

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-06(26)S
Sales Tax
October 19, 2006

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S051012A

On October 12, 2005, the Department of Taxation and Finance received a Petition for Advisory Opinion from WTAS, Inc., 452 Fifth Avenue, 23rd Floor, New York, NY 10018-2706. Petitioner, WTAS, Inc., provided additional information pertaining to the Petition on August 11, 2006.

The issues raised by Petitioner are:

1. Whether the purchase from a New York art dealer of Personal Artwork, as described below, that is shipped to a Geneva, Switzerland free trade zone is subject to New York State sales or use tax.
2. Whether the transfer of an art collection from an individual's estate to the individual's children is subject to New York State sales or use tax.
3. Whether the transfer from an individual's estate of shares and/or interests in companies that own artwork is subject to New York State sales or use tax.
4. Whether the artwork and furnishings located in an individual's Paris, France, residence that were acquired by the individual prior to establishing a New York residence are subject to use tax when the individual relocates from Paris to New York.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

An individual (X) was an art collector who resided in Europe. X was never a U.S. citizen or resident and his permanent place of abode was in Switzerland. X occasionally visited New York City; however, X did not maintain a permanent place of abode in New York.

X had three European residences. The majority of X's substantial art collection was located in these European residences. In 2004, X purchased four new pieces of artwork ("Personal Artwork"). Three of the pieces of Personal Artwork were purchased from auction houses or dealers within the United States. Two purchases were from New York auction houses or dealers and one was from an auction house or dealer outside New York. In each case, X did not take possession of any of these pieces of Personal Artwork in the United States. The Personal Artwork was shipped to and stored in a free trade zone (FTZ) located in Geneva, Switzerland, to defer paying European duties while X decided at which of his European residences he would display the artwork. Prior to X taking title, the Personal Artwork was held in escrow in the FTZ until its authenticity was verified by X. Subsequent to such verification, X

wired payment for the Personal Artwork to auction houses or dealers. Upon receipt of the wire transfer, the auction houses or dealers released the Personal Artwork to X. X paid for the storage of the Personal Artwork in the FTZ and insured the Personal Artwork during the period of storage. The Personal Artwork was in the FTZ at the time of X's death. X also owned other artwork and furnishings (i.e., paintings, sculptures, antique furniture, etc.) that were not in the FTZ ("Residential Artwork").

In addition to the Personal Artwork and Residential Artwork owned by X, there are numerous pieces of artwork ("Company Artwork") that are owned by closely held companies in which X was the sole shareholder or member. Such companies are located and operated entirely within Europe. The Company Artwork was acquired from all over the world, including the United States. To the extent that X or any of the companies took delivery of any artwork in New York, he or the company paid New York sales tax on the artwork.

X died in 2005 prior to placing the Personal Artwork he purchased in 2004 in any of his European residences. All of X's artwork, including the Personal Artwork, are part of X's estate and were bequeathed to his children who live in New York and anticipate bringing the items to New York. X's estate is being administered under the laws of Switzerland. By operation of Swiss law, upon X's death, X's children immediately became the owners of the Personal and Residential Artwork and other furnishings. For purposes of this Advisory Opinion, it is presumed that the transfers of the artwork in question from X's estate to his children are solely by bequest with no consideration paid. X's children also inherited shares and/or interests in X's companies that, in addition to operating businesses in Europe, own the Company Artwork.

X's former spouse, Y, has lived in Paris, France, for many years. Beginning in 2001, she also rented an apartment in New York City. Y recently terminated the New York City lease and purchased a New York City apartment. She now plans to sell her Paris residence and move to New York City permanently. Y has a substantial art collection, furniture, and other furnishings in her Paris residence that she desires to bring to the newly purchased New York City apartment upon her relocation from Paris to New York City. Much of Y's artwork and furnishings were acquired prior to the inception of the New York City lease in 2001.

Applicable law and regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

(6) Tangible personal property. Corporeal personal property of any nature. . . .

* * *

(7) Use. The exercise of any right or power over tangible personal property or over any of the services which are subject to tax under section eleven hundred ten of this article or pursuant to the authority of article twenty-nine of this chapter, by the purchaser thereof, . . .

Section 1105(a) of the Tax Law imposes sales tax upon:

The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1110(a) of the Tax Law provides, in part:

Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state . . . except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail, . . .

Section 1118 of the Tax Law provides, in part:

The following uses of property and services shall not be subject to the compensating use tax imposed under this article:

* * *

(2) In respect to the use of property or services purchased by the user while a nonresident of this state, except in the case of tangible personal property or services which the user, in the performance of a contract, incorporates into real property located in the state. A person while engaged in any manner in carrying on in this state any employment, trade, business or profession, shall not be deemed a nonresident with respect to the use in this state of property or services in such employment, trade, business or profession.

