

Alert: Who is a “Common Carrier” for NYS Sales Tax Purposes: What We Can Learn from the Gagosian Settlement with the NYS Attorney General

July 28, 2016

Last August, the New York Department of Taxation and Finance issued a bulletin that described the circumstances in which New York State sales tax had to be collected when property was being shipped out of New York.

The bulletin repeated the basic and familiar rules:

- If the buyer – or someone acting on the buyer’s behalf – takes possession of the purchased property within New York State, the gallery must collect and remit NYS sales tax (absent an applicable exemption).
- If a buyer sends a shipper to pick up the purchased property from the gallery in New York State, the buyer is deemed to have taken possession of the property in NY, and the gallery must collect and remit NYS sales tax (absent an applicable exemption).
- However, where the buyer’s shipper is a “common carrier,” and the property is shipped outside New York State, the gallery does not need to collect NYS sales tax.

The striking thing about the bulletin was that it defined “common carrier” in a very narrow way that appeared to exclude many art shippers. Under this narrow definition, sales that were previously understood by galleries to be non-taxable, out-of-state deliveries by common carrier could, under the narrow definition, require the collection of sales tax.

The Department later withdrew the bulletin, but it was not clear whether the withdrawal signaled a change in their position about “common carriers.” *It is now clear that it did not.*

On July 19th, 2016 the New York State Attorney General announced a \$4.28 million settlement with Gagosian Gallery following an investigation into its New York sales tax collection practices. According to the press release issued by the Attorney General, some portion of the settlement related to sales where the gallery “turned over art to shipping companies within New York that *were not common carriers like UPS, FedEx or the U.S. Postal Service* [emphasis added], but rather were contract carriers acting as the purchaser’s agent,” saying that in those circumstances, “Gagosian should have collected and remitted sales tax.”

In light of these events, where a transaction is not otherwise exempt from sales tax, galleries would be wise to:

- **Arrange for any out-of-state shipments by hiring and directly paying the shipper, if the shipper does not meet the Department’s definition of “common carrier.” The gallery may charge the buyer an allowance for shipping costs on the invoice, or seek reimbursement from the buyer for any shipping costs after the sale.**

- **Keep complete and accurate records that substantiate that the shipment was not arranged by the buyer, that the buyer did not hire the shipper, and to show that the gallery directly paid the carrier for the shipping costs.**

A copy of the Attorney General press release is available at, <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-428-million-settlement-international-art-dealer-gagosian> (last visited July 20, 2016).

We attach a copy of material distributed to Members last September that includes a more complete description of the August 2015 bulletin.

The discussion above is based on current New York sales tax law, judicial opinions and administrative guidance, each as of the date hereof.

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For further information on this topic, you may contact the following attorneys at Patterson Belknap Webb & Tyler LLP: [Jo Backer Laird \(jblaird@pbwt.com\)](mailto:jblaird@pbwt.com) | 212-336-7614) and [Matthew J. Kohley \(mkohley@pbwt.com\)](mailto:mkohley@pbwt.com) | 212-336-2017).

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New York Sales Tax – New York Department of Taxation’s View on Common Carriers

September 24, 2015

The issue – sales tax rules regarding deliveries in New York

The New York sales tax regulations describe sales tax as a “destination tax.” As a general rule, subject to certain exceptions, the location where the buyer takes possession of the sold property controls both the incidence and rate of tax. The location where title passes does not itself govern whether a sale of property is taxable in New York.

Specifically, delivery of the property to the buyer, its agent or designee inside New York, including delivery in the buyer’s own vehicles or private carriers hired by the buyer, is subject to New York sales tax (unless an exemption applies, such as the resale exemption). For example, a New York gallery that ships artwork to a buyer within New York would be responsible for collecting and remitting New York sales tax on the sale. Similarly, if a gallery ships artwork to a New York art restorer hired by the buyer, the gallery would be required to collect New York sales tax. Furthermore, if the gallery releases the artwork to the buyer in New York for delivery by the buyer’s own vehicle or by a private carrier hired by the buyer, the gallery would be responsible for collecting and remitting New York sales tax, even if the ultimate destination for the shipment was a location outside New York.

In contrast, delivery to the buyer outside New York – whether by the seller’s own vehicles, private and contract carriers hired by the seller or by a common carrier – is not subject to New York sales tax.

The term “common carrier” is not defined in the New York Tax Law or applicable regulations and, instead, has been given meaning by the courts and administrative judges. Recently, the New York Department of Taxation and Finance (the “Department”) issued a Tax Bulletin stating that a “common carrier is different from a private or contract carrier in that a common carrier does not operate under a private arrangement or contract with negotiated terms.” It defines a “common carrier” as “one that holds itself out to the public as one who will agree to carry (transport) personal property for all who apply; is required to carry for all who apply; agrees to carry for a specified and standard rate of compensation; and makes deliveries under standard delivery schedules.” The bulletin notes that “sales tax is due based on where a common carrier delivers tangible personal property, whether the common carrier has been hired by the seller or by the purchaser” and notes that a “seller must maintain records which substantiate points of delivery by common carriers.”

Recent positions taken by the New York Department of Taxation and Finance during sales tax audits

We understand that, during recent sales tax audits of New York art galleries, the Department is taking the position that certain art shippers are not “common carriers” (for sales tax purposes) and, instead, are “private carriers” because the carriers specialize in art shipments. They are not,

for example, the same as Federal Express. As a result, we understand that the Department is taking the position that, in order for a gallery not to collect any New York sales tax on such out-of-state deliveries, the buyer cannot directly pay for the shipment or make arrangements for the shipment. Instead, the gallery must arrange for the shipment and directly pay for the shipment. The Department is apparently advising that, in such a circumstance, the gallery *may* receive a reimbursement of the shipping costs from the buyer.

The Department is taking the position that this rule applies even if a carrier may be designated as a “common carrier” for other, non-tax purposes. For example, the Federal Motor Carrier Safety Administration (“FMCSA”) issues “operating authorities” to carriers that (in general) grant the carrier the legal permission to engage in for-hire transportation by a motor vehicle. One such “authority” is a “common authority” for common carriers. The FMCSA offers a database on its website where one can search for a carrier by name and determine the type of “operating authority” issued to the carrier by the FMCSA. For example, Crozier’s Fine Arts Inc. and Acumen Fine Art Logistics LLC are currently listed as having an “active” “common authority” in the FMCSA database. Our understanding is that, during recent audits of New York galleries, the New York Department of Taxation and Finance is not treating the designation of a carrier as a “common carrier” for other purposes (such as by the FMCSA) as dispositive for sales tax purposes.

Finally, we understand that, in order to substantiate that no sales tax was required to be collected on such out-of-state deliveries, the Department is requesting galleries to show (during the audit) documentation that the shipment was not arranged by the buyer and to show that the gallery directly paid the carrier for the shipping costs.

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