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## New York Sales and Use Tax and Works of Art

Sales tax on the purchase of artwork adds up to a significant amount in the high-end art world. Art dealers and collectors should be aware of two recent New York sales tax developments when it comes to selling or purchasing works of art.

### Resale certificates

The New York State Attorney General announced a \$7 million settlement of a sales and use tax claim against a real estate developer for misuse of resale certificates that he used in order to purchase artwork free from sales tax but later displayed the artworks in his residence or business premises. The Attorney General also announced a settlement with an employee of an art gallery who had registered a separate business as a vendor and used the resale certificate to purchase art she later used.

A valid resale certificate enables a retailer to purchase goods free of sales and use tax based on the fact that the retailer will then sell the goods to an ultimate consumer and that sale will be subject to tax. A vendor does not have to collect sales tax when the resale certificate is presented within 90 days of the purchase and is offered in good faith. Acceptance in good faith generally means that the vendor has no knowledge that the certificate being offered is false or fraudulently presented. 20 NYCRR§532.4(b)(2)(i). For example, if someone purchasing beer, wine, or liquor presents a resale certificate in the name of a hardware business, it would appear on its face that the certificate is being misused since one cannot sell those products legally without a proper license.

However, even a business that has a valid resale certificate will owe the use tax if the goods are subsequently taken out of inventory, held for sale to customers, and put to the businesses' own use. Consequently, a retail furniture store that takes some desks out of its inventory and uses them to furnish its offices owes use tax on those desks. 20 NYCRR§531.3(a).

In a case involving the publisher of Penthouse magazine, Bob Guccione, artworks purchased by a registered vendor were held to be subject to sales tax since they were not purchased "for one and only one purpose: resale" and were displayed at the residence and offices of Mr. Guccione. (*P-H Fine Arts, Ltd. v. NYS Tax Appeals Tribunal*, October 13, 1994 aff'd. 227 AD2d 683, 3<sup>rd</sup> Dept., 1996). The New York Department of Taxation and Finance has opined that lending art for display at a

museum in New York is ‘use’ that would trigger the tax if the owner was a resident for sales and use tax purposes when purchased. TSB-A-08(7)S.

### **Delivery**

On Aug. 6, 2015, the New York State Department of Taxation and Finance issued TB-ST-155, entitled “Delivery Rules for New York State Sales Tax.” This tax bulletin discusses the rules governing where delivery of property or services occurs and the resulting tax consequences. The bulletin also re-emphasizes that a use tax is due if tangible personal property is purchased by an individual who maintains a place of abode in New York (without regard to how many days it is used) or by anyone engaged in business in New York who brings the goods into the state.

The bulletin restates the rule that the amount of sales tax due is determined based on the location where delivery of tangible personal property is made—nothing new there. In an ordinary transaction where a purchaser takes the goods with them upon the sale, the location of the sale determines the amount of state and local sales tax due. If goods are purchased and then delivered by the seller’s own trucks, the location where delivery is made determines the tax due. Also, if the seller ships the goods by common carrier (such as the U.S. Postal Service, FedEx, UPS, etc.) or the seller arranges shipment by a private or contract carrier, the location where the goods are delivered determines the tax due.

However, the bulletin makes clear that if the **purchaser** makes arrangements for the goods to be picked up by a common carrier or private contract carrier, or if the goods are delivered to an employee, agent, or representative of the purchaser, sales tax is due based upon that location. This is a particular problem for those whose purchases are very valuable and require special handling which, for many reasons not related to tax, a purchaser may want to control.

For example, if you are buying a valuable, fragile piece of art, like a sculpture or large painting, which needs to be packed with extraordinary care and shipped through a service that specializes in handling that type of art the purchaser might want to make those arrangements himself even if the location of ultimate delivery is outside New York. In that case, New York sales tax would be due if you take delivery or send your agent to take the goods from New York to its ultimate destination in another state or foreign country. The tax consequence is based, in part, on the narrow definitions of delivery.

This has caused uproar throughout the galleries and art sellers in New York. Within weeks, TB-ST-155 disappeared from the Department’s website, except for one reference on page 32 of Publication 750 ([A Guide to Sales Tax in New York](#)), with a link to the bulletin that ultimately takes you to a note ‘webpage not found.’ The Department is reviewing the bulletin and will reissue it after the review.

The good news is that the Department heard the uproar and is reconsidering its position; the bad news is that without guidance otherwise, gallery owners, art dealers, and purchasers may have to pay and collect sales tax in New York and file protective refund claims until the issue is resolved.

Sales and use tax issues can be difficult and expensive to deal with since the tax is calculated on gross receipts from sales without regard to profits. If the tax is not collected from the purchaser it becomes the seller’s liability and, if not paid, can be collected from officers, employees, or directors who are ‘responsible persons’ and are personally liable for the delinquency.

GT has an experienced team handling state and local sales and use tax issues around the country including nexus questions, exempt and non-exempt goods and services, exempt organizations, and voluntary disclosure agreements.

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