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IN THE NEW YORK ART MARKET NOTHING IS CERTAIN, EXCEPT DEATH AND SALES TAXES: A Primer on the recent New York Sales Tax Collection Requirements for Art Galleries and Dealers without a Physical Presence in New York

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On January 15, 2019, the Department of Taxation and Finance of the State of New York (the “Tax Department”) published N-Notice N-19-1 “Notice Regarding Sales Tax Registration Requirement for Businesses with No Physical Presence in New York State” (the “N-Notice”). In such N-Notice, the State of New York provided notice and clarification regarding recent developments to the New York State Tax Law resulting from the United States Supreme Court decision in *South Dakota v. Wayfair, Inc.*¹ on June 21, 2018.

The State of New York has now amended its definition of who constitutes a sales tax vendor² for purposes of being required to register to collect and pay applicable New York sales taxes on sales of tangible personal property.³

Under the new tax provisions, an art gallery, auction house or dealer without any physical presence in New York State is deemed to be, and must register as, a sales tax vendor and collect and timely remit applicable New York State and local sales tax if it satisfies both of the following two requirements during the immediately preceding four sales tax quarters:

- It must have made more than US\$300,000.00 in sales of artwork delivered in the State of New York; and

¹ *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 201 L. Ed. 2d 403 (2018).

² A sales tax vendor is generally defined as a person who regularly or systematically solicits business in New York State by any means and by reason thereof makes taxable sales of tangible personal property to persons in New York State.

³ Tangible Personal Property includes artistic items such as paintings, sculptures, photographs, and craft items.

- It must have conducted more than 100 sales of tangible personal property delivered in the State of New York.

For purposes of determining if the tax registration and payment threshold has been met, the sales tax quarters are as follows:

- March 1 through May 31
- June 1 through August 31
- September 1 through November 30
- December 1 through February 28/29

The foregoing changes to the New York State Tax Law are effective immediately.

Art market participants that satisfy the aforesaid criteria for registering to collect and remit New York State and local sales taxes should immediately register as a sales tax vendor with the Tax Department and obtain a Certificate of Authority. The Certificate of Authority affords the registering party with the right to collect tax from artwork purchasers on taxable sales of artwork and to issue and accept New York State sales tax exemption certificates, including important Resale Certificates.⁴

Once registered to collect and remit New York State and local sales taxes, the registering party must file its sales tax returns on time, even if it has not made any taxable sales. It must also keep accurate records of all sales sufficient to determine the taxable status of each sale and the amount of tax due and collected. Such records should be kept for a minimum of three years from the due date of the tax return to which those records relate or the date the tax return is filed, if later.

To the extent that the registered vendor is relying on a Resale Certificate to exempt it from an obligation to collect sales taxes in connection with a particular sale, the vendor must be able, through its records, to connect an exempt sale to a particular purchaser to the Resale Certificate on file for that particular exempted sale.

The failure to register for sales tax purposes when required to do so results in significant penalties. The maximum penalty for operating a business without a valid Certificate of Authority is \$10,000.00.

⁴ Commonly referred to as “Dealer Resale Certificates”.

Moreover, duly registered art market participants are subject to substantial civil and criminal penalties for:

- Failing to file a sales tax return
- Failing to collect required sales and local taxes
- Failing to pay or pay over sales and local taxes to the State of New York
- Failing to maintain sales tax records in accordance with legal requirements
- Committing various acts of tax fraud, including filing false tax returns

Moreover, violations of the foregoing will likely subject the vendor to a tax audit to determine any additional taxes and penalties and interest due.

This article has provided a brief overview of the recent changes to New York State Tax Law. It should not be deemed as an exhaustive review of all relevant tax provisions necessary to comply with the sales and local tax registration, collection and filing requirements for art market participants selling and delivering to New York State. You should contact your art law attorney and tax advisor for further information about the regulatory regime and its applicability to your particular situation.⁵

For more information on this new tax framework and on navigating the new rules, please contact the author at eliberman@libermancanna.com or the firm at info@libermancanna.com.



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