

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

610.0663

APPEALS SECTION

In the Matter of the Petition)
for Redetermination Under the) SUPPLEMENTAL
Sales and Use Tax Law of:) DECISION AND RECOMMENDATION
J. P--- G--- T---) No. SR -- XX-XXXXXX-010
Petitioner)

Petitioner claimed exemption for numerous purchases on the ground that the items were works of art within the meaning of Revenue and Taxation Code Section 6365. The original Decision and Recommendation (issued by Senior Staff Counsel H. L. Cohen on April 16, 1993, and incorporated herein by this reference) found that the location where some items were displayed was not a museum, so the items were subject to tax even if they were works of art. At an oral hearing on May 3, 1994, however, the Board concluded that the location was a museum. A reaudit was ordered to allow exemption for works of art.

Two issues arose in the reaudit: Whether certain items qualify as works of art; and how to allocate the purchase price on transactions where taxable and exempt items were purchased together for a lump sum. A supplemental Appeals Conference to discuss these issues was held by Senior Staff Counsel James E. Mahler on February 7, 1996, at petitioner's facilities in --- ---, California.

Appearing for Petitioner:

J. P--- W---

Attorney at Law

C--- S---

General Counsel

S--- M. F---

Controller

L--- O--- - A---

Associate Director, C--- for the
H--- of A--- & the H--- (CHAH)

S--- L---

Head of Administrative Services (CHAH)

W--- de W---

Head of Special Collections (CHAH)

K--- S---, Curator (CHAH)

Special Collections - Graphic Arts

N--- P---, Curator (CHAH)
Special Collections - Manuscripts

M--- R---, Curator (CHAH)
Special Collections - Rare Books

Appearing for the Sales
and Use Tax Department:

Ms. Carol Sawa
Senior Tax Auditor

Mr. J. Durisin,
Senior Tax Auditor

Type of Business: --- ---

Protested Items

Based on the Reaudit Report dated March 30, 1995, the protested tax liability for the period October 1, 1996, through September 30, 1989, is measured by an unstated portion of:

<u>Item</u>	<u>State, Local and County</u>	<u>LACT</u>
E. Ex-tax purchases of property for the library	\$5,002,158	\$5,011,546
Reaudit adjustment	<u>-2,180,172</u>	<u>-2,180,172</u>
	<u>\$2,821,986</u>	<u>\$2,831,374</u>

Petitioner's Contentions

1. Nothing in the statute or regulation supports the test used in the reaudit to classify the purchases as works of art. To the contrary, the evidence shows that several of the items upon which tax was asserted are exempt works of art.

2. The reaudit did not correctly allocate the purchase prices of certain items.

Summary

The first issue is whether portfolios, books, and similar items containing both text and illustrations may be considered exempt works of art. In the reaudit, the Department classified such items as exempt only if they contained more than 50 percent illustrations, measured by surface area.

The protested transactions of this type are listed in the following chart, taken from the chart presented by petitioner at the supplemental Appeals conference. (The protested amount shown on the chart is lower than the audited purchase price in some cases because other, concededly taxable items were purchased in the same transaction. Also, the purchase scheduled on 12E-2c, page 3, line 16 is not included in the chart because petitioner conceded taxability at the conference.)

<u>Item #</u>	<u>Audit Schedule page, line</u>	<u>Protested Amount</u>	<u>Comments</u>
2	12E-2a, 1, 6	\$ 35,000	Screenplay with sketches
12	12E-2a, 3, 19	18,500	Illustrated books & pamphlets
13	12E-2a, 4, 5	315,000	Topographies with text
27	12E-2b, 3, 17	24,000	Illustrated books
35	12E-2b, 5, 27	26,125	Illustrated books
40	12E-2c, 1, 5	uncertain	Etchings & illustrated books
47	12E-2c, 3, 10	210,416	Illustrated books
48	12E-2c, 3, 16	30,758	Illustrated books

Referring to some of these items as “books” is rather misleading. For example, item #12 consists of illustrations of Italian festivals bound or inserted in volumes with textual explanations of the scenes. They were prepared in limited editions under the sponsorship of aristocrats to be given as souvenirs to privileged guests attending the festivals. In some cases the posters or reprints of the posters were also used to advertise the festival. Similarly, item #47 includes “livres d’artiste”, portfolios published jointly by poets and artists in limited editions, with poetry on some pages and artwork on others.

