

M e m o r a n d u m**610.0600**

To: Mr. Harold Scott
Return Review Unit

Date: September 6, 1990

From: John L. Waid
Tax Counsel

Subject: C--- N--- S---
SR -- XX-XXXXXX

Your mini-memo to the legal staff has been referred to me for response. You have requested advice as to the validity of the deduction taken by the above taxpayer.

I. FACTUAL BACKGROUND

A letter from G--- P---, bookkeeper for C--- S--- F--- A--- sets forth the facts of the case as follows:

The M--- of C--- Art (MOCA) hired C--- S--- F--- A--- (CSFA) to create the flower designs for its non-profit auction in March. MOCA informed CSFA not to include sales tax in the billing for this event.”

The portion of the file which you attached to your mini-memo indicates that the above taxpayer sold centerpieces, large shapes, and a ladies room arrangement. One of the supporting documents presumably supplied by the taxpayer contains the notation “Deposits for centerpieces at the MOCA Art Auction '90.” The same document also contains a further notation “Federal Tax Exemption #XX-XXXX-XXX.” I assume that this number is the IRS exemption number for MOCA.

II. OPINION

A. Sales and Use Tax Generally

Unless exempt, the transfer for a consideration of the title to, or possession of, property which was produced, fabricated, or printed to the special order of the customer is included in the definition of a “sale.” Revenue and Taxation Code Section (all further statutory references are to the Revenue and Taxation Code unless otherwise stated) 6006(f). The costs of the materials,

labor used or service cost, interest paid, or any other cost are included in the measure of gross receipts. (§ 6012(a)(2).)

The exemptions for the sale or purchase of works of art or museum pieces by or for donation to museum is provided by Revenue and Taxation Code Sections 6365 and 6366.3 and implemented by Sales and Use Tax Regulation (hereinafter "Regulation" or "Reg.") 1586. The statutes and regulation define what may be considered a "museum" and further define what may be considered "works of art" and "museum pieces."

B. Does this Transaction Qualify for the Museum Exemption?

Your mini-memo does not question MOCA's status as a "museum" under the above statutes and regulation. Since the documents you provided further reveal that MOCA is registered as a nonprofit organization under the Internal Revenue Code, I will assume that MOCA is a "museum" for the purposes of the above exemption. CSFA's products were not purchases to replace destroyed objects of MOCA's permanent collection, so they do not qualify as "museum pieces" under Regulation 1586(c)(2). The issue, then, is whether or not the tangible personal property at issue qualifies as a "work of art" for the purposes of Section 6365.

I will not argue the merits of "flower art" as meeting the dictionary definition of "art," i.e., an example of human creativity and skill (Webster's New World Dictionary, New York, Popular Library, 1977). Such a discussion is not necessary to answer your question. To qualify for the exemption, "art" must meet the definition contained in Regulation 1586(b)(1) and be purchased to become part of the permanent collection of the museum. (Reg. 1586(c)(1)(B).)

Flowers are notoriously perishable. Even kept in water, fresh flowers do not last more than a few days. The examples given in the regulation which are considered "original works of art" are all on media, such as paper, canvas, etc., which can be expected to last a long time, if not forever. Flowers could be included in the definition if they were part of a collage—an example mentioned specifically—but the documents indicate that we are dealing with fresh flowers. There is no indication the flowers were subjected to some process which would give them permanence. Thus, we conclude that "flower art," at least when it is only a display of fresh flowers, is not "art" within the meaning of the sales tax exemption statute.

Further, even if the "flower art" in question met the definition contained in the regulation, this particular display was not purchased to become part of MOCA's permanent collection but to decorate certain rooms, including the ladies room, for a specific event--the MOCA Art Auction '90. The sale is subject to sales tax, and CSFA should have paid sales tax measured by the price of the display.

The final issue is the measure of tax. due to the nature of their business, we are of the opinion that flower artists should be treated for sales and use tax purposes as florists whose services go beyond merely selling and delivering flowers to include setting up flower displays as decoratins for their customers. As such, all charges for the materials CFSA sold as well as its

delivery charges are subject to sales tax (§ 6006(f), 6012(a)(2).) Accordingly, we are of the opinion that the entire deduction should be disallowed.

One more issue remains. MOCA used the flower displays for a nonexempt purpose; the file indicates that it informed CSFA not to include sales tax on the billing to MOCA. The documents you provided do not indicate if MOCA issued an exemption certificate which CSFA accepted in good faith. If so, then, pursuant to Section 6421, MOCA is liable for the sales tax with the purchase price, \$5,490.00, being deemed the gross receipts from a retail sale made by CSFA. If not, that section indicates that the liability to pay sales tax measured by the \$5,490.00 gross receipts remains with CSFA.

I hope the above discussion answers your question. If not, do not hesitate to contact me.

JLS:sr