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Directive 03-8: Massachusetts Sales and Use Tax Treatment of Certain Transactions Between Printers and Their Customers

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I. INTRODUCTION

This Directive explains the Massachusetts sales and use tax treatment of certain transactions between printers and their customers who distribute various printed materials, not otherwise exempt under a particular provision of law, to Massachusetts recipients. Depending on the facts and circumstances surrounding a particular transaction, a printer or its customer may be liable for collecting and remitting sales/use tax to the Commissioner.

II. DIRECTIVES

1. PRINTERS AND CUSTOMERS BOTH HAVING NEXUS WITH MASSACHUSETTS

Directive 1(a): *Sales tax liability - Massachusetts sales.* A printer prints taxable material in Massachusetts; the customer takes possession of the printed material in Massachusetts or the printed material is shipped to the customer's designees in Massachusetts. A sale at retail of the printed material has occurred in Massachusetts. The printer, as a registered vendor, must therefore collect sales tax from its customer and remit it to the Commissioner. See G.L. c. 64H, §§ 2, 3.

Directive 1(b): *Out-of-state sales.* When a printer prints taxable material in Massachusetts for delivery to a customer's premises outside Massachusetts, the printer is not obligated to collect sales or use tax from its customer. The sale is an out-of-state sale exempt from sales tax under G.L. c. 64H, § 6(b) and exempt from use tax under G.L. c. 64I, § 7(b). The customer with Massachusetts nexus must, however, self-assess and remit Massachusetts use tax on the printed materials it distributes or causes to be distributed to the customer's Massachusetts recipients. See *Commissioner of Revenue v. J.C. Penney Company, Inc.*, 431 Mass. 684 (2000).

NOTE: *Use tax liability.* When a printer and its customer both have nexus with Massachusetts, either party may be liable for use tax, depending on the particular facts and circumstances of the transaction. Where neither party has paid the tax, the Commissioner may assess either one.

2. PRINTERS WITH MASSACHUSETTS NEXUS; CUSTOMERS WITHOUT NEXUS

Directive 2: When a printer with nexus produces taxable materials outside Massachusetts for an out-of-state customer without nexus, the printer has no obligation to collect use tax from its customers, and the customer has no obligation to self-assess and remit use tax. However, if the

customer takes delivery in Massachusetts, the printer must collect sales tax.

3. PRINTERS WITHOUT MASSACHUSETTS NEXUS; CUSTOMERS WITH NEXUS

Directive 3: Where a printer without Massachusetts nexus for sales and use tax purposes prints taxable printed matter on behalf of its out-of-state customer with Massachusetts nexus, the printer has no sales or use tax collection or remittance obligation. Rather, the out-of-state customer with Massachusetts nexus that delivers the printed material to Massachusetts recipients must self-assess and remit use tax on the printed materials, regardless of whether it delivers them itself, or effectuates the delivery through a printer or another party (such as the United States Postal Service) to deliver them. See *Commissioner of Revenue v. J.C. Penney Co., Inc.*, 431 Mass. 684 (2000).

4. PRINTERS WITHOUT MASSACHUSETTS NEXUS; CUSTOMERS WITHOUT NEXUS

Directive 4: *No sales or use tax liability.* Where neither a printer nor its customer has nexus for Massachusetts sales and use tax purposes, the Commissioner cannot assess either sales or use tax from either party on printed materials distributed to Massachusetts recipients. See G.L. c. 64H, § 6(a); G.L. c. 64I, § 7(b); See *Commissioner of Revenue v. J.C. Penney Co., Inc.*, 431 Mass. 684 (2000).

III. DISCUSSION

A. Massachusetts sales tax

Massachusetts imposes a five percent sales tax on sales at retail of tangible personal property by any vendor in Massachusetts, unless specifically exempt under another provision of law. See G.L. c. 64H, §§ 2, 3. A “sale” is defined to include any transfer of “title or possession or both, exchange, barter, lease, rental, conditional or otherwise, of tangible personal property for a consideration, in any manner, or by any means whatsoever” G.L. c. 64H, § 1. Reimbursement for the sales tax must be paid by the purchaser to the vendor, and each vendor in the Commonwealth must add the sales tax to the sales price and collect from the purchaser the full amount of the tax imposed. G.L. c. 64H, § 3(a).

