Letter Ruling 98-14: Use Tax on Artwork

September 4, 1998

You request a letter ruling on behalf of your client, ("Dealer"). You ask us to rule that Dealer is not required to collect and remit Massachusetts use tax on an out-of-state sale of a piece of artwork to an individual who is neither a citizen nor a resident of the United States ("Owner").

Facts

The following is your representation of the facts upon which we base this letter ruling. Dealer is registered as a Massachusetts vendor for sales and use tax purposes. Dealer's principal place of business is located in a state outside of Massachusetts. Dealer sold Owner a piece of artwork within the past six months. The sales agreement was executed and title to the artwork passed in a state outside of Massachusetts. You state that under that state's law, no sales or use tax is due in that state. To date, Owner has not taken possession of the artwork.

Subsequent to Owner's purchase of the artwork, Owner became aware of the previous owner's intention to make a philanthropic loan of the artwork to ("Exhibitor") for temporary public display in Massachusetts. While Owner has no legal obligation to honor the previous owner's intentions, Owner wishes to honor the philanthropic intent of that proposed loan agreement and loan the artwork to Exhibitor for temporary public display.

In the event that Owner undertakes such temporary loan, Exhibitor would assume all responsibility for insuring the artwork against loss or damage while it is on display in Massachusetts for the duration of the loan, a period of several months. Under the terms of the proposed loan agreement, the temporary loan would be executed by an authorized agent of Owner to keep Owner's name anonymous to the Exhibitor and the general public. Owner will retain the right to revoke the loan of the artwork at any time and for any reason. Further, Owner will not receive any compensation from Exhibitor or any other party for the loan. You also represent that Owner will derive no federal or state tax benefit as a result of the loan of the artwork to Exhibitor.

Owner asserts that Owner purchased the artwork with the sole intent of adding it to Owner's private collection outside of the United States. Only after the sale was executed did Owner learn of the previous owner's intentions with regard to loaning the artwork to Exhibitor. Owner states that Owner's motivations toward entering into the loan agreement with Exhibitor are purely benevolent and are not for purposes of tax avoidance. However, Owner's loan of the artwork to Exhibitor raises the question of whether the sale of the artwork and its temporary placement in Massachusetts after such sale pursuant to the loan agreement will subject Owner to Massachusetts use tax, since the artwork will be brought into Massachusetts within six months of its purchase. If so, Dealer, as a registered Massachusetts vendor, would be required to collect and remit use tax on Owner's purchase.

Ruling

Based on the facts and circumstances in this instance, we rule that the Owner did not purchase the artwork for storage, use or other consumption in Massachusetts. Therefore, the sale by Dealer is not a taxable transaction for purposes of the Massachusetts use tax.

Discussion

Massachusetts law imposes a use tax on the storage, use or other consumption in Massachusetts of tangible personal property purchased for storage, use or other consumption in Massachusetts at the rate of five percent of the sales price of the property. G.L. c. 64I, § 2. The term "store" or "storage" is defined as "any keeping or retention in the commonwealth for any purpose except sale in the regular course of business or subsequent use solely outside the commonwealth of tangible personal property purchased from a vendor." G.L. c. 64I, § 1. "Use" is defined to include "the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of that property in the regular course of business." Id. In addition, the terms "store" and "storage," and "use" do not include the keeping, retaining, or exercising of any right or power over tangible personal property for the purpose of subsequently transporting it outside of Massachusetts for use solely outside of Massachusetts. Id.

Massachusetts law also presumes that tangible personal property shipped or brought to Massachusetts by the purchaser was purchased from a retailer for storage, use or other consumption in Massachusetts if the property was shipped or brought into Massachusetts within six months after its purchase. G.L. c. 64I, § 8(f). A taxpayer can rebut this statutory presumption by presenting sufficient evidence to establish that the property shipped or brought into Massachusetts was not purchased for storage, use or other consumption in Massachusetts. M&T Charters, Inc. v. Commissioner of Revenue, 404 Mass. 137 (1989), citing Towle v. Commissioner of Revenue, 397 Mass. 599 (1986). See also Defore v. Commissioner of Revenue, A.T.B. Docket No. 132830 (1987); The Macton Corporation v. Commissioner of Revenue, A.T.B. Docket No. 137660 (1993).

Whether property was purchased for storage, use or other consumption in Massachusetts depends on the facts and circumstances of the particular transaction. DOR Directive 87-3, issued by the Commissioner, focuses on the effect of the statutory presumption of taxability provided in G.L. c. 64I, § 8(f) on property purchased out-of-state and brought into Massachusetts. The Directive lists five factors to be considered when determining whether or not a taxpayer has met the burden of rebutting the presumption of taxability. The factors are as follows:

1) the residency of the taxpayer;
2) whether there was an intervening use of the property in another state;
3) the length of time between purchase of the property and its use in Massachusetts;
4) an unforeseen change in circumstances occurring after purchase; and
5) whether the purchaser knew at the time of purchase that the property would be used in Massachusetts.

Applying the above factors to the facts as you have represented, we find the following: 1) Owner is neither a United States citizen nor United States resident and is therefore a nonresident of Massachusetts; 2) the artwork was purchased outside of Massachusetts; Owner has yet to take delivery of the artwork and, therefore, there is no intervening use of the artwork in another state; 3) the passage of time between the purchase of the artwork and its use by Exhibitor in Massachusetts would fall within six months of the Owner's purchase; 4) the contemplated loan agreement between Exhibitor and the artwork's previous owner was not made known to Owner until after Owner purchased the artwork, and thus was an unforeseen change in circumstances; and 5) since the Owner did not know at the time of purchase that artwork's previous owner was considering loaning the artwork to Exhibitor, located in Massachusetts, Owner had no knowledge at the time of purchase of any potential use of the artwork in Massachusetts.

Since the proposed loan agreement between Owner and Exhibitor will result in the artwork being brought into Massachusetts within six months of its purchase, Owner has the burden of proving that the artwork was not purchased for storage, use or other consumption here. Under the facts and circumstances discussed above, we conclude that Owner has met this burden and is not liable for use tax on the artwork. Dealer is therefore not required to collect or remit use tax on this transaction.

Very truly yours,

/s/Mithcell Adams

Mitchell Adams
Commissioner of Revenue

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