

STATE OF CALIFORNIA  
BOARD OF EQUALIZATION

**325.1715**

In The Matter Of The Petition Of )  
 ) DECISION AND RECOMMENDATION  
 ) OF HEARING OFFICER  
[A] MUSEUM OF ART,) )  
M--- A--- ) Account No. SR -- XX XXXXXX  
 a nonprofit corporation, )  
 )  
 )  
For Redetermination Under the )  
Sales and Use Tax Law )

The above entitled matter came on regularly for hearing on Wednesday, February 14, 1973 at 10:00 a.m. in West Los Angeles, California.

Appearing for Petitioner were Mr. M--- G---, Ms. A--- P---, Mr. W--- M---, Ms. P--- N---, and Mr. D--- R. S---, Attorney at Law. Messrs. Wylie, Laxer, and Slechta appeared for the board.

Protested Item  
(Period 4/1/68 to 3/31/71)

	<u>Measure at</u> <u>5% Rate</u>	<u>Measure at</u> <u>1/2% Rate</u>
Item A. Ex-tax purchases of works of art	\$2,295,445	\$225,484

Petitioner's Contentions

1. In view of the circumstances surrounding petitioner's purchases of works of art, the presumption set forth in Sales and Use Tax Law Section 6246 was rebutted, the purchases were not subject to use tax, and the use tax assessed should be deleted.

2. The question of when the purchases occurred was a question of fact to be determined upon the basis of petitioner's intent, such intent was that the purchases should not occur until the works of art were loaned to and received by museums and galleries located outside of California, and thus, the use tax assessed should be deleted.

3. As the portrait of Hugh Montgomerie and two Indian artifacts were not in petitioner's possession in California at the time the first checks in payment therefor were issued, those purchases did not occur in California, and the use tax assessed with respect thereto should be deleted.

### Summary of Petition

The [A] Museum of Art is a publicly supported museum owned by [A]. M--- A---, petitioner herein, pursuant to an agreement with [A] County, had the museum erected on the latter's property and then donated the museum to it. Petitioner then operated the museum subject to [A] County's control.

During the audit period, petitioner purchased works of art from out-of-state sellers. In some instances, the sellers had forwarded their works of art to petitioner in California so that its Board of Trustees could examine them prior to deciding whether they should purchase them. If the Board of Trustees decided to purchase the works of art and approved their purchases, the works of art were cataloged and then loaned to museums and galleries located outside California where they were exhibited for periods of three or more months prior to being returned to petitioner in California for exhibition as part of its permanent collection.

The auditor regarded purchases of works of art under such circumstances as purchases for use in California and the cataloging and loaning thereof as taxable uses in California. As petitioner did not report or pay use tax with respect thereto, amounts equal to the amounts of the purchase prices of the works of art were established as the taxable measures.

Per the petition and at the hearing, it was asserted that the presumption set forth in Sales and Use Tax Law Section 6246 had been rebutted, that those purchases were not subject to use tax, and that the use tax assessed should be deleted. In that regard, Mr. S--- stated that in 1968, petitioner's staff became aware of the fact that under certain circumstances, if works of art were purchased from out-of-state sellers and were first exhibited outside California, the presumption set forth in section 6246 would be deemed to have been rebutted. Thus, by letter dated November 19, 1968, Mr. S--- F. B---, petitioner's Chairman, requested confirmation of the applicability of the Sales and Use Tax Law to the following situations:

"1. Assuming a work of art is purchased at a time when such work is located outside California, it is our understanding that such purchase will not be subject to tax if

"(a) the art work is exhibited outside California for more than 90 days prior to its exhibition in California, and

"(b) tax will also not apply if the work is first exhibited outside California before its physical presence in the state and is then exhibited in California within 90 days after purchase, so long as the work is thereafter exhibited elsewhere than in California for 90 or more days out of the next 180 days following entry of the work into California.

“2. We assume results would be those outlined in paragraphs 1(a) and 1(b) above even though the person selling was located within the state, so long as the property involved was located outside the state.”

By letter dated December 26, 1968, Tax Counsel Gary J. Jugum advised, in part, as follows:

“It is presumed that tangible personal property delivered outside this state to a purchaser known by the retailer to be a resident of this state was purchased from a retailer for storage, use, or other consumption in this state and stored, used, or otherwise consumed in this state... (T)he presumption may be overcome (1) if the property is used outside California for more than ninety days prior to its use in California and (2) if the property is first used outside California, is then used in California within ninety days following its purchase, and is then used outside California for more than ninety days out of the next one hundred and eighty days following its use in California. Once the presumption that a purchase of the property was for use in California is overcome, the burden of proving that the purchase was for such a use shifts to this board.

“The explanation above, which is intended to confirm the understanding expressed by you in your question (1), applies equally to your question (2). Purchases which come within the rules of thumb are not taxable even though the seller may be located in California.”

