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## REQUEST LETTER

04-002

NAME

ADDRESS

Hi, TP REPRESENTATIVE. It was nice to see you in Atlanta in October.

I'm sending this note in my capacity as a member of the Board of Trustees of SERVICES. Even though we are not FAITH, my wife and I have supported their outreach efforts for years. They do a terrific job for the disadvantaged among us.

SERVICES plans to hold a fund raising event DATE. Known as the EVENT, FESTIVAL ", it offers an opportunity for local artists to show and hopefully sell their wares, with a portion of the proceeds going to SERVICES. The mechanics of the event are simple. Patrons purchase artwork, paying SERVICES. SERVICES in turn pays the artist 65% of the proceeds, and keeps the rest for its charitable work.

I'm helping to organize the event this year, and being an old tax guy, a whole bunch of questions popped into my mind.

1. Since SERVICES is an IRS qualified charity, not in the business of selling paintings, isn't this event a casual sale event such that SERVICES need not collect sales tax? It reminds me of a glorified yard sale.
2. If SERVICES must collect sales tax, must they collect sales tax on the entire amount, or just the amount that is passed on to the artist? In other words, isn't at least the "charity" portion of the proceeds exempt from sales tax? [By the way, that is the position that was taken by the last organizers of this event.]
3. For Utah purposes (and by implication Federal purposes) doesn't 35% of the amount paid by a patron count as a charitable deduction? One could take the position that the fair value of the goods received is equal to the amount that the artist received. [Note that the artist would receive the same amount if his/her work were sold in an art gallery, with the art gallery retaining 35% of the proceeds as revenues in a profit making business.]

Any light you or your staff could shed on this arrangement will be helpful.  
We want to do the right thing.

NAME

PHONE

## RESPONSE LETTER

RE: Private Letter Ruling Request –

August 4, 2004

NAME  
ADDRESS

Dear NAME,

We received your request for sales tax information pertaining to sales of art by SERVICES. TP REPRESENTATIVES, one of our Administrative Law Judges, also received a voice mail from you stating the event mentioned in your letter had been cancelled. You requested a response for guidance in future fundraisers. You posed three questions: Must SERVICES collect sales tax on art sold at the event; if sales tax is collected, on what portion of the sales price; and, is the purchaser entitled to treat the 35% of the purchase price retained by SERVICES as a charitable deduction. We offer the following:

Although SERVICES, as a 501(c)(3), qualifies as a charitable institution, the fundraising activity described does not automatically qualify for the sales tax exemption.

Exemptions may be permitted under either of two scenarios:

1. Isolated or occasional sales by persons not regularly engaged in business (13)
2. Conduct of regular . . . charitable functions and activities (8)

### **Isolated or Occasional Sales**

In determining an isolated or occasional sale, the Commission will examine several factors. First, in this case, we examine the characteristics of consignments in general and this event in particular

- Under the definition of a consignment, the putative seller is acting as an agent for the true seller
- In this case, the sale is made by SERVICES as agent for the artist
- The artist is regularly engaged in business of selling art
- The sale of artwork is a taxable transaction
- The artist is effectively donating 35% of sales price to SERVICES

Because SERVICES is acting as an agent for the artist, who is regularly engaged in the business of creating and selling art, and is not donating the art to SERVICES, the transactions cannot be considered as an isolated or occasional.

In addition, we note that this event, regardless of whether products are consigned or not, has been held in the past and may be held on a regular basis in the future. We would not view any transaction that was under consideration to be scheduled on a regular basis as isolated or occasional.

### **Sales by a Charitable Institution**

In determining whether sales by SERVICES are part of its regular functions and activities, the Commission again considers several factors:

- Although not an essential requirement, fundraising in general is not identified in Art. of Inc.
- SERVICES is not selling a donated good
- Sales of consigned property in general and artwork in particular are not identified in Art. of Inc.
- The sale of art is not otherwise directly related to SERVICES regular functions and activities.

An example of a directly related activity is found in Youth Tennis Foundation v. Tax Commission, 554 P.2d 220 (Utah 1976). In that case, the Youth Tennis Foundation, established to sponsor, promote, and encourage amateur tennis, held a tournament and charged admission. The proceeds of ticket sales were applied to the costs of the tournament. The excess was reserved for future activities consistent with the purposes of the Foundation. The Court held the proceeds from the ticket sales were not taxable, as they were part of its regular charitable activities.

The sale of artwork does not appear to be related to SERVICES regular functions and activities. And, although the Commission would not necessarily rule against fundraising as part of SERVICES regular activities on the basis of any single factor listed above, the fact that none of the factors are present indicates that the activity you have described would not qualify for the exemption.

And, although the sale of property may be consistent with the charitable purpose, if the proceeds are used to fund those activities, there is also an associated purpose – that of the artist's business enterprise. The artist receives a profit just as he or she would if the art were sold in a gallery or through some other medium, with appropriate adjustments for expenses.

In the future, should SERVICES hold fundraisers where goods are donated, those transactions may be considered to be exempt.

### **AMOUNT OF SALE SUBJECT TO TAX**

As outlined above, we do not see a basis for exempting the sale of art from sales tax. Sales tax would be due on the total amount of the sale.

### **DEDUCTIBILITY OF THE 35% RECEIVED BY SERVICES.**

The State of Utah has adopted the definition of Federal Taxable Income defined in Utah Code Annotated §59-10-111 which states: "Federal taxable income' means taxable income as currently defined in Section 63, Internal Revenue Code of 1986." State taxable income is also defined in Utah Code Annotated §59-10-112 as follows: "'State taxable income' in the case of a resident individual means his federal taxable income (as defined by §59-10-111) with the modifications, subtractions, and adjustments provided in §59-10-114..."

Based on these code sections, Utah accepts the same itemized deductions that are allowed on the federal return with certain modifications found in Utah Code Annotated §59-10-114. Since Utah accepts, in most cases, the charitable contributions claimed on the federal return it is recommended that this question be posed to the Internal Revenue Service.

### **Conclusion**

While the Commission would not necessarily rule out all consignment sales as isolated or occasional, in this case the specific nature of a professional artist putting up art for sale on consignment would disqualify the exemption. Similarly, regular business transactions, whether on consignment or not, do not qualify for the charitable exemption unless the nature of the business itself is part of a charity's regular functions and activities. In this case, SERVICES is not engaged in an activity related to the arts. The Commission, again, would not necessarily find against fund-raising as a qualified activity, even if not addressed in the articles of incorporation, in this particular case, the business related component of the transaction disqualifies the sale of art from the charitable exemption.

Sales tax would be due on the total amount of the sale. Whether the buyer would be able to deduct a portion of the purchase price as a charitable contribution is a question of federal tax law.

Please let us know if you have further questions.

For the Commission,

Marc B. Johnson  
Commissioner

MBJ/SR  
04-002

