

610.0500

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

To : Mr. Jack Warner  
District Principal Auditor - OH

Date: October 31, 1995

From : Sharon Jarvis  
Staff Counsel

Subject : R--- P---, Inc.  
Account No. SR --- XX-XXXXXX

This responds to a memorandum dated August 9, 1995 from Mr. Dennis Fox, Supervisor, Audit Evaluation and Planning, to Assistant Chief Counsel Gary Jugum concerning the above account. The memorandum requested a legal opinion, to be directed to you, concerning the application of tax to a contract between R--- P---, Inc. (R---) and the S--- W--- Center, Inc. (Center) for additions to the Center's Museum of T--- (Museum). The issue is whether the additions constitute original works of art under Revenue and Taxation Code section 6365 and Regulation 1586, or whether they are improvements to real property made pursuant to a construction contract under Regulation 1521.

R--- constructs exhibits for shows and museums. R--- contracted to do certain work for two separate exhibits in the Museum: the Introduction Exhibit and the H--- Exhibit. The contract price for R---'s work was \$2,889,167. According to the contract, the work was to be done as shown and described in drawings and specifications prepared by designers (1) H--- R-- - and Associates, Inc. and M--- S--- & Associates for the construction of the Introduction Exhibit, and (2) J--- G--- Studio and M--- S--- & Associates for the construction of the H--- Exhibit. The work is further described in attachments A-1 and A-2 to the contract, which list and describe each sheet of the designers' drawings.

R--- contracted that its work would include the completed services, furniture, furnishings, exhibits, equipment, labor and materials required by the contract and incorporated into the exhibits. The work was to be performed over an eleven month period with the first eight months for the "shop drawing and fabrication stage", and the last three months for installation of the work. The shop drawing phase was to include the preparation of shop

drawings and proposals for graphics and mechanicals. As the shop drawings were prepared by R---, they were to be forwarded for review, corrections, and comments to the designers and the Center's architect. After review of the shop drawings by the designers and architect, R--- was to proceed to make and install the various exhibits.

R--- states that the architect's only function was to review the planned exhibits to ensure that building codes were met. As to the designers, R--- states:

“[T]he exhibition designers ... did not ‘design’ the exhibit as one would design a building. They designed the ‘theme’ of the exhibit and consulted as to the physical layout of the various portions of the exhibit. ... R---, on the other hand, was commissioned to plan, sketch, and ultimately create each portion of the exhibit in accordance with the Designers’ overall theme and space constraints.” (2/8/95 M--- letter.)

R--- contends that it planned and created the exhibits on display at the museum, and that they are original works of art, the sales of which are tax exempt pursuant to Regulation 1586(c).

At our request, the auditor obtained copies of photographs of the two exhibits in question. (Copies attached.) The photographs show what appear to be (1) a life-sized, three-dimensional, historical street scene depicting shop fronts and a sidewalk cafe, (2) a life-sized, three-dimensional office scene, (3) a representational, three-dimensional scene, (4) a grouping in front of a phonograph of three life-sized mannequins, each with a video screen head, and (5) a drawing, mural or painting with three-dimensional representations of heads in front of it.

### Discussion

A construction contract includes contracts to erect, construct, alter, or repair any building or other structure, project, development, or other improvement on or to real property. (Reg. 1521(a)(1)(A)1.) Construction contracts also include contracts to furnish and install the property becoming part of a central heating, air-conditioning, or electrical system of a building or other structure, and to furnish and install wires, ducts, pipes, vents, and other conduit imbedded in or securely affixed to the land or a structure thereon. (Reg. 1521(a)(1)(A)4.) However, a construction contract does not include contracts for the sale and installation of tangible personal property such as machinery and equipment. (Reg. 1521(a)(1)(B)1.) It also does not include the furnishing of tangible personal property under what is otherwise a construction contract if the person furnishing the property is not responsible under the construction contract for the final affixation or installation of the property furnished. (Reg. 1521(a)(1)(B)2.) Generally construction contractors are consumers of materials, and retailers of fixtures, which they furnish and install in the performance of construction contracts. (Reg. 1521(b)(2).)

If R---'s contract with the Center was a construction contract, R--- is the consumer of materials and the retailer of fixtures furnished and installed in the performance of the contract. On the other hand, if the contract was a contract to produce original works of art, R---'s sale of such original works of art to the Center is exempt from tax if the original works of art were purchased under statutorily specified circumstances to become part of the permanent collection of a museum. (Rev. & Tax. Code § 6365; Reg. 1586(c)(1)(B).)

Section 6365 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 foregoing art media)." (Rev. & Tax. Code § 6365(c).)

The term "original work of art" is further defined in Regulation 1586(b)(1) as "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." (Emphasis added.)