The second issue is how to allocate the purchase price on transactions where taxable and exempt items were purchased together for a lump sum. Transactions in this category are listed in the following chart. (Two purchases listed in the previous chart [item numbers 40 and 47] are also at issue here and are therefore listed again.)

Item #	Audit Schedule page, line	Audited Amounts	Agreed Taxable
29	12E-2b, 4, 5	\$ 58,175	\$ 14,775
34	12E-2b, 5, 19	100,000	20,000
37, 38	12E-2b, 5, 31 & 33	450,000	75,000
40	12E-2c, 1, 5	150,197	uncertain
47	12E-2c, 3, 10	250,329	39,913
50	12E-2c, 3, 29	47,427	37,427

Analysis and Conclusions

Section 6365 of the Revenue and Taxation Code allows an exemption for “original works of art” if certain conditions are satisfied. Subdivision (c) of the statute defines “work of art” to mean:

“ ... a work of visual art, including, but not limited to, a drawing, painting, mural, fresco, sculpture, mosaic, film, or photograph, a work of calligraphy, a work of graphic art (including but not limited to, an etching, lithograph, offset print, silk screen, or a work of graphic art of like nature), crafts (including, but not limited to, crafts in clay, textile, fiber, wood, metal, plastic, glass, and like materials), or mixed media (including, but not limited to, a collage, assemblage, or any combination of the forgoing art media).”

Sales and Use Tax Regulation 1586 interprets the statute. Subdivision (b)(1) of the regulation provides:

“‘Original Work of Art’ for purposes of this regulation means tangible personal property which has been created as a unique object intended to provide aesthetic pleasure to the beholder and/or to express the emotions of the artist. The form in which an original work of art is presented includes but is not limited to:

“(A) visual art, e.g., a drawing, painting, mural, fresco, sculpture, mosaic, film, or photograph, a work of calligraphy, a work of graphic art (an etching, lithograph, offset print, silk screen, or a work of graphic art of like nature),

“(B) crafts, e.g., crafts in clay, textile, fiber, wood, metal, plastic, glass, and like materials, or

“(C) mixed media, e.g., a collage, assemblage, or any combination of the foregoing art media.” (Emphasis added.)

The parties appear to agree that poetry, essays and other written texts are not normally “works of art” for purposes of the tax exemption, even if they would be considered works of art for other purposes. The parties also appear to agree that sketches, etchings and similar works of visual art may qualify for the exemption. The problem is how to classify materials which include both written text and visual art.

The Department argues for an objective approach to the problem. To determine whether a particular book or document is exempt, one need only measure the surface area covered by text as opposed to the surface area covered by visual art. If more than 50 percent is text, the exemption is not available. The ease of applying such a rule would benefit taxpayers as well as the state. Taxpayers would know with relative certainty, at the time of the transaction, whether they would incur a tax liability by selling or buying the object; and the Board’s auditors would be able to determine taxability by standards that unquestionably apply equally to all taxpayers.

Petitioner prefers a subjective approach. Factors to be considered would include the “exhibitability”, “aesthetic value” and monetary value of the work, as well as the historical importance of the artist. The identity of the purchaser and the methods used to catalog and exhibit the property should also influence the decision. The opinions of art experts would be crucial if not conclusive on these subjects.

The Department’s objective approach has obvious advantages. Consistency and predictability are important goals in administering any tax program. Unfortunately, however, we must agree with petitioner that an objective test for “work of art” is simply not possible. Art, like beauty, is in the eye of the beholder, and any objective test will inevitably lead to misclassification in some cases. As petitioner points out, for example, the Codex of Leonardo da Vinci is generally recognized as a great work of art, and was recently sold as such for over \$30,000,000, but it would not qualify for exemption under the Department’s test because the text covers more area than the illustrations.

In our opinion, furthermore, the Department’s test would conflict with the express provisions of Section 6365 if applied literally. The statute lists “calligraphy” as an example of a work of art. Thus, written text can qualify for exemption under the statute, if it is presented as a work of visual art, and is not always taxable as suggested by the Department.