The exemptions from the sales tax are found in G.L. c. 64H, § 6. These exemptions include, among others, sales “which the Commonwealth is prohibited from taxing under the constitution or the laws of the United States.” See G.L. c. 64H, § 6(a). Also exempt are sales of tangible personal property that the vendor is obligated under the terms of any agreement to deliver either to a purchaser located outside Massachusetts or to a designee outside Massachusetts of a purchaser located outside Massachusetts. See G.L. c. 64H, § 6(b). If the vendor is obligated by an agreement to deliver the property to the purchaser’s designee outside Massachusetts, the sale will be exempt if the purchaser of the property is outside Massachusetts at the time the order for the property is placed. See *Out of State Sales regulation* 830 CMR 64H.6.7(3) (a) 4. Absent any evidence as to the location of the purchaser, the Commissioner will presume that the purchaser is inside Massachusetts at the time the order for the property is placed. If the vendor is obligated by an agreement to deliver the property to the purchaser’s designee outside Massachusetts and purchaser is inside Massachusetts at the time the order is placed, the sale is taxable unless both title and possession pass outside Massachusetts. See also Department of Revenue Printing regulation, 830 CMR 64H.6.2 for further rules pertaining to passage of title and a printer’s liability for sales tax collection.

In general, a printer that is engaged in making sales at retail in Massachusetts must collect sales tax on the retail sale of tangible personal property, including printed matter not otherwise exempt, in Massachusetts. See G.L. c. 64H, §§ 2, 3. A sale at retail occurs when a printer sells printed matter such as cards, invitations, books, letterhead or photocopies to its customer, who either uses or consumes the printed materials, or distributes this material free of charge. See Department of Revenue Printing regulation, 830 CMR 64H.6.2(3). Section 6 of this regulation generally requires a printer to collect sales tax on the retail sale of these items in Massachusetts. Thus, a printer engaged in making such sales in which title or possession passes in Massachusetts must collect sales tax on its sale of printed materials to a customer in Massachusetts, regardless of the location to which the customer may ultimately ship them.

A printer engaged in business in Massachusetts is required to be registered as a Massachusetts vendor. G.L. c. 64H, § 7. As summarized in Directive 1(a), a sales tax is due upon all sales of printed matter, not otherwise exempt, where the sale occurs in Massachusetts. For sales tax purposes, the sale occurs when the printer transfers title or possession of the taxable materials to the customer in Massachusetts. The printer, as a registered vendor, must collect and remit the sales tax on such transactions.

B. Massachusetts use tax

Massachusetts imposes a complementary use tax on property purchased for storage, use, or other consumption in Massachusetts, unless otherwise exempt. See G.L. c. 64I, § 2. The use tax and the sales tax, taken together, are complementary components of a unitary taxing program intended to reach all transactions, except those expressly exempted, in which tangible personal property is sold inside or outside the Commonwealth for storage, use, or other consumption within the Commonwealth. *Commissioner of Revenue v. J.C. Penney Company, Inc.*, 431 Mass. 684 (2000); *Towle v. Commissioner of Revenue*, 397 Mass. 599 (1986). As the two taxes are intended to be complementary and the statutory basis for imposing each tax is virtually identical, the distinction between the two taxes is often immaterial when either reaches a given transaction. See *Wide World Photos, Inc. v. Commissioner of Revenue*, A.T.B. Docket No. F250875 (2001), citing *Commissioner of Revenue v. Jafra Cosmetics, Inc.*, 433 Mass. 255, 259 (2001).

Broken down to its individual components, the use tax is imposed upon tangible personal property that (1) is stored, used or otherwise consumed in the Commonwealth; (2) that is purchased from any vendor; and (3) was purchased for storage, use, or consumption within the Commonwealth. "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 of the commonwealth of tangible personal property purchased from vendors." However, the terms "store," "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 the commonwealth for use thereafter solely outside the commonwealth. G.L. c. 64I, § 1.