A work of art must be an original or unique work which was designed to have, and does have, significant artistic value. It must be hand-crafted by, or under the direction of, an artist or master craftsman, rather than mass-produced. Under this interpretation, a utilitarian object, such as a bowl, could be considered to be a work of art if its aesthetic value is greater than the usual utilitarian bowl due to its uniqueness and the extra labor and/or effort invested in its creation to provide aesthetic pleasure to the beholder and/or to express the emotions of the artist. It is also of note that an item being one of a kind will affect a conclusion as to whether it is hand-crafted, but is not necessarily controlling. The intent to produce a limited quantity of an item such as a lithograph, photograph, or sculpture will carry weight, as opposed to an intent to produce as many as can be sold. There is not a simple test to determine what is a work of art. Some amount of judgment must be applied, and many decisions must be made on a case-by-case basis.

With these guidelines in mind, the work which R--- contracted to perform must be reviewed to determine whether it, or certain elements of it, should be classified as works of art or as improvements to realty made pursuant to a construction contract. From the photographs, and the descriptions contained in the documentation submitted with Mr. Fox's memorandum of August 9, 1995, it appears that R---'s work contains elements both of making improvements to realty in the performance of a construction contract, and of producing works of art.

The term in Revenue and Taxation Code section 6365 which best describes the exhibits produced by R--- is "mixed media". Mixed media includes, but is not limited to, a collage, assemblage, or any combination of art media listed in the section. (Rev. & Tax. Code § 6365(c).) An assemblage is defined as a form of art involving the assembly and arrangement of unrelated objects, parts, and materials in a kind of sculptured collage. (Webster's New World Dict. (3d college ed. 1988) p. 82.) It is our view that the exhibits produced by R--- are similar to "assemblages" (hereinafter, we shall refer to them as assemblages) since they involve the assembly and arrangement of related and unrelated objects, parts, and materials in a kind of unique sculptured collage or composition. As such, we view the assemblages as mixed media, and, thus, as original works of art within the meaning of Revenue and Taxation Code section 6365 and Regulation 1586(b)(1)(C).

Since we view these assemblages as original works of art, we consider the artistic components of each assemblage to be a part of that work of art. However, this does not mean that we necessarily view the basic shell of the museum and its rooms as part of the assemblages or works of art. In instances where walls, floors and ceilings are integral parts of the building structure, generally we would consider their construction improvements to realty performed pursuant to a construction contract, and apply the rules of Regulation 1521 to the materials and fixtures furnished and installed as a part of such a contract. On the other hand, if a wall, ceiling or floor constructed by R--- is itself a work of art, such as a wall painted with a mural or a fresco (see Rev. & Tax. Code § 6365(c)), or the store or cafe fronts, we would view it as a part of the work of art, not as a part of a construction contract. Further, if the walls, partitions, ceilings or floors surrounding an assemblage are in the nature of a shadowbox to enclose the contents and set them aside from other exhibits or areas, or are in the nature of a backdrop, such as is found in stage sets to establish a background or setting, we would view such walls, partitions, ceilings or floors as part of the assemblage and, thus, as part of the work of art. We consider such walls, partitions, ceilings or floors as an integral part of the assemblage which cannot be separated from it.

Items which are not integral artistic components of an assemblage or work of art are not considered a part of the work of art. For instance, electrical wiring is supportive of an assemblage but is not an integral part of the work of art. Thus, the wiring is an improvement to realty, not part of a work of art. Generally, we would view wiring, lighting, electrical boxes, ducting, and things of that nature, which are furnished and installed by R---, as work performed as part of a construction contract. On the other hand, a period lighting fixture or lamp post included in an assemblage as an artistic component of the assemblage is an integral part of the work of art. (This is as opposed to a lighting fixture which has as its primary function the illumination of the assemblage and, therefore, is a fixture furnished and installed in the performance of a construction contract.)

Such items listed in exhibits A-1 and A-2 as ramps and railings, electrical panels and lighting, showcases and lightboxes, handrails and leaflet dispensers generally fall under the category of work performed under a construction contract. Similarly, items such as shelving,

display cabinets, and seating which are supportive of, but not a part of, the assemblage are work performed pursuant to a construction contract, as opposed to being works of art. In contrast, the shelving, tables, desks, and cabinets which are part of the office scene (depicted in the attached photograph copies) are a part of that assemblage. In the same vein, the facades of the street and sidewalk cafe scenes (depicted in the attached photograph copies) are a part of those assemblages, as are the windows, doors, tables, chairs, mannequins, etc. therein. Also, the three mannequins with video display heads are part of an assemblage, including the video screens, but the electrical wiring, conduit, etc. in that assemblage are materials consumed in the performance of a construction contract.

In summary, this is a difficult area where the auditor must exercise some amount of judgment in determining what is integral to the assemblages or other works of art and what is merely an improvement to realty. Essentially, we conclude that generally the shell of the museum and of the museum rooms are improvements to realty made under a construction contract, and that components of the assemblages, including walls or partitions, ceilings, and floors which are in the nature of a shadowbox or backdrop for the assemblage, or walls, partitions, ceilings, or floors which are themselves works of art, are a part of the works of art. Items which are merely supportive of the assemblages and other works of art, such as wiring, lighting, ducting, etc., are improvements to realty made pursuant to a construction contract.

SJ:rz

#### Attachments

cc: Mr. Dennis Fox  
Mr. Gary J. Jugum  
Mr. David H. Levine