Section 525.2 of the Sales and Use Tax Regulations provides, in part:

Nature of tax. (a) Sales tax.

* * *

(2) Except as specifically provided otherwise, the sales tax is a "transactions tax," with the liability for the tax occurring at the time of the transaction. Generally, a taxed transaction is an act resulting in the receipt of consideration for the transfer of title to or possession of (or both) tangible personal property or for the rendition of an enumerated service. The time or method of payment is generally immaterial, since the tax becomes due at the time of transfer of title to or possession of (or both) the property or the rendition of such service

(3) Except as specifically provided otherwise, the sales tax is a "destination tax." The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax rate.

Section 526.7(e) of the Sales and Use Tax Regulations provides, in part:

(1) Except as otherwise provided in paragraph (3) of this subdivision, a sale is taxable at the place where the tangible personal property or service is delivered, or the point at which possession is transferred by the vendor to the purchaser or his designee.

* * *

(2) Except as otherwise provided in paragraph (3) of this subdivision, a sale of tangible personal property, in which the title to the property passes in New York State, but in which delivery occurs outside of New York State, is not subject to tax.

Section 526.8(c) of the Sales and Use Tax Regulations provides, in part:

Tangible personal property does not include:

- (1) real property;
- (2) intangible personal property.

Example 1: A corporation has bonds printed. It purchases paper, which is tangible personal property, printing and signature services, and must pay the tax on these charges. When the corporation issues the bonds as evidence of indebtedness, the bonds at this point in time are not tangible personal property subject to the sales tax. If, after the bonds are redeemed by the corporation, the

bonds are sold for display or collection purposes, they become tangible personal property which is subject to the sales tax.

Section 526.15 of the Sales and Use Tax Regulations provides, in part:

Resident. (a) Individuals. (1) Any individual who maintains a permanent place of abode in this State is a resident.

(2) Permanent place of abode is a dwelling place maintained by a person, or by another for him, whether or not owned by such person, on other than a temporary or transient basis. The dwelling may be a house, apartment or flat; a room, including a room at a hotel, motel, boarding house or club; a room at a residence hall operated by an educational, charitable or other institution; housing provided by the Armed Forces of the United States, whether such housing is located on or off a military base or reservation; or a trailer, mobile home, houseboat or any other premises.

Section 531.5(b) of the Sales and Use Tax Regulations provides, in part:

The compensating use tax shall not be imposed on the use of:

* * *

(2) Property within this State when purchased by the user while a nonresident of this State, except when the property is, in the performance of a contract, incorporated into real property located in this State (a nonresident is any person who is not a resident as defined in section 526.15 of this Title).

Example 1: A resident of Vermont purchased a television set in Vermont for his home in Vermont. At a later date he moves and takes up residency in New York State and uses the television set in this State. No use tax is due on the use of the television set in New York State.

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X purchased the Personal Artwork from auction houses and dealers located in and outside of New York State. X did not take title or possession of any of the Personal Artwork in New York. The auction houses and dealers, pursuant to X's directions, shipped the artwork to a free trade zone (FTZ) in Geneva, Switzerland, where title passed and the artwork was held in storage on X's behalf pending his decision as to where in Europe he would display it. X died while the Personal Artwork was in the FTZ. Under section 526.7(e) of the Sales and Use Tax Regulations, the sales of the Personal Artwork to X were not subject to New York State and local sales tax since delivery occurred at a location outside of New York.

The Personal Artwork and Residential Artwork described in this Opinion were bequeathed by X to his children. The children were not required to give any consideration to X's estate for the artwork. Since there was no consideration provided by X's children to the estate for the artwork, there was no sale as defined in section 1101(b)(5) of the Tax Law. Therefore, there is no sales tax due on the transfer of the artwork from X's estate to his children. Likewise, since the children did not purchase the artwork from the estate, there is no use tax due if the artwork is brought into New York State by the children or delivered to them by X's estate. See section 1110(a) of the Tax Law.

X's estate also transferred shares or interests in X's companies to X's children for no consideration. The transfer of the shares or interests in companies without any consideration is not a sale as defined in section 1101(b)(5) of the Tax Law. Further, receipts from the sale of shares of stock in a corporation are not subject to sales tax. See section 526.8(c)(2), Example 1 of the Sales and Use Tax Regulations. Thus no sales or use tax is due on the transfer of the shares or interests in X's companies from X's estate to his children.

Pursuant to section 1118(2) of the Tax Law, artwork and furnishings acquired outside New York State by Y while Y was a nonresident of New York State are exempt from New York State and local use tax when Y relocates and brings such artwork and furnishings into New York. See also section 531.5(b)(2) of the Sales and Use Tax Regulations.

DATED: October 19, 2006

/s/
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.