The statutory test requires that an exercise of a right or power incident to ownership of tangible personal property equivalent to some right to control that property occur in Massachusetts. See *J.C. Penney Co., Inc., v. Commissioner of Revenue*, A.T.B. Docket No. F239834 (Jan. 29, 1999), reversed on other grounds, *Commissioner of Revenue v. J.C. Penney*, 431 Mass. 684 (2000). See also *Hart & McGinley v. Commissioner of Revenue*, A.T.B. Docket No. F233702 (Aug. 5, 1998). However, it is not necessary that the taxpayer itself directly perform these acts in order for a taxable "use" to occur. This requirement may be satisfied where another possesses and acts on property in the Commonwealth at the taxpayer's direction." *Id.*, citing e.g., *New York Times Co. v. Commissioner of Revenue*, 22 Mass. App. Tax Bd. Rep. 177, 89-90, (1997), *aff'd* 427 Mass. 399 (1998) (non-Massachusetts taxpayer directing travel activities of an aircraft situated in Massachusetts was engaged in use of property in the Commonwealth).

The exemptions from the use tax are found in section 7 of chapter 64I. Exempt from the use tax are sales upon which Massachusetts sales tax has been paid, sales exempt from Massachusetts sales tax, including sales which the Commonwealth is precluded from imposing under the Constitution or laws of the United States (See G.L. c. 64H, § 6(a)), and sales upon which tax is due and paid in another state or territory of the United States to the extent that the foreign tax equals the tax that would be imposed in Massachusetts.

1. Printer's liability for use tax

Under chapter 64I of the Massachusetts Laws, a printer engaged in business in the commonwealth and making sales of tangible personal property for use, storage, or consumption in the commonwealth must generally collect use tax from its purchaser on its sales of such property, not otherwise exempt. See G.L. c. 64I, § 4; *Wide World Photos, Inc. v. Commissioner of Revenue*, A.T.B. Docket No. F250875 (2001). Where a printer doing business as a vendor in Massachusetts prints materials outside Massachusetts and ships them directly to the Massachusetts designees of

an out-of-state purchaser having no nexus in Massachusetts in accordance with the purchaser's direction, a printer is not liable to collect use tax from the purchaser on materials purchased for use, storage, or consumption in Massachusetts.

2. Purchaser's liability for use tax

On June 14, 2000, the Massachusetts Supreme Judicial Court (SJC) issued two decisions regarding the assessment of Massachusetts use tax on promotional materials mailed from out-of-state locations to Massachusetts residents. See *Commissioner of Revenue v. J.C. Penney Company, Inc.* 431 Mass. 684 (2000); *Commissioner of Revenue v. Outdoor World Corporation*, 431 Mass. 1003 (2000). These cases upheld assessments of use tax by the Commissioner against out-of-state corporations with Massachusetts nexus that effectuate the delivery of promotional catalogs to Massachusetts recipients for purposes of promoting their business in Massachusetts, subject to constitutional requirements under the U.S. Commerce Clause. Accordingly, so long as such corporations have nexus with Massachusetts for sales and use tax purposes, they must self-assess and remit use tax to the Commissioner on materials destined for Massachusetts recipients. This is true whether the out-of-state purchaser effectuates delivery of taxable printed materials to Massachusetts recipients itself, or through a printer or other party, such as the U.S. Postal Service.

3. Joint liability for use tax

In cases where a printer and its customer both have Massachusetts nexus, either party may have a use tax liability, although the tax is to be collected only once. A printer's use tax collection obligation as a vendor is expressly provided in G.L. c. 64I, § 4; a customer's use tax remittance liability as a purchaser is found in G.L. c. 64I, § 3. See *Wide World Photos, Inc. v. Commissioner of Revenue*, A.T.B. Docket No. F250875 (2001); *Commissioner of Revenue v. J.C. Penney Company, Inc.* 431 Mass. 684 (2000), respectively.