Mr. S--- stated that it had been petitioner’s intention to purchase the works of art in a manner which would rebut the presumption, in accordance with Mr. Jugum’s letter, and that its staff believed that it had done so. In that regard, he forwarded copies of various documents relating to the purchases whereon it had been indicated that use tax would not be due because the works of art were to be loaned to museums and galleries located outside California and exhibited there.

In that regard, it was also asserted that the question of when the purchases occurred was a question of fact to be determined upon the basis of petitioner’s intent, that petitioner’s intent, viewed in terms of the November and December 1968 letters and the copies of the documents forwarded, was that the purchases should not occur until the works of art had been loaned to and received by the museums and galleries located outside California, and that in view thereof, the use tax assessed should be deleted. In that regard, Mr. S--- referred to those provisions of the Uniform Commercial Code which might support such a conclusion.

Finally, it was asserted that as the portrait of Hugh Montgomerie (\$250,000) and two Indian artifacts (\$17,500) had not been in petitioner's possession in California at the time the first checks in payment therefor had been issued, those purchases did not occur in California, and the use tax assessed with respect thereto should be deleted. In that regard, Mr. S--- stated that approval for the purchase of the portrait had been given by the Board of Trustees on August .8, 1968, that the portrait had been loaned to The --- --- of ---, Washington, D.C., on May 22, 1969, and that the first check in payment therefor had been dated May 23, 1969.

He further stated that approval for the purchase of the artifacts had been given by the Board of Trustees on March 4, 1969, that the artifacts had been loaned to The --- Art Museum, --- Arizona, on March 11, 1969, and that the first check in payment therefor had been dated April 23, 1969. As the dates of those checks were dates subsequent to the dates those works of art had been loaned, that indicated that petitioner had purchased them outside California where they had been exhibited for periods exceeding three months, thus rebutting the presumption set forth in section 6246.

The auditors noted that prior to the dates those works of art had been loaned, petitioner's Board of Trustees had approved their purchases (portrait/August 8, 1968 - artifacts/March 4, 1969), that petitioner had been invoiced for the portrait (May 16, 1969), and that funds had been requested for payment of the purchase prices (portrait/May 20, 1969 - artifacts/February 20, 1969). Ms. P--- stated that invoices usually followed petitioner's receipt of works of art, and Mr. G--- added that periods between such times and petitioner's receipt of invoices for works of art varied and were dependent upon the owners' discretion and practices with respect to invoicing.

#### Analysis and Conclusions

1. Use tax is imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer for storage, use, or other consumption in this state (Sales and Use Tax Law Section 6201). "Storage" includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer (section 6008). "Use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property (section 6009}. Every person storing, using, or otherwise consuming in this state tangible personal property purchased from a retailer is liable for the tax (section 6202). Thus, if petitioner purchased the works of art for storage, use, or other consumption in California and stored or used or otherwise consumed them here, it was liable for use tax as a result of those purchases.

For the purpose of the proper administration of the law, it is presumed that tangible personal property sold by any person for delivery in this state is sold for storage, use, or other consumption here until the contrary is established (section 6241). It is further presumed that tangible personal property shipped or brought to this state by the purchaser was purchased from a retailer for storage, use, or other consumption here (section 6246).

Where tangible personal property has been delivered outside California to the purchaser, the presumption that the property was purchased for storage, use, or other consumption here may be overcome (1), if the property is used outside the state for more than ninety days prior to its use here or (2), if the property is first used outside the state, is then used in the state within ninety days following its purchase, and is then used outside the state for more than ninety days out of the next one hundred and eighty days following its use here. In that event, the burden of proving

that the property was purchased for storage, use, or other consumption in California shifts to the board. By his December 26, 1968 letter, Mr. Jugum so advised Mr. B---.

However, where tangible personal property has been shipped to the purchaser in California, the presumption may not be overcome as the result of (1) or (2) above because the property has not been used outside the state prior to its use here. Rather, the storage, use, or other consumption of the property is taxable at the time of such storage, use, or other consumption.

By his January 14, 1969 letter, together with his memorandum summarizing Mr. Jugum's letter, Mr. S---, in effect, so advised Mr. T. L. R---, petitioner's Deputy Director, Administration:

"...Summarizing somewhat more briefly with a concomitant loss of precise accuracy, it appears that... (2) property located in California which is purchased by the museum is subject to tax, and (3) property purchased outside the state will not bear California tax if it is first exhibited outside California and the 90-day or 180-day exhibition rules are observed."

And, per that memorandum, pages 5 and 6, Item 5:

"the purchase by the museum of art objects which are in California at the time of purchase will be taxable."