We therefore agree with petitioner that classification of an object as a “work of art” requires subjective evaluation. We do not agree with petitioner, however, as to what factors should be considered and who should make the evaluation.

As Mr. Cohen noted in the original Decision and Recommendation, the Board’s staff has no necessary expertise in determining what is a work of art. Art appreciation is not part of the normal training agenda for auditors and attorneys. The views of experts in the field should therefore have considerable weight. Nevertheless, the Board is responsible for administering the tax laws and determining eligibility for exemption, and cannot abrogate that responsibility by delegating authority to the taxpayers. The decision must be made by the Board’s staff, and ultimately by the Board itself, by applying the criteria set out in Section 6365 and Regulation 1586. The opinions of experts should of course be considered, but they are not always crucial and certainly not conclusive.

In this case, for example, we listened with great interest to the testimony of petitioner’s employees at the supplemental Appeals conference. They explained in detail the reasons they consider each protested item to be a work of art. They also outlined the procedures and criteria they use, at the time of purchase, to determine whether to claim exemption.

We were impressed with the expertise and integrity of petitioner’s employees. We were equally impressed with their failure to consider the definitions of “work of art” in Section 6365 and Regulation 1586. Their testimony focused primarily on the historical significance of each object as representing a particular type or school of art (which is quite understandable, since petitioner’s --- is devoted to the history of art.) Under the statute as interpreted by the regulation, however, classification as a work of art depends on whether the object was “intended to provide aesthetic pleasure to the beholder and/or to express the emotions of the artist.” Historical significance may well determine whether an object is “important”, and worthy of purchase and display by a museum, but it does not determine whether an object is a work of art. In our opinion, items which a museum purchases for display as objects of historical interest, rather than as works of visual art *per se*, do not qualify for the exemption.

We turn now to the specific objects under protest. Item #2 is a 35-page, hand-written screenplay. The author, Juan Gris, is known as an artist and not as a playwright. He made rough sketches in the margins on five pages to illustrate how scenery should be placed on the stage. Petitioner’s experts indicated that the play is worthless, but the sketches are valuable because they give insight into the author’s “thought processes”. Since the author added sketches to the manuscript only to provide directions for placing scenery, and not “to provide aesthetic pleasure to the beholder and/or to express the emotions of the artist”, we conclude that the manuscript is not a work of art for tax purposes.

The remaining items, however, qualify for exemption. In reaching this decision, we have considered the opinions of petitioner’s experts as to the aesthetic quality of the work, as well as petitioner’s purposes for buying the work and the purpose of the artist in creating it. We

have evaluated those opinions in light of the definitions in the statute and regulation, and reached our own conclusions. In each case, we believe the object was “intended to provide aesthetic pleasure to the beholder and/or to express the emotions of the artist”, and was purchased by petitioner for display as a work of visual art. Exemption is therefore appropriate.

The second issue is how to allocate the purchase price on transactions where taxable and exempt items were purchased together for a lump sum. Petitioner’s employees also offered testimony on this point at the supplemental Appeals conference, and their testimony is reflected in the chart on page 4 above. In each case, their allocation of the purchase price was based on their expert opinions as to the relative fair market values of the particular objects. We have no reason to disagree with their opinions, and the audit staff has offered no alternatives, so we recommend that petitioner’s allocations be accepted.

Regarding item #40, petitioner’s experts stated at the conference that “about two-thirds to three-quarters” of the \$150,197 purchase price was for prints, plus \$2,000 for a plate in an otherwise worthless book, and the remainder was for books which do not qualify as works of art. However, petitioner later submitted a list of the protested items indicating that the entire purchase price of this item is in dispute. Given the testimony at the conference, we assume that the entry on the list is a typographical error. Based on the testimony, we conclude that \$102,131 of the purchase price was for works of art and is nontaxable (two-thirds of \$150,197, plus \$2,000.)

Recommendation

Reaudit in accordance with the schedule presented by petitioner at the supplemental Appeals conference, with allocations as shown in the chart on page 4 above, except that item #2 should be considered taxable, and only \$102,131 of the purchase price of item #40 should be allowed as exempt.

J. E. Mahler, Senior Staff Counsel

May 1, 1996
Date