

The New York State Sales Tax Net Widens for Sales by Exempt Organizations

Revised Alert

Although New York law exempts certain types of organizations (such as nonprofit charitable, educational and religious organizations) from the payment of sales tax on their purchases, recent changes to the New York Tax Law and the regulations promulgated under that law have considerably increased the situations in which such qualifying exempt organizations must collect sales tax on their sales of tangible personal property (such as books, jewelry and furniture).

Prior to September 1, 2008, retail sales of tangible personal property by qualifying exempt organizations generally were subject to New York sales tax only if the sales were made at a physical shop or store.

Since September 1, 2008, when amendments to the New York Tax Law took effect, sales of tangible personal property by exempt organizations through remote means, and delivered within New York, have been subject to New York sales tax if such sales are made with a degree of regularity, frequency and consistency, regardless of whether the organization also makes taxable sales from a shop or store. (See our prior Alert, *Important Changes to New York Sales Tax Law Affecting Exempt Organizations*.¹)

Effective January 1, 2009, amendments to the Sales and Use Taxes Regulations expand the application of the New York sales tax to additional sales outside an exempt organization's shop or store and to certain auctions conducted by or for the benefit of exempt organizations. These most recent changes are described below.

Sales Outside a Shop or Store

As of January 1, 2009, if an exempt organization operates a shop or store and also makes retail sales of similar items of tangible personal property by any other means (including remote means or at an auction), the sales by such other means are considered to be made from the organization's shop or store and therefore subject to sales tax if the property is taken by the purchaser or delivered within New York, regardless of the frequency of such sales.

Auction Sales

Additionally, certain sales of tangible personal property made by traditional or remote auction, and taken by the purchaser or delivered within New York, are subject to sales tax if made with a degree of regularity, frequency and continuity. The regulations define a "traditional auction" as an auction where any bidders or their representatives are physically present (regardless of whether bids are also accepted by telephone, over the Internet or otherwise), and each "traditional auction event" is defined as any day or portion of a day during which a traditional auction sale takes place. A "remote auction" is defined as an auction conducted by remote means where no bidders or their representatives are physically present, and each "remote auction event" is defined as 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.

If an exempt organization holds no more than two traditional auction events during a calendar year, sales made at each event will not be subject to sales tax unless (1) the organization makes sales of similar items at a shop or store or (2) the auction event is conducted on the premises of a commercial auction house or on any premises where other auction sales are made. Subject to certain exceptions, if an organization holds more than two traditional auction events during a calendar year, sales at all such events will be subject to sales tax. Similar rules apply to remote auction events, with very precise guidelines on what constitutes "one" remote auction for purposes of determining whether the organization has exceeded the threshold.

Sales Not Subject to These New Regulations

Since the new regulations pertain only to sales of tangible personal property (such as books, jewelry and furniture), the new regulations do not apply to some items frequently auctioned at fundraising events, such as vacation packages or spa services.

Additionally, the following exceptions to sales tax liability have not been changed by the new regulations:

- Certain types of items currently are exempt from New York State sales tax, regardless of the method of sale, such as clothing and footwear sold for less than \$110 per item of clothing or per pair of shoes, periodicals and certain drugs and medicines.
- Sales to purchasers that provide the vendor with a properly completed Exempt Organization Certificate or Resale Certificate are not subject to New York State sales tax.

Guidelines and Registration Requirements

Guidelines issued by the New York State Department of Taxation and Finance (the "Department") discussing these changes and providing helpful examples can be found at http://www.tax.state.ny.us/pdf/memos/sales/m08_15s.pdf. As noted on page five of the guidelines, an exempt organization that makes any taxable sales must register with the Department for sales tax purposes if it has not already done so. Once registered, organizations generally will be required to file quarterly sales tax returns, regardless of whether any sales tax is actually collected.

Endnote

- ¹ The August 2008 Alert can be found on our website at: http://www.pbwt.com/files/Publication/041f393b-94b3-4285-9b0c-02f677d42bb8/Presentation/PublicationAttachment/23fa1ba8-8d5a-4422-89fe-03fb6cc46a96/EO_Alert_SalesTaxChangesEO_081508.pdf.

If you would like more information about this alert, please contact one of the following attorneys:

Megan E. Bell	212.336.2077	mbell@pbwt.com
Laura E. Butzel	212.336.2970	lebutzel@pbwt.com
Nishka Chandrasoma	212.336.7629	nchandrasoma@pbwt.com
William F. Gaske	212.336.2923	wfgaske@pbwt.com
Antonia M. Grumbach	212.336.2840	amgrumbach@pbwt.com
Dana W. Hiscock	212.336.2290	dwhiscock@pbwt.com
Rochelle Korman	212.336.2680	rkorman@pbwt.com
Robin Krause	212.336.2125	rkrause@pbwt.com
Robert M. Pennoyer	212.336.2700	rmpennoyer@pbwt.com
Gerald A. Rosenberg	212.336.2610	garosenberg@pbwt.com
John Sare	212.336.2760	jsare@pbwt.com
Janine Shissler	212.336.2213	jshissler@pbwt.com
Jean L. Tom	212.336.2214	jltom@pbwt.com
Caroline Trowbridge	212.336.2575	ctrowbridge@pbwt.com

IRS Circular 230 disclosure: Any tax advice contained in this communication (including any attachments or enclosures) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication. (The foregoing disclaimer has been affixed pursuant to U.S. Treasury regulations governing tax practitioners.)

This alert is for general informational purposes only and should not be construed as specific legal advice. To subscribe to any of our publications, call us at 212.336.2329, email info@pbwt.com, or sign up on our website, www.pbwt.com/resources/publications.