Accordingly, where a California museum purchases for its permanent collection works of art which have been shipped to it in California and cleans, restores, repairs, frames and/or catalogs them, such works of art have been stored (section 6008) and used (section 6009) here, and the museum is liable for use tax, regardless of whether it then loaned the works of art to museums and galleries located outside California where they were first exhibited (Cal. Tax Serv. Ann. No. 570.0020). As petitioner purchased works of art which had been shipped to it in California, and as it then stored and used them here, it is concluded that petitioner was liable for the use tax assessed as the result of the purchases.

2. For purposes of the law, the place of the sale or purchase of tangible personal property is the place where the property is physically located at the time and act constituting the sale or purchase, as defined in sections 6006 and 6010, takes place (section 6010.5).

With the exceptions of the sales/purchases of the portrait of Hugh Montgomerie and the Indian artifacts, petitioner did not contest the auditor's findings that the works of art were in its possession in California at the time acts constituting the sales/purchases thereof occurred. Per the section, then, the place of those sales/purchases of the works of art was California.

If section 6010.5 conflicts with provisions of the Uniform Commercial Code regarding the place of sale, it is the former which controls. Section 6010.5 was enacted to forestall any possible contention that under the provisions of the Uniform Commercial Code, the place of sale might be deemed to be other than the place where property was physically located at the time of sale (Cal. Tax Serv. Ann. No. 495.0680).

While petitioner may have intended to structure its purchases in a manner such that the places of the sales/purchases were outside California, in spite of having the benefit of Mr. Jugum's and Mr. S---'s letters, it did not do so. In matters of tax liability, the form of a transaction is often determinative of tax consequences. Thus, where a taxpayer having a choice of methods of accomplishing an economic or business result pursues a particular means to accomplish its ends, it must abide the tax consequences resulting from its choice of methods, even though had it made another choice the tax consequences would have been less severe or even nonexistent (Freeman v. Commissioner, 303 F (2) 580).

3. "Sale" and "purchase" mean and include any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration (sections 6006(a) and 6010(a)).

With respect to the portrait of Hugh Montgomerie, although the Board of Trustees approved its purchase on August 8, 1968, the audit working papers disclosed that the portrait was not received by petitioner until August 28, 1968, some three weeks later. This indicates that petitioner purchased the portrait in August 1968 and had the seller ship the portrait to it in California.

By invoice dated May 16, 1969, the seller invoiced petitioner for the portrait as follows:

"Sold to [A] Museum of Art  
XXXX --- Boulevard, --- ---, California XXXXX

STATEMENT

August 12, 1968 Painting by John Singleton Copely  
A9143 'Portrait of Hugh Montgomerie,  
12<sup>th</sup> Earl of Eglinton'

Special Price \$250,000"

The Statement date of August 12, 1968 further indicates that petitioner purchased the portrait in August 1968.

Accordingly, it is concluded that petitioner purchased the portrait in August 1968 for use in California, that it stored and used the portrait here prior to forwarding it to Washington, D.C., and that it was liable for the use tax assessed.

With respect to the Indian artifacts, under a sale on approval, unless otherwise agreed, although property is identified to the contract title passes to the purchaser upon acceptance (Uniform Commercial Code Section 2)27(1)(a)). Acceptance occurs when the purchaser after reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming (section 2606(1)(a)) or does any act inconsistent with the seller's ownership (section 2606(1)(c)). Thus, acceptance may be conveyed verbally or nonverbally.

In view of the February 17, 1969 Agreement between the sellers of the artifacts and petitioner whereunder the parties acknowledged a prior sale of works of art for a sum of \$100,000, consummated a present sale of works of art for a sum of \$213,000, and provided for future sales of works of art for sums of \$113,000, it seems likely that petitioner would have indicated in some manner to the sellers its acceptance of the artifacts concurrent therewith or shortly thereafter (February 20, 1969 Request for Payment and March 4, 1969 approval by Board of Trustees, both for the purchase of the artifacts and for the purchases of the above-mentioned works of art). If petitioner did, such acceptance consummated the sale/purchase. If petitioner did not, the March 4, 1969 approval by its Board of Trustees together with its March 11, 1969 loan of the artifacts constituted an act inconsistent with the seller's ownership of the artifacts and hence, acceptance which consummated the sale/purchase.

Accordingly, it is concluded that petitioner purchased the artifacts in March 1969 for use in California, that it stored and used the artifacts here prior to forwarding them to ---, Arizona, and that it was liable for the use tax assessed.

Although the date of the check for the artifacts was a date subsequent to the date they were loaned, that does not establish that they were not purchased in California. Rather, under section 2606(1)(a), payment made after tender is one circumstance tending to signify acceptance of property but in itself is not conclusive (Section 2606, Official Comment 3).

Recommendation

It is recommended that the use tax assessed be redetermined without adjustment.

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J. Kenneth McManigal, Hearing Officer

March 29, 1973

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Date