

**New York State Department of Taxation and Finance  
Office of Tax Policy Analysis  
Taxpayer Guidance Division**

TSB-A-08(7)S  
Sales Tax  
February 14, 2008

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S061220C

On December 20, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from The Great Art Fund III, LLC, 203 Springer Building, 3411 Silverside Road, Wilmington, Delaware 19810. Petitioner, The Great Art Fund III, LLC, submitted additional information pertaining to the Petition on July 27, 2007.

The issue raised by Petitioner is whether artwork, purchased by a nonresident, that is brought into New York State for the sole purpose of loaning it to an exempt organization is subject to sales and compensating use tax.

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

Petitioner is a Delaware limited liability company, treated as a partnership for federal tax purposes, which was formed on June 12, 2006. Petitioner's purpose is to purchase and hold for future appreciation quality works of art by established artists and to resell the pieces after a period of time. Petitioner maintains its principal office in the State of Delaware.

Petitioner is managed by DL Art Management, LLC ("DL"), a Delaware limited liability company. DL functions as a consultant making recommendations to Petitioner as to which pieces of artwork should be acquired or sold. The sole member (and employee) of DL is a New York State resident. DL does not at any time make any purchases or sales of the artwork on behalf of Petitioner. Neither DL nor its sole member (and employee) is a member of Petitioner.

Petitioner has, for investment purposes, purchased fine artwork from an art dealer located outside New York State. Upon purchase, the art dealer directly shipped the artwork to a storage facility in the state of Delaware, where it continues to be stored. To date, the artwork has not entered New York State and, as a result, no New York State sales and use tax has been paid in connection with the purchase of the artwork.

At no time is any individual member of Petitioner or DL permitted to take possession of any piece of artwork acquired by Petitioner for that individual's personal enjoyment.

The New York State resident and sole member of DL is a board member of the Nassau County Museum of Art ("NCMA"). Petitioner has received a request from the NCMA to loan the NCMA selected pieces of Petitioner's artwork for a limited time. The NCMA is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code of 1986, as amended, and is a registered exempt organization with New York State. The artwork is expected

to be displayed by the NCMA so that the general public will be able to view and enjoy the artwork.

Petitioner will receive no consideration from the NCMA for allowing the NCMA to display the artwork in the museum. Petitioner, at all times, remains the owner of the artwork though the NCMA will control decisions pertaining to the display of the artwork. The NCMA will transport the artwork from Petitioner's Delaware warehouse to the museum and return it to the Delaware warehouse at the end of the exhibition.

Petitioner has not previously made loans of artwork to museums in New York.

### **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 1116(a) of the Tax Law provides, in part:

Except as otherwise provided in this section, any sale or amusement charge by or to any of the following or any use or occupancy by any of the following shall not be subject to the sales and compensating use taxes imposed under this article:

\* \* \*

(4) Any corporation, association, trust, or community chest, fund, foundation, or limited liability company, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;

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:

Transfer of possession. (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 526.15 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. . . .

\* \* \*

(b) Others. (1) Any corporation incorporated under the laws of New York, and any corporation, association, partnership or other entity doing business in the State or maintaining a place of business in the State, or operating a hotel, place of amusement or social or athletic club in the State is a resident.

(2) Any person while engaged in any manner in carrying on in this State any employment, trade, business or profession shall be deemed a resident with respect to the use in this State of tangible personal property or services in such employment, trade, business or profession.

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.

\* \* \*

(6) Tangible personal property or services purchased by any organization which has qualified as an exempt organization under section 1116 of the Tax Law.

## Opinion

Petitioner purchases artwork for investment purposes from art dealers that may be located within or outside of New York State. The dealers ship the artwork directly to Petitioner's storage facility in the state of Delaware. Under section 526.7(e) of the Sales and Use Tax Regulations, the sale of artwork to Petitioner is not subject to New York State and local sales taxes upon the purchase thereof since delivery occurs at a location outside of New York. Petitioner proposes to loan the artwork to the Nassau County Museum of Art (NCMA) for display to the public.

The NCMA will be responsible for picking up the artwork from Petitioner's out-of-state storage facility and returning the artwork to that storage facility after its display in New York State.

Since there is no consideration provided by the NCMA to Petitioner for the use and display of the artwork by the NCMA in New York State, there is no sale, as defined in section

1101(b)(5) of the Tax Law, of the artwork by Petitioner to the NCMA. Even if such transaction were considered to be a sale, such a sale to the NCMA would be exempt from sales tax under section 1116(a) of the Tax Law. However, Petitioner's loan of the artwork to the NCMA for display by NCMA to the public is considered to be a use by Petitioner of the property in New York State. See section 1101(b)(7) of the Tax Law. The use of tangible personal property in New York State is generally subject to use tax under section 1110 of the Tax Law except to the extent that the property has already been or will be subject to the State sales tax or the use of such property is otherwise exempt.

Pursuant to section 1118(2) of the Tax Law, tangible personal property, such as artwork, purchased outside New York State by a person who is a nonresident at the time of purchase is exempt from New York State and local use tax when brought into New York by the person. Pursuant to section 1118(2) a person who purchases tangible personal property outside New York State is not deemed to be a nonresident if, at the time of such purchase, that person is engaged in any manner in carrying on any employment, trade, business, or profession in New York State, in which such property is used. See section 526.15 of the Sales and Use Tax Regulations. Provided that, at the time that Petitioner purchased the artwork, Petitioner did not maintain a place of business or carry on any business in New York State, Petitioner is deemed to be a nonresident of this State for purposes of section 1118(2). In such case, Petitioner will not owe use tax with respect to the subsequent use within New York State of the artwork it purchased outside New York.

If Petitioner engaged in New York State in its business activity of purchasing and selling artwork or otherwise engaged in business in New York (e.g., soliciting in New York for additional investors in Petitioner's business or soliciting in New York for customers to purchase any of the artwork Petitioner had accumulated) Petitioner might be considered to be a resident of New York and subject to use tax with respect to the use in New York of artwork purchased after the date Petitioner was engaged in business in New York.

It is noted that Petitioner's management company, DL, may be a New York State resident if DL's sole member and employee (who is a New York resident) conducts DL's consulting business in this State. The facts of this Petition indicate that Petitioner and DL are unrelated entities operated as separate and distinct entities. If DL or its employee performed services as Petitioner's employee, agent, representative, etc. in New York State, Petitioner would be considered to be conducting business within New York and would thus be a New York resident for sales and use tax purposes. Further, if the activities of either Petitioner or DL were so dominated and controlled by the other, or their activities were so commingled, that they would be considered to be operating as alter egos of each other rather than separate legal entities, then the separate entity structures would be disregarded and the conclusions reached in this Opinion

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might be different. See *Harfred Operating Corporation*, Adv Op St Tx Comm, July 18, 1986, TSB-A-86(28)S; and *Bass Pro Outdoor World, LLC*, Adv Op Comm T&F, June 11, 2003, TSB-A-03(25)S.

DATED: February 14, 2008

/s/  
Jonathan Pessen  
Tax Regulations Specialist IV  
Taxpayer Guidance Division

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.