IV. ILLUSTRATIVE SCENARIOS

The application of Massachusetts sales and use taxes to transactions between printers and their catalog company customers are illustrated by, but not limited to, the following scenarios:

Example 1: A Massachusetts-based printer and its New Hampshire-based customer both have nexus with Massachusetts for sales and use tax purposes. The printer prints taxable materials at its plant in Massachusetts and is obligated to deliver them to its customer's plant in New Hampshire. The New Hampshire customer then mails 10% of the taxable printed materials through the U.S. Postal Service to Massachusetts addressees.

Analysis: Here, the sale by the printer to its New Hampshire customer is exempt from sales tax as an out-of-state sale under G.L. c. 64H, § 6(b). Because the printer is not liable to collect sales tax under this scenario, it is also not liable for collecting use tax from its customer under G.L. c. 64I, § 7(b). However, because its New Hampshire-based customer has nexus with Massachusetts and is making use of the materials it mails to Massachusetts recipients, the New Hampshire customer must self-assess and remit use tax on the materials it distributes or causes to be distributed through an agent or other party to Massachusetts recipients. See G.L. c. 64H, §§ 2, 3; *Commissioner of Revenue v. J.C. Penney Company, Inc.*, 431 Mass. 684 (2000).

Example 2: A printer headquartered in New York and registered as a Massachusetts vendor prints printed matter outside Massachusetts for its New York-based customer that has nexus with Massachusetts. The printer delivers the materials to its customer's designees in Massachusetts.

Analysis: As a registered vendor doing business in Massachusetts, the New York printer must generally collect and remit Massachusetts use tax from its customers on the printed matter it delivers to the New York customer's designees, *i.e.*, located in Massachusetts. See G.L. c. 64I, § 4; *Wide World Photos, Inc. v. Commissioner of Revenue*, A.T.B. Docket No. F250875 (2001). Additionally, since the New York-based customer has Massachusetts nexus and is making a use of the printed matter in Massachusetts, it is also liable for self-assessing and remitting use tax on printed matter it distributed or causes to be distributed to Massachusetts recipients if the printer has not collected it.

See *Commissioner of Revenue v. J.C. Penney, Co. Inc.*, 431 Mass. 684 (2000). If neither party has paid the tax, the Commissioner may assess either of them.

Example 3: A printer with Massachusetts sales tax nexus (regional sales office in Boston) prints taxable materials for an out-of-state customer, a merchant that has nexus only in Wisconsin, its home state. The printed materials are shipped via the United States Postal Service (USPS) from a loading dock in Georgia, the location of the printer's headquarters and printing plant. Approximately 2% of the total printed order is shipped by the printer directly to Massachusetts designees. The remainder of the order is shipped to other states.

Analysis: Since the merchant lacks nexus, it has no obligation to remit Massachusetts use tax on materials it causes to be delivered to Massachusetts. Accordingly, although the printer has Massachusetts nexus, it has no obligation to charge and collect a use tax from the merchant. The merchant's lack of nexus prohibits the Commissioner from imposing a use tax collection liability on the printer. See, G.L. c. 64H, § 6(a); G.L. c. 64I, § 7.

Example 4: National Chain Inc. (NCI) has 10 stores in Massachusetts. NCI contracts with an out-of-state printer having no Massachusetts nexus to print and mail materials to designees nationwide. Approximately 2% of the materials are shipped by the printer from outside Massachusetts to Massachusetts designees.

Analysis: Since NCI has nexus with Massachusetts, NCI must self-assess and remit the use tax to the Commissioner. *Commissioner of Revenue v. J.C. Penney Company, Inc.*, 431 Mass. 684 (2001); and *Commissioner of Revenue v. Outdoor World Corporation*, 431 Mass. 1003 (2001). The printer is not obligated to remit use tax on behalf of NCI, because the printer has no nexus with Massachusetts.

/s/Alan LeBovidge
Alan LeBovidge
Commissioner of Revenue

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