

(“1”) the exempt organization does not otherwise make sales of similar (though not necessarily

identical) items of tangible personal property at a shop or store; and

(“2”) 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.

(“b”) An auction event is any day or portion of a day during which auction sales take place.

Accordingly, if an exempt organization conducts only one or two one-day auctions during a calendar year or only one auction over a two-day period during a calendar year (as described in clause (“a”) of this subparagraph), the sales made at any of these auction events are not taxable. Auctions conducted by different auctioneers or auction services constitute separate auction events.

(“c”) If an exempt organization conducts, or schedules or otherwise intends to conduct, three or more auction events during a calendar year, sales made at these events are considered to be made with a degree of regularity, frequency, and continuity from a shop or store, and it must collect tax on all taxable sales commencing with the first event. However, if an exempt organization does not schedule or otherwise intend to conduct more than two auction events during a calendar year, but in fact conducts more than two auction events that year, it does not have to collect tax on sales made at the first two auction events provided they meet the requirements described in clause (“a”) of this subparagraph. But it must collect tax on all taxable sales made at the third and any subsequent auction events.

(vii) For calendar years beginning on or after January 1, 2009, the following provisions apply to sales made at auction events by remote means (“i.e.,” bidders or their representatives are not physically present at the auction event).

(“a”) For purposes of subparagraph (iv) of this paragraph, if an exempt organization described in section 1116(a)(4), (5), or (6) of the Tax Law conducts no more than two auction events during a calendar year by

remote means, then 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 exempt organization does not otherwise make sales of similar (though not necessarily identical) items of tangible personal property at a shop or store or by remote means.

(“b”) An auction event by remote means is an auction conducted for a period of time beginning with 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. Generally, each item must be offered for sale 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, to end on the common closing date, will not be considered a new auction event. In addition, if items are offered for bid and bidding for those items ends on the same day, that day will be considered one auction event. Auctions conducted by different auctioneers or auction services constitute separate auction events. Accordingly, if an exempt organization has only one or two auction events during a calendar year by remote means (as described in clause (“a”) of this subparagraph), the sales made at either of these auction events are not taxable.

(“c”) If an exempt organization conducts, or schedules or otherwise intends to conduct, three or more auction events during a calendar year by remote means, sales made at these events are considered to be made with a degree of regularity, frequency, and continuity, and it must collect tax on all taxable sales commencing with the first event. However, if an exempt organization does not schedule or otherwise intend to conduct more than two auction events by remote means during a calendar year, but in fact conducts more than two auction event by remote means that year, it does not have to collect tax on sales made at the first two auction events provided they meet the requirements described in clause (“a”) of this subparagraph. But it must collect tax on

all taxable sales made at the third and any subsequent auction events.

Section 6. Subparagraph (ii) of paragraph (2) of subdivision (d) of section 529.8 of such regulations is amended to read as follows:

(ii) spouses, widows, [or] widowers, ancestors, or lineal descendants of the individuals referred to in paragraphs (1) and (2)(i) of this subdivision.

Section 7. Paragraph (1) of subdivision (k) of section 529.8 of such regulations is amended to read as follows:

(1) Except as provided in [paragraphs (2), (3) and (4) of this subdivision] section 1116 of the Tax Law or other law, sales of tangible personal property and services by exempt posts, organizations, and affiliates are exempt from the sales and use tax.

Section 8. Paragraph (2) of subdivision (k) of section 529.8 of such regulations is renumbered to be subparagraph (i) of such paragraph.

Section 9. New subparagraphs (ii) and (iii) are added to paragraph (2) of subdivision (k) of section 529.8 of such regulations, following Example 6, to read as follows:

(ii) If an exempt post, organization, or affiliate 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.

(iii) Notwithstanding any other provision of this paragraph and except as provided by law, all of the provisions of paragraph (2) of subdivision (i) of section 529.7 of this Part apply to sales of tangible personal property and services by an exempt post, organization, or affiliate.

Section 10. Paragraph (1) of subdivision (d) of section 529.9 of such regulations is amended to read as follows:

(1) Except as provided in [paragraphs (2) and (3) of this subdivision] section 1116 of the Tax Law or other law, sales of tangible personal property and services by exempt Indian nations or tribes are exempt from the sales and use tax.

Section 11. New subparagraphs (iii) and (iv) are added to paragraph (2) of subdivision (d) of section 529.9 of such regulations, following Example 1, to read as follows:

(iii) If an exempt Indian nation or tribe 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.

(iv) Notwithstanding any other provision of this paragraph and except as provided by law, all of the provisions of paragraph (2) of subdivision (i) of section 529.7 of this Part apply to sales of tangible personal property and services by an exempt Indian nation or tribe.

Section 12. This rule will take effect on January 1, 2009.

Robert L. Megna
Commissioner of Taxation and Finance

Dated: Albany, New York
October 14, 2008