

**New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit**

TSB-A-11(10)S
Sales Tax
April 8, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S100504B

On May 4, 2010, the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. Petitioner asks whether he owes sales or use tax on the purchase of a sculpture from a New York vendor. We conclude that Petitioner owes sales tax on the purchase because the purchase was not made exclusively for resale.

Facts

On November 18, 2009, Petitioner purchased a sculpture at an auction held by [REDACTED] (“Auctioneer”) at its New York City sales room. Under the terms of auction, the sculpture became Petitioner’s property at the fall of the gavel and acceptance of Petitioner’s bid. The sculpture was on display at the Auctioneer’s New York City establishment prior to the sale.

The Auctioneer issued a sales invoice to Petitioner on the auction date. As an accommodation to Petitioner, the Auctioneer arranged and paid for the shipment of the sculpture to a warehouse in the Bronx. The Auctioneer also paid for the warehousing of the sculpture. Petitioner’s fine arts insurance policy covered the sculpture while it was stored at the Bronx warehouse.

Petitioner made a down payment of \$50,000 on purchase of the sculpture on November 25, 2009 and paid the balance of the amount due on December 14, 2009.

Petitioner contends that he purchased the sculpture with the intent of eventually reselling it. To increase its value and visibility, Petitioner executed a loan agreement with [REDACTED] (“Museum”) for the purpose of displaying the sculpture at the museum. The Museum arranged and paid for delivery of the sculpture from New York to its location in Florida. The Museum hired a private carrier specializing in the transportation of large items, to transport the statue to the Museum.

Petitioner remitted Florida sales tax to the Auctioneer on February 8, 2010 because the Auctioneer conditioned its release of the sculpture from the Bronx warehouse on Petitioner paying this tax.

Prior to the purchase of the sculpture from the Auctioneer, Petitioner had discussions with his advisors on the merits of creating a separate legal entity to buy and sell art works as a business. As a result, [REDACTED] (“LLC”) was formed on February 2, 2010. The LLC had an office in Minneapolis, Minnesota and was registered to do business in Florida.

Petitioner tendered the Auctioneer a New York resale certificate executed by the LLC but the Auctioneer refused to accept the exemption certificate. Petitioner then presented the Auctioneer within 90 days of the date of the purchase a sales tax resale certificate executed in his own name. The

Auctioneer, however, refused to accept the certificate because it believed the sale occurred in Florida for purposes of New York sales tax.

Analysis

New York sales tax is a transaction tax; liability for the tax occurs at the time of the transaction. 20 NYCRR §525.2. Generally speaking, a taxed transaction occurs upon the transfer of title or possession or both of tangible personal property or rendition of services. *Id.* The time or method of payment is immaterial. *Id.* The sales tax is a destination tax. 20 NYCRR §525.2(a)(3). The point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate. *Id.*

If a vendor delivers property in New York to a private or contract carrier engaged by the customer or his designee, an in-state transfer of possession of purchased goods is considered to have occurred. *Matter of Savemart, Inc. v State Tax Comm'n*, 105 AD2d 1001 (3rd Dep't 1984). Because the sculpture was shipped to Florida by a private carrier hired by the Museum, acting as the Petitioner's designee, the sculpture was delivered to Petitioner in New York for purposes of New York sales tax. Petitioner's purchase of the sculpture constitutes a New York sale; therefore, the sale is subject to New York sales tax unless the sale is not a retail sale or is otherwise exempt from sales tax.

20 NYCRR §526.6(b)(4)(i) provides:

Where a person, *in the ordinary course of his business operations*, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale and therefore not subject to tax until he has transferred the property to this customer. (Emphasis added.)

Factors that would be relevant as to whether tangible personal property is sold in the ordinary course of business are the frequency and regularity of sales, the length of time property is held, the extent of the owner's sales efforts by advertising or otherwise, and the time and effort that the owner devotes to sales. Based on these factors, Petitioner is not selling the sculpture in the ordinary course of business. Stated differently, the display of the sculpture at the Museum, without more, does not constitute a sales activity in the ordinary course of business even if the display enhances the cachet and, thus, the value of artwork.

Petitioner's purchase of the sculpture qualifies for the resale exclusion from sales and use tax only if the property was purchased for one and only one purpose: resale. *See P-H Fine Arts Ltd. v. Tax Appeals Tribunal*, 227 AD2d 683 (3rd Dep't 1996). That is, any use of the sculpture by Petitioner would make his purchase of the tangible personal property a purchase at retail subject to sales tax. *See Micheli Contracting Corp. v. New York State Tax Comm'n*, 109 AD2d 957 (3rd Dep't 1985). Here, Petitioner made use of the sculpture by entering into an agreement for the sculpture to be exhibited at the Museum. Accordingly, the sculpture was not purchased exclusively for resale and the exclusion does not apply.

This Department is authorized to issue Advisory Opinions about the taxes administered by the Department, but has no authority to issue opinions about the applicability of taxes imposed by other

states. Consequently, this Advisory Opinion takes no position as to the applicability of Florida sales tax to the sale at issue.

DATED: April 8, 2011

/S/

DANIEL SMIRLOCK
Deputy Commissioner and 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.